

NLWJC- Kagan

Counsel - Box 002 - Folder 002

NFRC v. Glickman II [1]

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

FAX NUMBER (202) 305-0506
CONFIRMATION NUMBER (202) 305-0460

PLEASE DELIVER TO:

To:	Dinah Bear	456-0753
	Peter Coppelman	514-0557
	Elena Kagan	456-1647
	Jay McWhirter	690-2730
	Karen Mouritsan	219-1792
	Roger Nesbit	503-231-2166

NUMBER OF PAGES:

DATE: August 21, 1996

FROM: Michelle Gilbert

MESSAGE: In response to comments, I have prepared the attached draft reply to NFRC's opposition to federal defendants' motion to clarify. As any reply must be filed today, please call me with any comments by 2:00 p.m. today. Thanks.

DRAFT
8-21-96

1 KRISTINE OLSON
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 2 JAMES L. SUTHERLAND
 Assistant United States Attorney
 3 701 High Street
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 4 (541) 465-6771
 LOIS J. SCHIFFER
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 Environment and Natural Resources Division
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10
 11 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

12	NORTHWEST FOREST RESOURCE COUNCIL,)	
13	Plaintiff,)	
14	v.)	Civil No. 95-6244-HO
15	)	(lead case)
16	GLICKMAN and BABBITT,)	Civil No. 95-6267-HO
17	Defendants,)	(consolidated case)
18	OREGON NAT. RES. COUNCIL, et al.)	Federal Defendants'
19	Defendants-Intervenors)	Reply to NFRC's
	)	Opposition to Motion
	)	for Clarification or
	)	Stay

20
 21 Federal defendants submit the following three points in
 22 reply to plaintiff Northwest Forest Resource Council's (NFRC's)
 23 opposition to defendants' motion to clarify, or in the
 24 alternative to stay, this Court's July 2 Order as amended.

25 1. Noting the success the Bureau of Land Management (BLM)
 26 has had in providing alternative timber, NFRC argues that there

1 is no reason the Forest Service could not likewise provide
 2 alternative timber within 60 days of the Court's order. NFRC's
 3 Opposition at 2-3. NFRC's argument disregards the significant
 4 fact that BLM is required to provide alternative timber
 5 consisting of approximately 31 MMBF for ___ sale units while the
 6 Forest Service is required to provide alternative timber
 7 consisting of approximately 190 MMBF [confirm] for ___ sale
 8 units withheld under subsection 2001(k)(3) in five different
 9 national forests located throughout Washington and Oregon.

10 2. NFRC next claims that if the Forest Service had started
 11 the process of providing alternative timber a year ago, the
 12 agency could have completed its obligations under 2001(k)(3) by
 13 now. NFRC's Opposition at 3-4. This argument disregards the
 14 critical fact that starting in August of last year and continuing
 15 through the filing of a petition for rehearing before the Ninth
 16 Circuit which was just denied on July 22, 1996, NFRC has
 17 continuously challenged the agencies' "known to be nesting"
 18 determinations for withholding sales under subsection 2001(k)(2).
 19 NFRC sought the release of those sales; it did not seek
 20 replacement timber. Indeed, if replacement timber had been an
 21 acceptable remedy to NFRC, the past year's litigation over this
 22 issue would have been unnecessary. Thus, because the Forest
 23 Service, as a result of NFRC's litigation position, only recently
 24 learned the universe of sales for which alternative timber is
 25 required, NFRC's argument that the agency could have avoided the

-3-

1 current situation by starting the process a year ago rings
2 hollow.

3 3. NFRFC also claims that the Forest Service has never
4 explained how it provided replacement timber for units of four
5 sales, Elk Fork, Boulder Krab, First and Last, in a short time.
6 NFRFC's Opposition at 2. NFRFC apparently forgot that it had
7 previously raised this same issue in its motion to compel timber,
8 which federal defendants addressed in their opposition to that
9 motion.^{1/} As previously explained, these four sales were
10 released under subsection 2001(k)(1), which unlike subsection
11 2001(k)(3), includes the "notwithstanding any other provision of
12 law" language. The replaced units were not withheld under
13 subsection 2001(k)(2) and therefore were not subject to the
14 alternative timber requirements of subsection 2001(k)(3),
15 including compliance with all environmental laws. Instead,
16 replacement timber for these 2001(k)(1) sales was provided
17 pursuant to mutual modifications made in accordance with a new
18 regulation with limited application to such sales. See 61 Fed.
19 Reg. 14618 (April 3, 1996).

20 CONCLUSION

21 For the reasons stated herein and as more fully explained in
22 defendants' motion for clarification, or in the alternative for a
23 stay, of this Court's July 2 Order as amended, defendants' motion
24 should be granted.

25 _____
26 ^{1/} See Federal Defendants' Opposition to NFRFC's Motion to
Compel Timber at 7 note 5 (dated May 21, 1996).

1 Dated this 21st day of August, 1996.

2 Respectfully submitted,

3 KRISTINE OLSON
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6 Assistant United States Attorney

7 LOIS J. SCHIFFER
8 Assistant Attorney General

9 ELLEN ATHAS
10 MICHELLE L. GILBERT
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20 Attorneys for Defendants

21 Of Counsel:

22 JAY MCWHIRTER
23 Office of the General Counsel
24 United States Department of Agriculture
25 Washington, D.C.

26 KAREN MOURITSEN
27 Office of the Solicitor
28 United States Department of the Interior
Washington, D.C.

U.S. DEPARTMENT OF JUSTICE
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GENERAL LITIGATION SECTION
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NUMBER OF PAGES: 17 (including cover)

DATE: August 20, 1996

FROM: Michelle Gilbert

Attached please find NFRC's opposition to defendants' motion to clarify, or in the alternative to stay, the Court's July 2 order as amended and Vaagen Brothers' opposition to defendants' motion for clarification in connection with the Gatorson sale. At this time, we are not planning on filing a reply to either opposition. However, if you have any comments or facts you would like to discuss, please give me a call as soon possible. If we want to file a reply to NFRC's opposition, it would be due tomorrow.

HAGLUND & KIRTLEY LLP
ATTORNEYS AT LAW

ONE MAIN PLACE
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TELEPHONE (503) 225-0777

FACSIMILE (503) 225-1257

August 19, 1996

VIA OVERNIGHT MAIL

Clerk's Office
U.S. District Court
For the District of Oregon
(Eugene Division)
211 E. 7th Street
Eugene, Oregon 97401

Re: NFRC v. Glickman, et al.
U.S. District Court for the District of Oregon
Case No. 95-6244-HO (Lead)
Case No. 95-6267-HO (Consolidated)

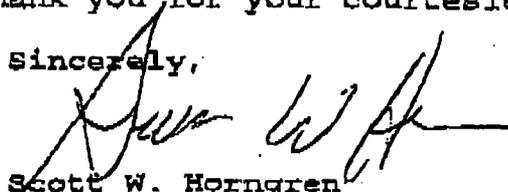
Dear Clerk:

Enclosed for filing are the original and one copy of
the following documents:

1. Vaagen Bros.' Motion for Order and Response to
Defendants' Motion for Clarification; and
2. [Proposed] Order.

Please return the enclosed postcards showing the date
these documents are filed. Thank you for your courtesies.

Sincerely,


Scott W. Horngren

Enclosures
cc w/enclosure: Counsel

1 Michael Haglund, OSB 77203
2 Scott W. Horngren, OSB 88060
3 Shay S. Scott, OSB 93421
4 HAGLUND & KIRTLEY LLP
5 Attorneys at Law
6 1800 One Main Place
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9 (503) 225-0777

6 Attorneys for Vaagen Bros. Lumber

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10	NORTHWEST FOREST RESOURCE)	
11	COUNCIL, an Oregon	)	No. 95-6244-HO (Lead)
12	corporation,	)	No. 95-6267-HO (Consolidated)
13		)	No. 95-6384-HO (Consolidated)
14	Plaintiff,)	
15		)	[PROPOSED] ORDER
16	v.)	
17)	
18	DANIEL R. GLICKMAN, in his)	
19	capacity as Secretary of)	
20	Agriculture, BRUCE BABBITT, in)	
21	his capacity as Secretary of)	
22	Interior,)	
23)	
24	Defendants.)	

18 Federal defendants' are hereby ORDERED to immediately
19 comply with this Court's October 17, 1995 Order and January 10,
20 1996 Order as amended January 17, 1996 for the Gatorson Timber
21 Sale and permit the plaintiff-intervenor Vaagen Bros. to begin
22 harvest of the sale immediately.

23 IT IS SO ORDERED.

24 Dated this ____ day of August, 1996.

25
26
MICHAEL R. HOGAN, DISTRICT JUDGE
HAGLUND & KIRTLEY LLP
ATTORNEYS AT LAW
ONE MAIN PLACE
101 S.W. MAIN, SUITE 1800
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing [PROPOSED]
ORDER on the following parties:

Ms. Patti A. Goldman VIA REGULAR MAIL
Mr. Adam J. Berger
Ms. Kristen J. Boyles
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705 Second Avenue, Suite 203
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Attorneys for Plaintiffs

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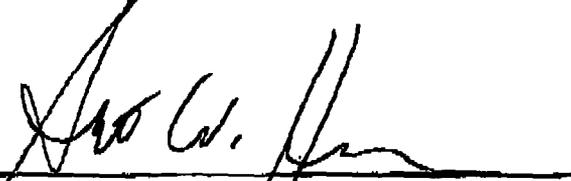
Attorney for NFRC

Mr. Jim Sutherland VIA REGULAR MAIL
U.S. Attorney's Office
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Eugene, Oregon 97401

Ms. Michelle Gilbert VIA FAX AND REGULAR MAIL
Mr. Geoffrey Garver
U.S. Department of Justice
Env. & Nat. Res. Div.
601 Pennsylvania Avenue, N.W., Suite 854
Washington, D.C. 20004

by serving a true and correct copy thereof to said parties by the
means indicated and on the date stated below.

DATED this 19th day of August, 1996.



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Shay S. Scott, OSB 93421
Attorneys for Plaintiff
Vaagen Bros.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

27 NORTHWEST FOREST RESOURCE)
28 COUNCIL, an Oregon) No. 95-6244-HO (Lead)
29 corporation,) No. 95-6267-HO (Consolidated)
30) No. 95-6384-HO (Consolidated)
31 Plaintiff,)
32)
33 v.) VAAGEN BROS.' MOTION FOR
34) ORDER AND RESPONSE TO
35 DANIEL R. GLICKMAN, in his) DEFENDANTS' MOTION FOR
36 capacity as Secretary of) CLARIFICATION
37 Agriculture, BRUCE BABBITT, in) (Decision on Motion
38 his capacity as Secretary of) Requested by August 26,
39 Interior,) 1996)
40)
41 Defendants.

42 Federal defendants' continue to refuse to release the
43 Gatorson Timber Sale and there is no longer any reason to prevent
44 plaintiff-intervenor Vaagen Bros. from harvesting the sale given
45 the affirmance of this Court's Orders by the Ninth Circuit in
46 Northwest Forest Resource Council v. Glickman, 82 F.3d 825 (9th
47 Cir. 1996) (NFERC I) and Northwest Forest Resource Council v.
48 Pilchuck Audubon Soc'y., 1996 U.S. App. LEXIS 14518 (9th Cir.
49 June 14, 1996) (NFERC II).

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SWH/svhk7868

1 Earlier this year, the federal defendants contended
2 that the Gatorson Timber Sale was not released by the Rescissions
3 Act because the Act did not apply to eastside timber sales.
4 Federal defendants asked the Ninth Circuit to enjoin release of
5 the Gatorson Timber Sale in a Petition for Rehearing, or in the
6 Alternative, Motion for Clarification and Stay in NFRC I.
7 Exhibit 1. The Ninth Circuit rejected the government's motion
8 for clarification and stay in its amended Order of May 20, 1996.
9 The May 20, 1996 amendment makes it clear that the Rescissions
10 Act applied to eastside timber sales, such as the Gatorson Timber
11 Sale, and affirms this Court's October 17, 1995 injunction to
12 release the sales. 82 F.3d at 839.

13 Given the federal defendants defeat on this argument in
14 NFRC I, the environmental plaintiffs in NFRC II argued that the
15 Gatorson Timber Sale could not be released because it was subject
16 to a court decision which had found that the sale violated
17 NEPA.¹ Exhibit 3. The Ninth Circuit in NFRC II, held that
18 timber sales were void ab initio if they were offered in
19 violation of their authorizing statute as determined by a court
20 injunction. 1996 U.S. App. LEXIS 14518 at *7-8. In NFRC II, the
21 Ninth Circuit held four timber sales previously enjoined by Judge
22 Dwyer for violation of section 318 were void ab initio. Id. at
23 *8. Following the decision in NFRC II, Pilchuck sought to expand

24
25 ¹ Both federal defendants and plaintiffs Pilchuck, et
26 al., concede that there is no injunction against the Gatorson
Timber Sale. Exhibits 2 and 4.

1 the number of sales that would be halted on the grounds that they
2 were void ab initio. The Pilchuck motion for clarification
3 explicitly sought to stop the release of the Gatorson Timber
4 Sale. Exhibit 3. The Ninth Circuit in NERC II denied the motion
5 for clarification on July 22, 1996, Exhibit 5. Following this
6 decision, since there was no reason for the Forest Service to
7 prevent Vaagen from operating the sale, Vaagen's counsel sent a
8 letter to federal defendants' counsel demanding that harvest be
9 permitted on the sale. Exhibit 6. Federal defendants' motion
10 with this Court followed.

11 This Court will recall that Pilchuck vigorously
12 advocated that this Court modify its Order of October 17, 1995,
13 to agree to take no action compelling release of the Gatorson
14 Timber Sale until Judge Quackenbush ruled. Exhibit 4 at 38 and
15 39. Vaagen opposed such modification of this Court's Order and
16 the Court refused to grant Pilchuck's requested modification of
17 the Order. Id.

18 Consequently, given the government's continued refusal
19 to release the Gatorson Timber Sale, and now that the Ninth
20 Circuit has ruled on all remaining issues that effect the
21 Gatorson Timber Sale, Vaagen respectfully requests that the Court
22 compel the government to immediately comply with the Court's
23 October 17, 1995 Order and January 10, 1996 Order as amended
24 January 17, 1996, and permit Vaagen to harvest the Gatorson

25

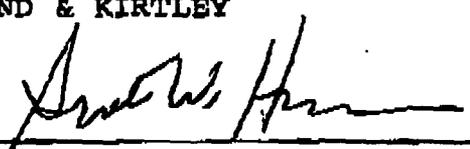
26

1 Timber Sale as outlined in the [Proposed] Order filed with this
2 Motion and Response.

3 Dated this 19th day of August, 1996.

4 HAGLUND & KIRTLEY

5
6 By


Scott W. Horngren, OSB 88060
Shay S. Scott, OSB 93421
Attorneys for Plaintiff
Vaagen Bros.

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26

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing VAAGEN
BROS.' RESPONSE TO FEDERAL DEFENDANTS' MOTION FOR CLARIFICATION
on the following parties:

Ms. Patti A. Goldman VIA REGULAR MAIL
Mr. Adam J. Berger
Ms. Kristen J. Boyles
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104

Attorneys for Plaintiffs

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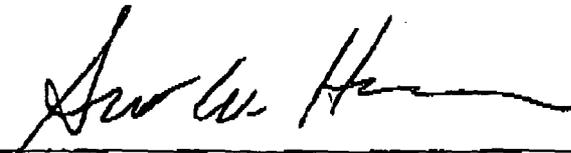
Attorney for NFRG

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Mr. Geoffrey Garver
U.S. Department of Justice
Env. & Nat. Res. Div.
601 Pennsylvania Avenue, N.W., Suite 854
Washington, D.C. 20004

by serving a true and correct copy thereof to said parties by the
means indicated and on the date stated below.

DATED this 19th day of August, 1996.



Scott W. Horngren, OSB 88060
Shay S. Scott, OSB 93421
Attorneys for Plaintiff
Vaagen Bros.

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W. Albert

LEBOEUF, LAMB, GREENE & MACRAE
L.L.P.

DEPARTMENT OF JUSTICE
FEDERAL LITIGATION
SECTION

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

96 AUG 15 AM 10:39

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MULTINATIONAL PARTNERSHIP

WRITER'S DIRECT DIAL

August 12, 1996

VIA OVERNIGHT COURIER

Roger A. Jacobs
Clerk of the Court
United States District Court
for the District of Oregon
Eugene Divisional Office
102 U.S. Courthouse
211 East 7th Street
Eugene, Oregon 97401

Re: Northwest Forest Resource Council v. Glickman
No. 95-6244-HO

Dear Mr. Jacobs:

Enclosed for filing in the above-referenced matter is NFRC's
Opposition to Motion for Clarification of Stay.

Please stamp and return the extra copy of the pleading in the
envelope provided.

Very truly yours,

Mark C. Rutzick
Mark C. Rutzick

MCR:cp
Enclosures
cc: Counsel of Record

90-1-1-2928
#240
AUG 15 1996

1 Mark C. Rutzick, OSB # 84336
 2 LeBOEUF, LAMB, GREENE & MacRAE, L.L.P.
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Attorneys for Plaintiff

8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE DISTRICT OF OREGON

10 NORTHWEST FOREST RESOURCE) Civil No. 95-6244-HO
 11 COUNCIL, an Oregon corporation,) Lead Case

12 Plaintiff,) Civil No. 95-6267-HO

13 and) Civil No. 95-6384-HO
 14 Consolidated Cases

15 SCOTT TIMBER CO., VAAGEN BROS.) NFRC'S OPPOSITION TO MOTION
 16 LUMBER INC., and WESTERN TIMBER) FOR CLARIFICATION OR STAY
 17 CO.,)

Plaintiff-intervenors,)

vs.)

18 DAN GLICKMAN, in his capacity)
 19 as Secretary of Agriculture;)
 20 BRUCE BABBITT, in his capacity)
 21 as Secretary of the Interior,)

Defendants,)

and)

22 OREGON NATURAL RESOURCES)
 23 COUNCIL, et al.,)

Defendant-intervenors.)

Plaintiff Northwest Forest Resource Council ("NFRC")

Page

1 - NFRC'S OPPOSITION TO MOTION FOR CLARIFICATION OR STAY

LEBOEUF, LAMB, GREENE &
 MACRAE
 L.L.P.
 KOIN Center, Suite 1600
 222 S.W. Columbia Street.
 Portland, OR 97201

1 opposes defendants' motion for clarification or stay of this
2 court's order of July 2, 1996, which was amended on July 9,
3 1996. NFRC joins in Scott Timber Co.'s opposition to this
4 motion, and provides further opposition as follows:

5 1. The Court's July 2 order was based largely on the fact
6 that the Bureau of Land Management (BLM) had successfully
7 identified and provided replacement timber, apparently in
8 compliance with all environmental laws, in a matter of a few
9 weeks. The government never explained why the Forest Service
10 could not comply with section 2001(k) (3) in the same short time
11 frame as the BLM. Nor had the Forest Service ever explained
12 how it managed to provide replacement timber for the First,
13 Last, Boulder Krab and Elk Fork sales in a matter of weeks,
14 when it chose to do so. Lacking such an explanation, the court
15 directed the Forest Service to act in 60 days to provide
16 replacement timber all required units.

17 Defendants' current motion still does not explain why the
18 BLM now has been able to provide almost all of the replacement
19 volume required under the statute, and how the Forest Service
20 managed to provide replacement timber for four sales earlier
21 this year, while the Forest Service now maintains it will take
22 years to provide replacement timber for its other sales.

23 In fact, the BLM now reports that it has identified
24 replacement volume for all its units except two where murrelet
25 occupancy was only very recently detected, and has reached
26 agreement with purchasers on most of the units. Twenty-Third

1 Declaration of William L. Bradley (Ex. C to defendants' motion
2 for clarification or stay). In contrast, the Forest Service
3 still has not met with most purchasers, and in some cases
4 refused to hold meetings even after this court's July 2 order
5 was entered. See attachment A hereto.

6 The government never explains why, under the same¹
7 environmental laws, the BLM can act efficiently and promptly to
8 provide replacement timber in weeks, while the Forest Service
9 says it can do nothing for years.

10 In the guise of a motion for clarification, the Forest
11 Service in effect asks the court to express a series of
12 advisory opinions as to whether various potentially planned
13 activities are consistent with section 2001(k)(3). Perhaps the
14 Forest Service should instead consult with the BLM to learn how
15 to comply promptly with both section 2001(k)(3) and
16 environmental laws.

17 The court should not indulge the Forest Service in its
18 quest to justify its inexcusable inaction. It is now almost
19 one year since the Secretary of Agriculture directed the Forest
20 Service on August 23, 1995 to withhold all occupied murrelet
21 units under section 2001(k)(2), which triggered a mandatory
22 duty to provide replacement timber under (k)(3). If the Forest
23 Service had started this process a year ago, they would be

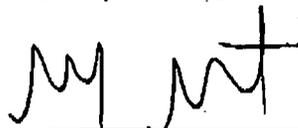
24
25 ¹The National Environmental Policy Act and the Endangered
26 Species Act apply to both agencies. While each agency has
somewhat different appeal procedures, they are not
substantively different in the rights afforded the public.

1 done. The court should not reward the Forest Service now for
2 its willful neglect of its statutory duties in the past.

3 2. The court should also deny the motion for a stay. The
4 purchasers waiting for replacement timber are irreparably
5 harmed by the Forest Service's delays, since there is no
6 assurance of any monetary damages, and monetary damages can
7 never compensate for the harm to companies and communities from
8 the closure of a sawmill. The government's chances of success
9 are remote, since section 2001(k) commanded prompt and
10 expedited action to provide or replace the timber released
11 under the statute, and the Forest Service has clearly not
12 complied with that duty. The BLM's ability to comply with the
13 law promptly belies the Forest Service's lame excuses.

14 Dated this 12th day of August, 1996.

15
16 LeBOEUF, LAMB, GREENE
& MacRAE, L.L.P.

17
18 By: 
19 Mark C. Rutzick
Of Attorneys for Plaintiff

JUL 17 10 40 AM '96

Department of
AgricultureFRERES LUMBER
ServiceJuslaw
National
Forest

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P. 01/03

4077 S.W. Research Way
P.O. Box 1148
Corvallis, OR 97339-1148

Reply To: 2450

Date: July 16, 1996

Mr. Robert Freres Jr.
Freres Lumber Co., Inc.
P.O. Box 276
Lyons, OR 97358RE: Ryan Wapati IX Timber Sale
Contract No. 084855

Dear Mr. Freres:

I am in receipt of your letter dated July 8, 1996 recommending a replacement volume option for the above sale. Please be advised that to date I have received no direction from the regional office for dealing with replacement volume considerations.

I did however, notify Mr. Gary Biles, Contracting Officer on the Willamette, and informed him of your proposal for replacement volume in the vicinity of the Red 90 timber sale.

All opportunities will be assessed when direction is received. Currently, government lawyers are challenging Judge Hogan's order to find replacement volume within 60 days and appealing his decision based on impracticability of finding replacement volume within the stated time period.

Until these proceedings are completed in the 9th Circuit Court, I don't anticipate direction for dealing with any options submitted by purchasers.

Your recommendation is duly noted, and I will be in contact with you to explore all ideas when given the replacement volume guidelines.

Sincerely,


ROBERT TURNER
Contracting Officer

cc: J.Hofer:RO

Exhibit A

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing NFRC'S OPPOSITION TO MOTION FOR CLARIFICATION OF STAY on:

Jean Williams
U.S. Department of Justice
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225-1257 (fax)

on August 12, 1996, by facsimile and by mailing to said attorneys true copies thereof, certified by me as such, contained in sealed envelopes, with postage paid, addressed to said attorneys at said attorneys' last known addresses, and deposited in the post office at Portland, Oregon, on said day, and to:

Michael D. Axline
Marianne Dugan
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401

Patricia M. Dost
Schwabe Williamson & Wyatt
Attorneys at Law
Pacwest Center, Suites 1600-1800
1211 Southwest Fifth Avenue
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on August 12, 1996, by mailing to said attorneys true copies thereof, certified by me as such, contained in sealed envelopes, with postage paid, addressed to said attorneys at said attorneys' last known addresses, and deposited in the post office at Portland, Oregon, on said day.

Dated this 12th day of August, 1996.

LEBOEUF, LAMB, GREENE
& MACRAE, L.L.P.

By: Frank X. Curci
Frank X. Curci
Of Attorneys for Plaintiff

1 KRISTINE OLSON
United States Attorney
2 JAMES L. SUTHERLAND
Assistant United States Attorney
3 MICHELLE L. GILBERT
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17 (206) 343-7340
Attorneys for Defendants-Intervenors

18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE DISTRICT OF OREGON

20 NORTHWEST FOREST RESOURCE COUNCIL,)
21 Plaintiff,)
22 v.) Civil No. 95-6244-HO
) (lead case)
23) Civil No. 95-6267-HO
) (consolidated case)
24 GLICKMAN and BABBITT,)
25 Defendants.) Joint Status Report
) Pursuant to Court's
26) July 11, 1996
Minute Order

1
2 Pursuant to a Minute Order dated July 11, 1996, the Court
3 directed the parties to file a Joint Status Report. The parties
4 report that they have taken the following actions pursuant to
5 Section 2001(k) of Pub. Law No. 104-19, 102 Stat. 194 (1995).

6 Federal Defendants' Actions

7 Pursuant to a compliance report dated August 8, 1996 federal
8 defendants reported actions taken by the United States Forest
9 Service and Bureau of Land Management (BLM) in connection with
10 timber sales that were offered or awarded between October 1, 1990
11 and July 27, 1995. Regarding the provision of alternative timber
12 pursuant to subsection 2001(k)(3), the agencies hereby report
13 that they are taking the actions described in the attached
14 declarations of Gray F. Reynolds, Robert Williams and William L.
15 Bradley.

16 Plaintiffs' Actions

17 Plaintiffs have been harvesting those sales released
18 pursuant to Subsection 2001(k)(1), and harvesting the alternative
19 timber-replacement volume provided thus far by federal
20 defendants. Plaintiffs still seek release of replacement volume
21 consistent with the Court's July 2, 1996 Order, as amended,
22 although settlement negotiations are occurring as described
23 below.

1 The Parties' Negotiations

2 The parties further report that representatives of the
3 parties have met and are pursuing settlement negotiations to
4 discuss potential resolution of issues relating to the provision
5 of alternative timber. Those negotiations are continuing at this
6 time.

7 Defendants-Intervenors' Position

8 Defendants-intervenors take no position on the status of
9 release and harvest of timber sales under subsections 2001(k)(1)
10 and 2001(k)(3). Defendants-intervenors have not been part of any
11 settlement negotiations with respect to alternative timber under
12 subsection 2001(k)(3), and will seek to be included in any future
13 settlement discussions on this issue.

14 The undersigned Michelle L. Gilbert has the authority of all
15 the parties, NFRC, Scott Timber Co. and Sierra Club Legal Defense
16 Fund,, to sign for them due to time constraints.

17 Dated this 12th day of August 1996.

1 FOR THE PARTIES:

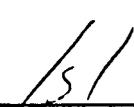
2 Respectfully submitted,

3
4 LOIS J. SCHIFFER
Assistant Attorney General

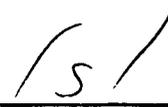
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6 

7 MICHELLE L. GILBERT
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12 KRISTINE OLSON
13 United States Attorney

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CERTIFICATE OF SERVICE

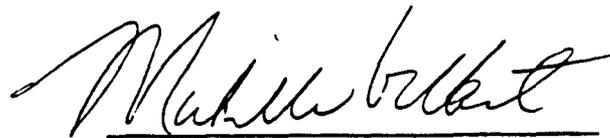
The undersigned hereby certifies that on August 12, 1996 she caused one copy of the foregoing JOINT STATUS REPORT PURSUANT TO COURT'S JULY 11, 1996 MINUTE ORDER to be served by first class mail upon the counsel of record hereinafter named:

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Michelle L. Gilbert

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,	)	Civil No. 95-6244-HO
	)	(lead case)
v.	)	Civil No. 95-6267-HO
	)	(consolidated case)
DAN GLICKMAN, in his capacity as)	
Secretary of Agriculture,	)	TWENTY-SIXTH DECLARATION
BRUCE BABBITT, in his capacity as	)	OF WILLIAM L. BRADLEY
Secretary of Interior)	
)	
Defendants.)	

I, William L. Bradley do hereby depose and say that:

1. My name is William L. Bradley. I have previously prepared a declaration for this case, in which I described my position with the Bureau of Land Management (BLM) and the nature of my responsibilities.

2. I am familiar with the Rescissions Act, Public Law 104-19 (109 Stat. 194), including the provisions regarding "Award and Release of Previously Offered and Unawarded Timber Sale Contracts," Section 2001(k).

3. In my twenty-third declaration, I reported on the progress BLM has made in providing replacement volume to the purchasers of the 15 sale units of 8 sales which qualify for replacement volume under Section 2001(k)(3). Total volume for these units is approximately 31 MMBF.

4. As stated in my previous declaration, the BLM has awarded replacement timber to Lone Rock for Unit No. 4 of Lost Sock (1.1 MMBF) and has modified Lone Rock's Olalla Wildcat sale contract to replace volume for Unit No. 5 (0.9 MMBF) of that sale.

5. As stated in my previous declaration, there are 2 sale units for which occupancy by marbled murrelets was not determined until recently. Occupancy for Tobe West Unit No. 3 (2.9 MMBF) was determined on June 20, 1996. This unit has been partially cut. The BLM is estimating that at least 1.5 MMBF of replacement volume will need to be provided. Occupancy for Bear Air Unit No. 1 (6.9 MMBF) was determined on July 19, 1996. As stated in my previous declaration, the BLM has not had the opportunity to make substantial progress in providing replacement volume for these

units. However, since my previous declaration the proposed replacement volume for the Tobe West Unit No. 3 has now been identified.

6. The attached table shows the status of BLM's efforts to provide replacement volume to purchasers of the remaining 13 sale units. In addition to having now identified replacement volume for Unit No. 3 of Tobe West, the following progress has been made since my previous declaration:

a. Discussions have been held with Hull-Oakes regarding the proposed replacement volume for Unit No. 3 of Tobe West and Unit No. 1 of Roman Dunn. Tentative agreement has been reached with the purchaser on a portion of the replacement volume for Unit No. 1 of Roman Dunn. A notice was published for this portion of the volume and no protests were received;

b. The protests on the replacement volume for Unit No. 2 of Bear Air have been denied;

c. The notices for the replacement volume for the Deep Creek sale and Unit No. 1 of the North Fork Chetco sale have been published; and

d. The purchaser has agreed to the replacement volume for Unit No. 5 of the North Fork Chetco sale. The modification is being prepared.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Portland, Oregon, on August 8, 1996 .

William L. Bradley

William L. Bradley

August 8, 1996
B:STATUMDOC

STATUS OF REMAINING REPLACEMENT VOLUME - BUREAU OF LAND MANAGEMENT

DISTRICT	SALE NAME	PURCHASER	VOLUME IDENTIFIED	TENTATIVE PURCHASER AGREEMENT	NOTICE PUBLISHED	PROTEST RECEIVED/ PROTESTANT	STATUS	APPEAL
SALEM	TOBE WEST #3	HULL-OAKES	YES					
EUGENE	ROMAN DUNN #1	HULL-OAKES	YES	Purchaser rejected initial proposal; tentative agreement on a portion of the volume	YES - for a portion of the volume	NO		
	ROMAN DUNN #2	HULL-OAKES	YES	YES	YES	YES/ GARY AND SHERIE KUHL, ET AL	DENIED 7/18/96	Appeal period open
COOS BAY	BEAR AIR #1	MURPHY	NO					
	BEAR AIR #2	MURPHY	YES	YES	YES	YES/ MEDITE; Independent Forest Products Assoc.	DENIED 8/2/96	Appeal period open
	DEEP CREEK #1, #2	CLR	YES	YES	YES			
	NORTH FORK CHETCO #1	CLR	YES	YES	YES			
	NORTH FORK CHETCO #5	CLR	YES	YES	YES	NO	N/A	N/A
	WREN N DOUBT #2, #3, #7	LONE ROCK	YES	YES	YES	YES/ UMPQUA WATERSHEDS	DENIED 8/6/96	Appeal period open
	WREN N DOUBT #5	LONE ROCK	YES	NO	NO			

006
 DIV. OF LANDS AND PERM. RESOURCES
 14:52
 06/06/96

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)

Plaintiff,)

v.)

DAN GLICKMAN, in his capacity as)
Secretary of Agriculture,)
BRUCE BABBITT, in his capacity as)
Secretary of the Interior)

Defendants.)

Civil No. 95-6244-HO

SECOND DECLARATION
OF
ROBERT W. WILLIAMS

I, Robert W. Williams, hereby declare the following to be true and correct:

1. I am the Regional Forester for the Pacific Northwest Region of the United States Forest Service, headquartered in Portland, Oregon. I have been the Regional Forester since July 1996, serving as the Acting Regional Forester during the four prior months. I was the Associate Regional Forester when I filed my first declaration in this case setting forth my experience and qualifications.

2. This declaration informs the court of actions taken by

the Forest Service to provide replacement volume to timber sale purchasers since the declarations of Deputy Chief Gray Reynolds and Deputy Regional Forester Nancy Graybeal, which were attached to Defendants' Motion to Clarify, or in the Alternative to Stay, the Court's July 2, 1996, Order as Amended.

3. On August 1, the Forest Service sent the letters referenced in the second paragraph of Nancy Graybeal's declaration to companies who hold timber contracts which require replacement volume pursuant to Section 2001(k) of Pub. L. 104-19.

4. On August 8, the Olympic National Forest contracting officer met with with representatives of Hoh River Lumber and Hurn Shingle to discuss the purchasers' preferences, needs, and priorities for replacement volume.

5. On August 9, the Siuslaw National Forest contracting officer and representatives of Seneca Sawmills met to discuss the purchaser's preferences, needs, and priorities.

6. On August 12, the Umpqua, Siskiyou, and Siuslaw National Forests' contracting officers and representatives of Scott Timber Company are meeting in Roseburg, Oregon, to discuss the purchaser's preferences, needs, and priorities.

7. Also on August 12, the Siuslaw National Forest contracting officer and representatives of Boise Cascade are meeting to discuss the purchaser's preferences, needs, and priorities.

8. Also on August 12, the Olympic National Forest contracting officer and representatives of Mayr Brothers are meeting to discuss the purchaser's preferences, needs, and

priorities.

9. On August 13, the Mount Baker-Snoqualmie National Forest contracting officer and representatives of Buse Timber will meet to discuss the purchaser's preferences, needs, and priorities.

10. Also on August 13, the Mount Baker-Snoqualmie National Forest contracting officer and representatives of Miller Shingle will meet to discuss the purchaser's preferences, needs, and priorities.

11. Also on August 13, the Olympic National Forest contracting officer and representative of McMc Resources, Inc. will meet to discuss the purchaser's preferences, needs, and priorities.

12. On August 14, the Siuslaw National Forest contracting officer and representatives of Freres Lumber will meet to discuss the purchaser's preferences, needs, and priorities.

13. Also on August 14, the Siskiyou National Forest contracting officer and representatives of CLR Timber will meet to discuss the purchaser's preferences, needs, and priorities.

14. On August 15, the Siuslaw National Forest contracting officer and representatives of Hampton Tree Farm will meet to discuss the purchaser's preferences, needs, and priorities.

15. Also on August 15, the Mount Baker-Snoqualmie National Forest contracting officer and representatives of LB&R Logging will meet to discuss the purchaser's preferences, needs, and priorities.

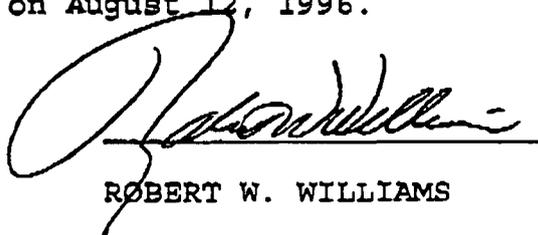
16. Also on August 15, the Mount Baker-Snoqualmie National Forest contracting officer and representatives of Summit Timber

will meet to discuss the purchaser's preferences, needs, and priorities.

17. Bugaboo Timber and Lone Rock Timber have responded to the Forest Service August 1 letter, but a specific meeting time has not yet been established.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Portland, Oregon, on August 12, 1996.



ROBERT W. WILLIAMS

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 OSB # 73254

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
Plaintiff,)	
)	
)	
v.	)	Civil No. 95 6244-HO
	)	(lead case)
	)	Civil No. 95-6267-HO
CLICKMAN and BABBITT	)	(consolidated case)
Defendants,)	
)	
	)	DECLARATION OF
OREGON NAT. RES. COUNCIL, et al.	)	GRAY F. REYNOLDS
Defendants-Intervenors)	
)	
)	

I, Gray F. Reynolds, do hereby depose and say that:

1. I am the Deputy Chief of the National Forest System in the Washington office of the Forest Service. I have previously filed a declaration in this matter.
2. On July 2, 1996, this court ordered the Forest Service to complete the identification and release of replacement timber for sale units which meet the "known to be nesting" criteria set

Ex.A, p.1

forth in section 2001(k)(2) of the FY 1995 Rescissions Act (P.L. 104-19).

3. On May 6, 1996, the Forest Service Pacific Northwest Region sent a letter (attached to Federal Defendant's May 21, 1996, Motion to Include) to Forest Supervisors in the region to request assistance in identifying potential replacement volume. The Forests were directed to identify replacement volume on Matrix and Adaptive Management Area lands outside key watersheds that was in compliance with all applicable standards and guidelines in each Forest's land management plan. The Forests were also asked to identify potential replacement volume on these lands that was in compliance with the standards and guidelines for Riparian Reserves and avoided known occupied marbled murrelet stands, unsurveyed suitable marbled murrelet habitat, or known spotted owl activity centers. The letter included the species and sizes of timber needing to be replaced and included a reporting format to provide consistency in data.

4. Each forest that received the May 6, 1996, letter completed the requested analysis and provided the results of their analysis to the Regional Office. An example of how a national forest responded to the May 6, 1996, letter is seen in the work the Siskiyou National Forest did. The Siskiyou National Forest convened a team of Forest Service and U.S. Fish and Wildlife Service Biologists, hydrologists, Graphic Information System (GIS) experts, and timber experts. The team started by

CERTIFICATE OF SERVICE

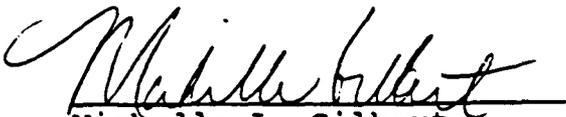
The undersigned hereby certifies that on August 1, 1996 she caused one copy of the foregoing FEDERAL DEFENDANTS' MOTION TO CLARIFY, OR IN THE ALTERNATIVE TO STAY, THE COURT'S JULY 2, 1996 ORDER AS AMENDED to be served by first class mail upon the counsel of record hereinafter named:

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Michelle L. Gilbert

looking at the total Forest land base (1,092,360 acres), and eliminating areas that were not Matrix or Adaptive Management Area lands. This included elimination of Late Successional Reserves, Riparian Reserves for class 1, 2, and 3 streams, Congressionally designated areas, all unsuitable lands (according to NFMA definitions), stands occupied by marbled murrelets, acres harvested since GIS map base was installed, and buffers around each marbled murrelet survey point. This left 2,562 acres identified in the GIS data base.

5. The location of the potential replacement volume was then reviewed to eliminate additional unmapped riparian areas, currently sold volume, known protected wildlife, fish and plant sites, known archaeological sites, and land that, if harvested, would violate NFMA's adjacency standards. From this remaining potential replacement volume, the Forest Service identified accessibility options and visual management restrictions. This resulted in the Siskiyou National Forest being able to identify 6.82 million board feet of potential replacement volume.

6. On June 6, 1996, the Forest Service additionally requested the Forests to identify potential replacement volume within key watersheds where watershed assessments had been completed and approved pursuant to the Northwest Forest Plan. Any such potential replacement volume would be on lands where timber harvest is allowed and in full compliance with all standards and guidelines.

7. After this court's July 2, 1996, order the agency continued to assess how to comply with the court's order, and proceed with providing replacement volume in consideration of the continuing proceedings before the Ninth Circuit on plaintiff NFRC's motion for rehearing of the Ninth Circuit's June 14, 1996, order. On July 27, 1996, the Ninth Circuit rejected NFRC's motion.

8. On July 23, 1996, the Under Secretary of Agriculture for Natural Resources and Environment issued the direction (attached as Exhibit 1b) outlining the process for providing replacement timber in accordance with the July 2, 1992, order. On July 30, 1996, the Forest Service issued supplemental direction (attached as Exhibit 1a) to the Regional Forester.

9. Among other things, the July 23, 1996, guidance directed the Forest Service to:

a. provide replacement volume through the usual environmental assessment process to ensure they comply with all environmental laws including providing for appeals;

b. provide replacement volume from areas consistent with all standards and guidelines of the Northwest Forest Plan;

c. use any timber that has not been advertised in the FY 1996 Pacific Northwest Region timber program as the first source for replacement volume for purchasers who indicate a need this year; and

d. quickly prepare replacement volume and give priority to preparing replacement volume over all other timber sales;

10. The Forest Service is currently in discussions with one purchaser to mutually cancel seven sales subject to this court's July 2, 1996, order. The sales, which contain approximately 31 mmbf of volume, will now not be subject to replacement under the terms of 2001(k)(3).

11. On July 26, 1996, the Department of Agriculture representatives and government lawyers met with attorneys and purchasers representing the plaintiffs in this case to discuss resolving alternative volume issues.

12. By close of business on August 1, 1996, the Forest Service will send letters to purchasers holding contracts requiring replacement timber under section 2001(k)(3) of the FY 1995 Rescissions Act notifying them of their eligibility for replacement timber, and requesting their assistance to identify additional potential locations of replacement timber, and requesting meetings with the purchasers to discuss their preferences, needs, and priorities for replacement timber.

13. Upon receiving input from purchasers, the Forest Service will compare the availability of replacement timber to the timber currently suspended.

14. Forest Service timber sale contract experts will meet with the Forests involved in providing replacement volume to

explain and emphasize the Department and Agency direction for meeting with the individual purchasers.

15. Providing replacement timber in compliance with existing environmental law and providing for administrative appeals is anticipated to take longer than 60 days to complete. The following criteria will guide those actions expected to require more than 60 days:

a. for purchasers who indicate an immediate need, replacement timber which comes from the existing FY 1996 Pacific Northwest Region timber program must initiate and complete notice, comment, and the administrative appeal process. This process will take approximately 150 days from the time the sale is identified;

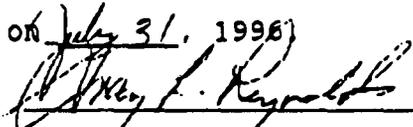
b. for purchasers who do not indicate a need for replacement timber this year, replacement timber will require environmental analyses that fully comply with all environmental laws including appeals. The process and timeframes for preparing this replacement volume are described in the May 10, 1996 declaration of Sterling Wilcox which is attached.

16. On March 28, 1996, in my previous declaration and on May 10, 1996, in Sterling Wilcox's declaration discussing Forest Service efforts to provide replacement volume, the amount of volume subject to replacement was approximately 51 mmhf. After the June 14, 1996, ruling by the Court of Appeals for the Ninth Circuit, the amount of replacement volume increased to

approximately 225 mmbf. It will not be physically possible to identify replacement volume that is consistent with environmental laws, including administrative appeals, within 60 days of the court's July 2, 1996, order. Even if no environmental law applied to replacement timber, it would not be physically possible to lay out alternative volume, establish the volume of timber being provided from Forest Service lands, perform contract modifications, and provide sales to purchasers within 60 days of the court's July 2, 1996, order.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C. on July 31, 1996



Gray F. Reynolds



United States
Department of
Agriculture

Forest
Service

Washington
Office

14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

File Code: 2400
Route To :

Date: July 30, 1996

Subject: Replacement Volume

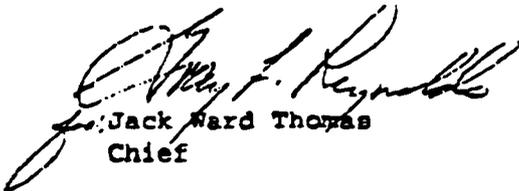
To: Regional Forester, R-6

On July 2, 1996, the District Court for the District of Oregon ordered the Forest Service to complete the identification and release of replacement timber for sale units which meet the "known to be nesting" criteria set forth in section 2001(k)(2) of the Fiscal Year 1995 Rescissions Act (P.L. 104-19).

On July 23, 1996, the Under Secretary for Natural Resources and Environment directed the Forest Service to proceed with actions necessary to provide replacement volume for sales subject to the district court's July 2, 1996, order.

Accordingly, you are directed to move quickly to provide the replacement volume on those sales with units which meet the "known to be nesting" criteria pursuant to the attached July 23, 1996, directive. Please begin the process by immediately contacting timber sale purchasers to identify their preferences, needs, and priorities and to set the priorities for Forest Service actions.

You must stay in close contact with Government lawyers regarding your actions in implementing the Under Secretary's directive.


Jack Ward Thomas
Chief

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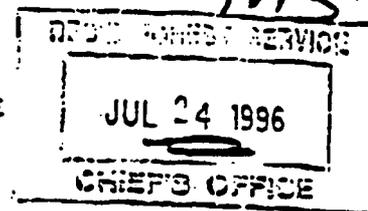
Caring for the Land and Serving People

EX A, p. 8





DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250



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Lager
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MEMORANDUM TO JACK WARD THOMAS, FOREST SERVICE CHIEF

FROM: James R. Lyons
Under Secretary
Natural Resources and Environment

JUL 23 1996

SUBJ: Direction For Replacement Volume

On July 2, 1996, the District Court for the District of Oregon ordered the Forest Service to complete the identification and release of replacement timber for sale units which meet the "known to be nesting" criteria set forth in section 2001(k)(2) of the Fiscal Year 1995 Rescissions Act (P.L. 104-19).

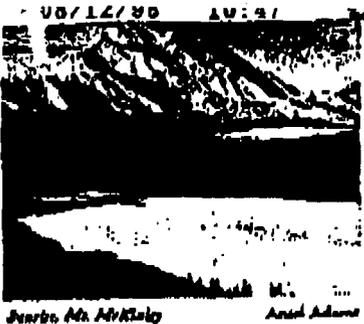
You are to proceed with actions necessary to provide replacement volume for the subject sales or portions of such sales subject to 2001(k)(2) of the Fiscal Year 1995 Rescissions Act that meet the "known to be nesting" criteria. You may offer replacement volume from any national forest in Region 6.

You may delegate this authority to the Regional Forester with further Delegation to Forest Supervisors as you deem appropriate. Any inability to reach agreement on replacement volume on these sales should be communicated through the normal chain of command within the Forest Service, as soon as possible.

It is important that the Forest Service move quickly to provide the replacement volume for those sales with units which meet the "known to be nesting" criteria. In fulfilling that requirement, you are directed to take the following action:

1. Contact the timber sale purchasers involved with sales needing replacement volume to identify their preferences, needs, and priorities and to set the priorities for Forest Service actions.
2. Provide the replacement volume from areas that are consistent with the standards and guidelines of the National Forest Plans, as amended by the NW Forest Plan;
3. Use the remaining unadvertised FY 1996 Region 6 Northwest Forest Plan program as the first source for replacement volume for those purchasers who indicate a need this year.
4. For those purchasers whose preference is to have replacement volume from other than the FY 1996 Northwest Forest Plan timber sale program, an agreement must be completed (signed by the purchaser and the Forest Service) that includes process, timeframes, and general location for the replacement volume.
5. Replacement timber sales should receive priority over other timber sale preparation in the Northwest Forest Plan area.
6. Provide replacement volume through the usual environmental assessment process to ensure they comply with all environmental laws including providing for appeals.

Promptly issue any necessary direction to the Regional Forester to implement these actions.



SIERRA CLUB LEGAL DEFENSE FUND, INC.

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August 8, 1996

VIA FACSIMILE - (202) 305-0506

Ms. Ellen Athas
U.S. Department of Justice
Environmental & Natl. Resources Division
601 Pennsylvania Avenue N.W.
Washington, D.C. 20044

Dear Ellen:

As you know, Judge Hogan's oral ruling yesterday confirms that the federal environmental and natural resources laws apply to timber sales awarded or released under Section 2001(k)(1) of the Rascissions Act after September 30, 1996. We are pleased that the Forest Service and the Bureau of Land Management ("BLM") embraced this position and that they plan to ensure that any timber sales that have not been completed as of that date will be brought into compliance with the law or stopped.

However, we are concerned that logging may continue after September 30, 1996, unless the Forest Service and BLM suspend the sales on that date. Accordingly, we ask that the Forest Service and BLM commit to suspend all Section 2001(k)(1) timber sales after September 30, 1996, until the agencies determine and provide us ten days advance notice that the sales, as modified if necessary, fully comply with federal law.

We believe that such a suspension is essential to ensure that illegal logging does not take place. Further, advance notice is necessary to give our clients an opportunity to challenge the agencies' determination.

We would appreciate receiving a prompt response. If we have not received a commitment along these lines within two weeks, we will assume that our request is being denied and will consider taking appropriate further action.

Sincerely,

Patti A. Goldman

Bozeman, Montana Denver, Colorado Honolulu, Hawaii Juneau, Alaska New Orleans, Louisiana
San Francisco, California Tallahassee, Florida Washington, D.C.

a member of Earth Share

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
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601 PENNSYLVANIA AVENUE, N.W.
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NUMBER OF PAGES: 30

DATE: August 6, 1996

FROM: Paula Clinedinst, (202) 305-0431

MESSAGE: NFRC v. Glickman -- Attached is our
Opposition to NFRC's Motion for Further
Injunctive Relief as to Two Timber Sales,
filed yesterday in Eugene. Declarations of
Bill Bradley (BLM) and Darrel Kenops (Forest
Service) are attached.

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10
 11 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

12	NORTHWEST FOREST RESOURCE COUNCIL,)	
13	Plaintiff,)	
14	v.)	Civil No. 95-6244-HO
15	)	(lead case)
16	GLICKMAN and BABBITT,)	Civil No. 95-6267-HO
17	Defendants,)	(consolidated case)
18	OREGON NAT. RES. COUNCIL, et al.)	Federal Defendants'
19	Defendants-Intervenors)	Opposition to NFRC's
	)	Motion for Further
	)	Injunctive Relief as to
	)	Two Timber Sales

20 Federal defendants hereby oppose plaintiff Northwest Forest
 21 Resource Council's (NFRC's) motion to enjoin federal defendants
 22 from "suspending, disrupting or interfering in any way with the
 23 operations or completion" of the Forest Service Horse Byars
 24 timber sale, through January 8, 1997, and the Bureau of Land
 25 Management Shady timber sale, through November 15, 1996. NFRC is
 26

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1 seeking to extend applicability of the "notwithstanding any other
2 provision of law" in subsection 2001(k)(1) beyond September 30,
3 1996 to ensure that harvesting can continue regardless of whether
4 the sales comply with applicable laws and standards and
5 guidelines. As an initial matter, NFRF's request is premature.
6 The agencies cannot at this time predict what will be the actual
7 status of the two sales on September 30, 1996. For example, the
8 purchaser for one of the sales has stated that under certain
9 conditions they "may be able to finish the sale by September 30,
10 1996." Accordingly, there has been no finding to date that the
11 two sales would not otherwise proceed after September 30, 1996.
12 The sales will have to be assessed at that time to determine
13 whether modifications or suspension would be appropriate in light
14 of the sales' status on that date.

15 In addition, the relief sought would violate the fundamental
16 principle that courts of equity cannot ignore statutory
17 deadlines. Congress clearly expressed its intent that the
18 "notwithstanding" provision apply only through September 30, 1996
19 and that the original terms of the contracts, including those
20 which have imposed the seasonal restrictions complained of by
21 plaintiff, continue in effect. Moreover, while the end date for
22 application of the "notwithstanding" is firmly set, because the
23 beginning date was tied to "the date of enactment," clearly
24 Congress did not intend to provide a set number of days during
25 which such a provision would apply as much as a specific cut off
26 date of application.

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1 Further, even if the relief sought were otherwise available,
2 NFRC has failed to establish that the balance of harms weighs in
3 its favor so as to justify such an equitable remedy. NFRC has
4 relied on the September 30, 1996, deadline in other proceedings
5 to successfully defend against defendants' motion for stay. In
6 addition, the facts relating to these sales simply do not justify
7 granting such equitable relief. On the other hand, the agencies
8 are entitled to rely on a date certain when applicability of the
9 "notwithstanding" provision expires so as to allow the land
10 managers to assess the impacts of harvesting of the released
11 sales and move forward with their planning and management
12 activities under governing law.

13 FACTS

14 A. The Shady Sale

15 Pursuant to this Court's October 17, 1995 order directing
16 the award of timber sales offered during fiscal years 1990 to the
17 date of the enactment of Public Law 104-19, on October 26, 1995,
18 the Bureau of Land Management (BLM) directed the award of the
19 Shady timber sale to Timber Products, Inc., which was
20 subsequently approved on October 31, 1995. See Twenty-fourth
21 Declaration of William Bradley, attached hereto, at ¶ 4. The
22 original volume of the sale is 7,635 MBF contained in 17 units,
23 which for purposes of this memorandum are separated into two
24 groupings (Groups A and B) according to applicability of certain
25 contract terms. Group A, consisting of 10 units, comprised of an
26 original volume of 4,952 MBF. Id. at 5. These units are subject

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1 to original contract term Section 41(B) (7) which precludes all
2 operations, except slash burning, between October 15th of one
3 calendar year and June 1st of the following calendar year, both
4 days inclusive. Id. This seasonal restriction was included in
5 the timber sale contract to prevent adverse soil impacts.^{1/} As
6 of July 30, 1996, approximately 27 percent of the Group A
7 remained to be cut and yarded, and it was then anticipated that
8 the yarding would be completed in two to three weeks. Bradley
9 Dec. at ¶ 6.

10 Group B consists of 7 units, comprised of an original volume
11 of 2,683 MBF. Id. at ¶ 7. These units are subject to original
12 contract term Section 41(b) (8) which precludes all operations
13 from March 1st to September 30th of each year, both days
14 inclusive. This seasonal restriction was included in the timber
15 sale contract to prevent adverse impacts to two nesting pairs of
16 northern spotted owls adjacent to the units. Id. Although the
17 nest sites are located outside of the units, the sites are close
18 enough to warrant application of the seasonal restriction under
19 the contract terms. Id. BLM biologists have been monitoring
20 both pairs of owls since May of 1996 and it is currently
21 anticipated that the final owl status (confirmed non-nesting and
22

23 ^{1/} Normally, fall rains begin in the general area of this sale
24 around October 15th and the soil becomes too wet to operate on
25 without causing significant adverse impacts. Because yarding
26 operations are to be done with ground-based equipment (tractors),
soil moisture is a critical item monitored to enforce the
seasonal restriction. Bradley Dec. at ¶ 5.

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1 dispersal of juveniles) will be determined by August 15, 1996,
2 which may enable the seasonal restriction to be lifted. Id.
3 This would allow the Purchaser to begin operations early on the
4 Group B units. Id. There has not yet been any harvest
5 operations conducted in the Group B units. Id.

6 The purchaser has been informed that if BLM enforces the
7 spotted owl seasonal restriction applicable to the Group B units
8 until September 30, 1996, the purchaser may have a sufficient
9 time period in which to complete the harvest after September 30th
10 and before the soil becomes too wet to log. Id. at ¶ 9.
11 However, on October 1, 1996, the BLM will have to assess the
12 situation on the sale under applicable laws and determine if
13 harvest operations can continue. Id. It is not possible to make
14 that determination now. Id. It is possible that, if the
15 seasonal restriction is lifted, the operations will have
16 proceeded up to October 1, 1996, in such a manner (i.e., all
17 cutting will have been completed) that harvest operations can
18 continue under the terms of the contract in compliance with
19 applicable laws. Id.

20 The Purchaser elected to begin operations on the contract in
21 November of 1995 by harvesting the Group A units, which are
22 nearly completed. Id. at ¶ 11. The Group A units were not
23 subject to the spotted owl seasonal restrictions, as are the
24 Group B units. Id. The BLM believes that it would have been a
25 reasonable course of action for the purchaser, assuming they
26 desired to complete operations by September 30, 1996, to have

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1 first operated the Group B units in the winter of 1995/1996. Id.
2 The Group A units then could have been saved for summer 1996
3 operation because such units were not subject to the spotted owl
4 seasonal restriction. Id. The purchaser also could have
5 concurrently operated the Group A and B units in the winter of
6 1995/1996. Id.

7 B. The Horse Byars Sale

8 The Forest Service advertised the Horse Byars timber sale,
9 as originally designed, on August 30, 1990. Declaration of
10 Darrel Kenops, attached hereto, at ¶ 2. The timber sale was not
11 awarded because, in September of 1990, the discovery of a pair of
12 owls required further consultation regarding the effects of the
13 sale and logging was subsequently enjoined. Id. at ¶ 3. Later,
14 new standards for timber sales required the Forest Service to
15 redesign the Horse Byars timber sale. Id. at ¶ 4. This redesign
16 reduced the sale area from 136 acres and 4 acres of road clearing
17 to 68 acres of sale area. Id. at ¶ 5. The 68 acre sale was then
18 laid out on the ground. Id.

19 Public Law 104-19 required the Forest Service to undo the
20 changes it had made on the ground to the Horse Byars timber sale.
21 Id. at ¶ 6. Re-establishment of the Horse Byars timber sale of
22 August of 1990 was possible, but required the Forest Service to
23 remark payment unit boundaries on units and portions of units
24 that had previously been deleted, deleting clumps of wildlife
25 trees and remarking original wildlife trees, and reconfiguring
26 the contract back to its original terms. Id. at ¶¶ 7 - 8. The

1 Forest Service started that process in September of 1995. Id. at
 2 ¶ 8. That process was completed by December 15, 1995. Id. at ¶
 3 9. The timber sale was awarded on December 19, 1995, to Freres
 4 Lumber Co. Id.

ARGUMENT

I. PLAINTIFF'S MOTION TO EXTEND THE
 SEPTEMBER 30 DEADLINE IS PREMATURE

7 By its latest motion, NFRFC seeks an order "prohibiting
 8 defendants from suspending or interfering with the completion" of
 9 the Horse Byars and Shady timber sales after September 30, 1996.
 10 NFRFC's Memorandum at 1. Such a request is premature. While, as
 11 plaintiffs have admitted, under the statute the period of legal
 12 sufficiency expires September 30, 1996, a determination has not
 13 been made at this time as to whether any modifications or
 14 suspensions would be appropriate in light of the renewed
 15 applicability of environmental laws. Rather, such a
 16 determination will have to be made after assessing the status of
 17 the sales on September 30. For example, as to the Horse Byars
 18 sale, while the purchaser claims that it "will be very difficult"
 19 to complete falling of the sale by September 30, it does not say
 20 that it would be impossible. See Declaration of Robert Freres at
 21 ¶ 8. Come September 30, the sale will have to be assessed in
 22 terms of its status regarding completion of actual falling and
 23 ability to proceed with yarding and hauling in light of
 24 applicable environmental laws.

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1 As to the Shady sale, plaintiff admits that the complained-
2 of seasonal restrictions may be lifted around August 15 and if
3 so, while "it will be very difficult for Timber Products to
4 complete logging on the sale by September 30, 1996," they do not
5 say it will be impossible. NFRC's Memo. at 3. Indeed, the
6 declaration supporting this statement says that "[i]f the
7 seasonal restrictions are completely lifted at that time, we may
8 be able to finish the sale by September 30, 1996, but doing so
9 will put great strain on our logging crew." Declaration of
10 Joseph Gonyea III at ¶ 8 (emphasis added). If cutting is
11 completed, the sale will have to be evaluated in that context to
12 determine whether further operations can continue under the terms
13 of the contract in compliance with applicable laws. See Bradley
14 Dec. at ¶ 9.

15 Thus, not only is it premature to argue that the sales are
16 going to be suspended on September 30, but it is premature to
17 argue that, at least as to the Shady sale, the purchaser cannot
18 complete the sale by September 30. Most importantly, because the
19 relief that the purchasers are seeking is equitable in nature,
20 nothing prevents them from seeking it at or around September 30
21 when the agencies have had the opportunity to assess how the
22 sales should or should not proceed in light of the facts at that
23 time.

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1 II. IN ANY EVENT, NFRC IS NOT ENTITLED TO AN
2 ORDER EXTENDING THE STATUTORY DEADLINE

3 It is well established that "[c]ourts of equity can no more
4 disregard statutory ... requirements and provisions than can
5 courts of law." See INS v. Pangilinan, 486 U.S. 877, 883 (1987)
6 (citing Hedges v. Dixon County, 150 U.S. 182, 192 (1893)). In
7 Pangilinan, the Supreme Court held that a court lacked the
8 authority to order naturalization for certain persons after
9 expiration of a statutory deadline. 486 U.S. at 882-883. The
10 Court found that the explicit cutoff date for filing petitions
11 for naturalization and subsequent legislation specifying new
12 requirements for adjudging petitions made it clear that courts
13 did not have the power to confer citizenship in violation of such
14 limitations. Id. at 884-885.

15 Similarly, in Section 2001(k)(1), Congress has clearly
16 expressed its intent that applicability of the phrase
17 "notwithstanding any other provision of law" in subsection
18 2001(k)(1) expires at the end of fiscal year 1996, or September
19 30, 1996. The relevant language of subsection 2001(k)(1)
20 provides:

21 Notwithstanding any other provision of law, within 45
22 days after the date of enactment of this Act, the
23 Secretary concerned shall act to award, release, and
24 permit to be completed in fiscal years 1995 and 1996,
25 with no change in originally advertised terms . . .
26 [the relevant timber sale contracts].

27 Both NFRC and Scott Timber repeatedly have acknowledged that this
28 language can only be read to mean that the "notwithstanding"

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1 provision applies only through September 30, 1996.^{2/} This,
2 then, is not a disputed point.

3 This September 30, 1996 deadline for legal sufficiency as to
4 subsection 2001(k)(1) sales is extremely significant. Unlike
5 subsections 2001(b) and (d), which allow the Secretaries to
6 consider environmental laws and effects in offering sales
7 thereunder, subsection 2001(k) does not provide such discretion.
8 Accordingly, it is all the more important that the Secretaries be
9 able to rely on a date certain when the legal sufficiency period
10 expires so that they can assess the impacts and continue with
11 their planning and management of resources in accordance with
12 their governing laws.^{3/}

13 Moreover, as to contracts offered under subsections 2001(d)
14 and 2001(b), the statute expressly provides that the "terms and
15 conditions of [the section] shall continue in effect with respect
16 to" such timber sale contracts. See Subsection 2001(j).
17 Noticeably, no such continuation of the provisions of 2001(k)(1),
18 including the notwithstanding provision, is mentioned anywhere in
19 the statute. Such an omission underscores the significance

21 ^{2/} See NFRC's Reply Memorandum in Support of Motion to Compel
22 Provision of Replacement Timber for Certain Sale Units at 3;
23 Appellee's Opposition to Motion for Stay Pending Appeal at 8
24 (dated October 23, 1995, relevant pages attached hereto);
Declaration of Peter Quast at ¶ 4, attached as Ex. A to Horngren
Declaration in support of Scott Timber Co.'s May 10 Motion to
Compel Release of Replacement Timber.

25 ^{3/} While NFRC's current motion only refers to two sales, it is
26 quite possible that NFRC will attempt to expand its request for
relief in connection with other sales in the future, interfering
further with the agencies' management activities.

1 Congress attributed to the September 30, 1996, deadline with
 2 respect to subsection 2001(k)(1) sales. Under Pangilinan, such a
 3 significant statutory deadline cannot be extended through
 4 judicial decree.

5 Such a position is further supported by the statute's
 6 explicit mandate that 2001(k)(1) sales be released "with no
 7 change in originally advertised terms. . . ." As to the
 8 contracts at issue here, such terms explicitly state that
 9 seasonal restrictions shall apply to the harvest of such sales.
 10 See Twenty-fourth Declaration of William Bradley at ¶ 7. The
 11 agencies have simply followed those terms in administering the
 12 contracts. Id. Nothing in the statute indicates that Congress
 13 intended that these terms should not continue to apply. As the
 14 Ninth Circuit explained:

An implied repeal of the underlying statutory and
 regulatory provisions governing the timber sale
 contracting process may be found only if no other
 construction is possible. Here, S 2001(k)(1) itself
 incorporates other laws by referring to the "award" and
 "release" and "original contract terms" of timber sale
 contracts The agencies have regulations which
 tell them what these words mean and how to form such
 contracts. . . . Section 2001(k)(1) is not clearly
 repugnant, in words or purpose, to the contract
 regulations established under the agencies' organic
 acts.

21 See NFRC v. Glickman, No. 96-35106 (9th Cir. June 14, 1996)

22 (emphasis added). Certainly, nothing in the statute suggest that
 23 application of such original terms, explicitly referred to in the
 24 same sentence as the "notwithstanding" language and September 30,
 25

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1 1996 deadline, could provide the basis for extending that
2 deadline.

3 Cases cited by NFRC do not support their request to extend
4 the statutory deadline. First, in relying on Reno v. Catholic
5 Service, Inc., 509 U.S. 43 (1993), NFRC disregards two very
6 important distinguishing points. While NFRC claims that the
7 majority did not address the question of equitable relief, the
8 majority did comment on potentially available relief. While
9 noting that it need not reach the question of remedy, the
10 majority opined as to a way in which relief could be granted,
11 which did not require extension of the relevant 12-month period
12 at issue there. The Court explained that because "there is no
13 statutory deadline for processing the [adjustment of immigration
14 status] applications," and as an individual "applied" for an
15 adjustment within the relevant 12-month period, "there is no
16 reason to think that a District Court would lack the power to
17 order such relief." 509 U.S. at 66.

18 Regarding the dissent upon which NFRC relies, NFRC's
19 citations to Catholic omit reference to that portion of the case
20 that distinguishes it from the present one. In distinguishing
21 Pangilinan, the dissent notes that "the Reform Act does not
22 itself contain a statutory deadline at all, leaving it largely to
23 the Attorney General to delineate a 12-month period. 8 U.S.C. s
24 1255a(a)(1)(A). This delegation highlights the relative
25 insignificance to Congress of the application cutoff date, as

26

27 DEFENDANTS' OPPOSITION TO
28 NFRC'S MOTION FOR FURTHER
INJUNCTIVE RELIEF -12-

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1 | opposed to the length of the application period itself." Id. at
2 | 84 (emphasis added).

3 | In contrast, the present case deals with an emergency
4 | measure, intended to provide short-term relief, with an explicit
5 | cut-off date of the legal sufficiency period to prevent
6 | indefinite interference with the agencies' normal management
7 | activities. Indeed, in the present case, the way in which
8 | subsection 2001(k) is crafted makes it clear that Congress
9 | considered the cut-off date significant, not the length of the
10 | period of applicability of the "notwithstanding" provision.
11 | While the end date is clear, fiscal year 1996 (September 30,
12 | 1996), the date upon which the "notwithstanding" term became
13 | applicable was fluid, as it was tied to the "date of enactment"
14 | of the law. Accordingly, Congress did not guarantee a specific
15 | number of days of "legal sufficiency" as claimed by NFRC, but did
16 | set a specific cut-off date. Thus, Catholic provides no support
17 | for NFRC's position.^{4/}

18 |
19 | ^{4/} In Sierra Pacific Industries v. Lyng, 866 F.2d 1099 (9th
20 | Cir. 1989), the relevant issue was whether a statute provided a
21 | specific consequence for the agencies' failure to promulgate
22 | regulations by a statutorily set date, thereby justifying the
23 | court's imposition of a judicial sanction for the agency's delay.
24 | 866 F.2d at 1111. There, the agency regulations, which were
25 | promulgated after the intended date, released timber purchasers
26 | from contractual obligations upon the agency's receipt of the
27 | relevant application. Id. at 1112. To compensate for the delay
28 | in promulgating the regulations, the Court adjusted the date of
release to reflect the period of the delay. Id. at 1110-111. The
Ninth Circuit found that nothing in the statute prevented this
form of equitable relief. Id. at 1112. Sierra Pacific thus
involves an agency's power to act beyond a statutory deadline; it
does not involve the issue of extension of a substantive
provision of a statute beyond a specific deadline. Parents of

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1 III. ASSUMING EQUITABLE RELIEF WERE AVAILABLE, THE
2 BALANCE OF HARMS DOES NOT WEIGH IN NFRC'S FAVOR

3 Moreover, even if extension of the deadline were available
4 as a form of equitable relief, NFRC has failed to establish that
5 the equities weigh in favor of such an extension. First, NFRC
6 has relied on the existence of the September 30 deadline to
7 support various positions throughout this litigation. For
8 example, NFRC successfully defended against a stay of this
9 Court's injunction mandating the release of such sales, in part
10 by arguing that NFRC would suffer irreparable harm if a stay were
11 granted because it would prevent logging by September 30, 1996.
12 NFRC argued that Section 2001(k) was intended to "provide some
13 short-term relief" and in order "to assure the sales could
14 actually be logged, Congress gave the sales absolute legal
15 sufficiency for the period through September 30, 1996 A
16 stay from [the Ninth Circuit] will delay logging for months . . .
17 directly frustrating the intent of the emergency timber sale
18 program enacted by Congress." See Appellee's Opposition to
19 Motion for Stay Pending Appeal at 8. Upon consideration of
20 NFRC's argument, the Ninth Circuit denied the government's motion
21 for a stay.^{5/}

22 Student W v. Puyallup School District, 31 F.3d 1489 (9th Cir.
23 1994), deals with a court's general equitable powers to fashion
24 appropriate relief under the facts of a case; it does not address
the current situation in which the relief requested requires
extension of statutory deadline.

25 ^{5/} NFRC repeated these arguments in arguing that this Court
26 should not extend a stay of its order directing release of sales
withheld pursuant to the agencies' determination of "known to be

1 Second, as to the Shady sale, NFRC has not demonstrated that
 2 work could not have been completed if the purchaser had proceeded
 3 in a more prudent fashion, in light of the well known September
 4 30, 1996 deadline. See Bradley Dec. at ¶ 7. As to the Horse
 5 Byars sale, Freres Lumber Company has been free to operate all
 6 units of this sale except units 6 and 9 since the operating
 7 season commenced on June 1, 1996. See Freres Declaration at ¶ 6.
 8 They admit that they have been free to log units 6 and 9 since
 9 July 8, 1996, but seek an injunctive order on the basis that this
 10 ordinary seasonal restriction on units 6 and 9 has made it "very
 11 difficult" for Freres to complete falling this timber by
 12 September 30. See, id at ¶¶ 7 - 8.

13 On the other side of the equation, the agencies are entitled
 14 to know when the legal sufficiency period expires to allow them
 15 to assess impacts and continue with their forest management and
 16 planning process.

17 \\
 18 \\
 19 \\
 20 \\
 21 \\

22 _____
 23 nesting" under the Pacific Seabird Group Protocol. See NFRC's
 24 Supplemental Memorandum in Opposition to Defendants' Motion for
 25 Extension of January 25, 1996 Stay at 3 ("Congress gave the
 26 contract holders the absolute right 'notwithstanding any other
 provision of law' to complete these sales by September 30, 1996.
 Any further stay of the court's January 19 order will defeat the
 intent of Congress by making it impossible for the contract
 holders to complete operations by September 30").

CONCLUSION

For the reasons stated herein, NFRC's motion for further injunctive relief as to two timber sales should be denied.

Dated this 5th day of Aug., 1996.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)
)
Plaintiff,)
)
v.)
)
DAN GLICKMAN, in his capacity as)
Secretary of Agriculture,)
BRUCE BABBITT, in his capacity as)
Secretary of the Interior)
)
Defendants.)

Civil No. 95-6244-HO

DECLARATION OF
DARREL L. KENOPS

I, Darrel L. Kenops, declare under penalty of perjury
that the foregoing is true and correct:

1. I am the Forest Supervisor of the Willamette
National Forest of the Pacific Northwest Region,
headquartered in Eugene, Oregon. I have been the Forest
Supervisor for five years and have been employed with the
Forest Service for thirty-three years in various capacities,
including the Forest Supervisor of the Black Hills National
Forest in South Dakota. I supervise the district rangers on



the Willamette National Forest and I am responsible for Willamette National Forest management activities,

2. The Horse Byars Timber Sale (T.S.) is located on the Willamette National Forest and was originally advertised for sale on August 30, 1990, pursuant to Section 318 of the FY 90 Appropriations Act. The Forest Service determined Freres Lumber Co. was the highest qualified bidder.

3. However, Forest Service biologists discovered a new pair of northern spotted owls within the Horse Byars T.S. Such a discovery required additional consultation with the U.S. Fish and Wildlife Service and delayed the award of Horse Byars T.S. to Freres Lumber Co. until consultation could be completed. Before the sale could be awarded, the Court in Seattle Audubon Society v. Evans, 89-160-WD, Western District of Washington, issued an injunction on May 23, 1991, barring the award of any timber sale that would log spotted owl habitat. This injunction applied to Horse Byars T.S. and the Forest Service did not award the sale.

4. In April 1994, the Northwest Forest Plan, prepared under the auspices of the above referenced case, amended the Willamette National Forest and adopted new land management standards and guidelines.

5. The Forest Service determined that Horse Byars T.S. did not comply with the new standards and guidelines. The Forest Service redesigned the sale to comply with the new standards and guidelines and with the U.S. Fish and Wildlife Service consultation. As a result, the Forest Service

reduced the timber sale area from 140 acres to 68 acres, eliminating two cutting units and a road clearing. The remaining cutting units were redesigned to leave clumps of trees, individual wildlife trees, and riparian area buffers. This redesigned, smaller sale was then marked on the ground with marking paint and boundary tags. The Forest Service sent an award letter to Freres Lumber Co. on September 1, 1994, for the redesigned sale. On September 13, Freres Lumber Co. requested a delay in their return of executed contract documents. On September 23, 1994, the Forest Service rescinded the previous award letter (September 1 letter) and requested return of the associated unsigned contract and other documents.

6. Under Order of this Court on September 13, 1995, the Forest Service proceeded to award Horse Byars T.S. to Freres Lumber Co. in its original advertised terms and conditions.

7. Re-establishment of the August 1990 advertised Horse Byars T.S. was possible. In order to do so, a number of administrative steps had to be taken to revert the Horse Byars T.S. to its original terms and conditions both on paper and in the field.

8. In September 1995, the Forest Service began the process of remarking the timber stands to be harvested to represent the original layout. The Forest Service was able to locate the original sale boundaries because the redesigned units utilized many of the same boundaries. The

payment units had to be remarked and the redesigned area that had been marked to not be cut, had to be unmarked, i.e. existing colored paint covered with black paint. All of this work was field work and performed by timber marking crews. The original timber sale contract no longer existed because it had been edited to reflect the redesign. Therefore, the Forest Service had to re-create the original timber sale contract and attach the road construction specifications. This work was performed by sale preparation specialists.

9. The Forest Service completed this process by December 15, 1995, and awarded the Horse Byars T.S. contract to Freres Lumber Co. on December 19, 1995.

10. From the time of award until May 8, 1996, the Horse Byars T.S. contract did not contain operating restrictions that limited the time of year during which Freres Lumber Co. could operate. No spotted owl seasonal restrictions are included in the contract as awarded.

11. On May 8, the Forest Service notified Freres Lumber Co. that spotted owls had been found in Units 6 and 9 and operations could not begin under provision C6.25# of the contract. Units 6 and 9 constitute approximately 25% of Horse Byars T.S. volume. On July 1, 1996, the Forest Service notified Freres Lumber Co. that operations could begin on Units 6 and 9.

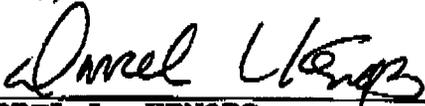
12. On July 16, 1996, Freres Lumber Co. began cutting on Units 2 and 5. As of August 5, 1996, Freres Lumber Co.



were cutting or had completed cutting on Units 1, 2, 3, 4,
and 5.

I declare under penalty of perjury the foregoing is true and
correct.

Executed at Eugene, Oregon, on August 5, 1996


DARREL L. KENOPS

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,	)	Civil No. 95-6244-HO
	)	(lead case)
v.	)	Civil No. 95-6267-HO
	)	(consolidated case)
DAN GLICKMAN, in his capacity as)	
Secretary of Agriculture,	)	TWENTY-FOURTH DECLARATION
BRUCE BABBITT, in his capacity as	)	OF WILLIAM L. BRADLEY
Secretary of Interior)	
)	
Defendants.)	

I, William L. Bradley do hereby depose and say that:

1. My name is William L. Bradley. I have previously prepared a declaration for this case, in which I described my position with the Bureau of Land Management (BLM) and the nature of my responsibilities.

2. I am familiar with the Rescissions Act, Public Law 104-19 (109 Stat. 194), including the provisions regarding "Award and Release of Previously Offered and Unawarded Timber Sale Contracts," Section 2001(k).

3. On October 17, 1995, Judge Hogan, U.S. District Court of Oregon, directed BLM to award timber sales offered during fiscal years 1990 to the date of the enactment of Public Law 104-19, but which remained unawarded or suspended. This included the Shady timber sale.

4. In response to the court's direction, the Shady timber sale was awarded to Timber Products Co. on October 26, 1995, and subsequently approved on October 31, 1995. The original contract term is 36 months with an expiration of cutting and removal rights on October 31, 1998. The original volume of the sale is 7,635 MBF contained in 17 units. For simplicity of description in this declaration, the 17 units can be separated into two groupings (Groups A and B) which are subject to differing contract terms.

5. Group A is 10 units (unit Nos. 25-1, 25-2, 25-3, 25-4, 25-5, 25-6, 36-2, 36-3, 36-4, and 36-5) comprised of an original volume of 4,952 MBF. The unit numbers are configured such that the portion of the number before the hyphen refers to the actual section number in which the unit is located. These units are

subject to Sec. 41(B)(7) of the contract (an original term) which precludes all operations, except slash burning, between October 15th of one calendar year and June 1st of the following calendar year, both days inclusive. This seasonal restriction was included in the timber sale contract to prevent adverse soil impacts. Normally, fall rains begin in the general area of this sale around October 15th and the soil becomes too wet to operate on without causing significant adverse impacts. Because yarding operations are to be done with ground-based equipment (tractors), soil moisture is a critical item monitored to enforce the seasonal restriction.

6. As of July 30, 1996, approximately 1,324 MBF (27 percent of the Group A total volume) remained to be cut and yarded, and it was then anticipated that the harvest would be completed in two to three weeks.

7. Group B is 7 units (unit Nos. 11-1, 11-3, 11-4, 3-3, 3-4, 3-6, and 3-7) comprised of an original volume of 2,683 MBF. The unit numbers are configured such that the portion of the number before the hyphen refers to the actual section number in which the unit is located. These units are subject to Sec. 41(B)(8) of the contract (an original term) which precludes all operations from March 1st to September 30th of each year, both days inclusive. This seasonal restriction was included in the timber sale contract to prevent adverse impacts to two nesting

pairs of northern spotted owls adjacent to the units. Although the nest sites are located outside of the units, the sites are close enough (within one-quarter mile) to warrant application of the seasonal restriction under the contract terms. As it pertains to the seasonal restriction, the nest site in Sec. 3 only affects the Sec. 3 units and the Sec. 11 nest site only affects the Sec. 11 units. In terms of critical habitat, both nest sites affect all the units in Secs. 3 and 11 because the habitat in all the units in Secs. 3 and 11 is within 1.2 miles of either of the sites. BLM biologists have been monitoring both pairs of owls since May of 1996. The pair of owls in Section 11 nested and had two young. This was first detected on May 8, 1996. Nesting by the pair of owls in Section 3 has not been confirmed after a fourth visit. The first and only detection that confirmed adults were present (and not nesting) was an adult female detection on May 30, 1996. To meet the spotted owl survey protocol, two more night visits are required to confirm that the pair is not nesting. It is anticipated that by August 15, 1996, the final owl status (confirmed non-nesting and dispersal of juveniles) will be determined which may enable the seasonal restriction to be lifted. This would allow the Purchaser to begin operations early on the Group B units. There has not yet been any harvest operations conducted in the Group B units.

8. Adverse impacts to soil from wet-weather operations by ground-based logging equipment is also a concern for the Group B

units. In this case, adverse impacts are precluded through the enforcement of Sec. 25 of the contract which requires the Purchaser to discontinue operations that will cause excessive damage to the soil. The Group B units were not included (along with the Group A units) in Sec. 41(B)(7) of the contract because the two seasonal restrictions, when added together, would have only allowed operations on the Group B units for two weeks of each year. It was determined in the case of the Group B units that Sec. 25 could be enforced in a more flexible manner to facilitate the harvest and accomplish the necessary environmental protection.

9. The Purchaser has been informed that if BLM enforces the spotted owl seasonal restriction, applicable to the Group B units, until September 30, 1996, they may have a sufficient time period in which to complete the harvest after September 30th and before the soil becomes too wet to log. However, on October 1, 1996, the BLM will have to assess the situation on the sale under applicable laws and determine if harvest operations can continue. It is not possible at this time to make this assessment. It is possible that the operations will have proceeded up till October 1, 1996, in such a manner (e.g., all cutting has been completed) that harvest operations can continue under the terms of the contract in compliance with applicable laws. The Purchaser was also informed that they could operate in the Group B units when the snow depth was approximately twenty (20) inches or greater.

This measure also prevents significant adverse impacts to the soil associated with wet conditions.

10. It is anticipated that approximately 500 MBF to 1,000 MBF of additional volume will be added to the contract by bilateral contract modifications. This is necessary because of insect mortality and blowdown, and logging damage. Several modifications have been executed; this additional volume is being cut and yarded concurrently with timber designated for cutting.

11. The Purchaser elected to begin operations on the contract by harvesting the Group A units, which are nearly completed. Their operations began in November of 1995. The operations continued (when allowed by sufficient snow depth) until March 15, 1996. A 36-month contract term, barring unusual weather conditions would normally allow completion of the entire contract by the expiration date in spite of the apparent cumulative restrictiveness of the seasonal restrictions. The Group A units were not subject to the spotted owl seasonal restriction; the Group B are. It would have been a reasonable course of action for the Purchaser, assuming they desired to complete operations on the entire sale by September 30, 1996, to have first operated the Group B units in the winter of 1995/1996. Then the Group A units could have been saved for summer 1996 operation because the Group A units were not subject to the spotted owl seasonal restriction. Another reasonable course of

action for the Purchaser would have been to concurrently operated the Group A and B units in the winter of 1995/1996. These other courses of action would have increased the likelihood of the completion of harvest by September 30, 1996.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Portland, Oregon, on August 5, 1996.

William L. Bradley

William L. Bradley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 5, 1996 she caused one copy of the foregoing **FEDERAL DEFENDANTS' OPPOSITION TO NFRC'S MOTION FOR FURTHER INJUNCTIVE RELIEF AS TO TWO TIMBER SALES** to be served via telefacsimile and first class mail upon the counsel of record hereinafter named:

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NUMBER OF PAGES: 33 (including cover)

DATE: August 2, 1996

FROM: Michelle Gilbert

Attached is Defendants' Motion to Clarify, or in the Alternative to Stay, the Court's July 2, 1996 Order as Amended.

~~Dennis~~
 619/0403 →

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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE DISTRICT OF OREGON

12	NORTHWEST FOREST RESOURCE COUNCIL,)	
13	Plaintiff,)	
14	v.)	Civil No. 95-6244-HO
15	)	(lead case)
16	GLICKMAN and BABBITT,)	Civil No. 95-6267-HO
17	Defendants,)	(consolidated case)
18	OREGON NAT. RES. COUNCIL, et al.)	Defendants' Motion
19	Defendants-Intervenors)	to Clarify, or in the
20	)	Alternative to Stay,
21	)	the Court's July 2, 1996
22	)	Order as amended
23	)	EXPEDITED CONSIDERATION
24	)	REQUESTED

20 Federal defendants hereby move for clarification, or in the
 21 alternative, for a stay of this Court's July 2, 1996 Order, as
 22 amended on July 9, 1996, directing federal defendants to
 23 "complete the identification and release of replacement timber
 24
 25
 26

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 CLARIFY, OR IN THE ALTERNATIVE
 TO STAY

1 . . . within 60 days" for sale units which meet the "known to be
 2 nesting" standards in the government's Pacific Seabird Group
 3 (PSG) Protocol. Amended Order at 7. Federal defendants seek
 4 clarification regarding those agency guidelines governing the
 5 provision of alternative timber the Court deems consistent with
 6 subsection 2001(k)(3) of the 1995 Emergency Supplemental
 7 Appropriations and Rescissions Act.

8 ARGUMENT

9
 10 I. FEDERAL DEFENDANTS SEEK CLARIFICATION AS TO THOSE
 11 ACTIONS THE AGENCIES HAVE TAKEN AND ARE PROPOSING TO TAKE
 12 TO PROVIDE ALTERNATIVE TIMBER THAT THE COURT DEEMS
 13 CONSISTENT WITH SUBSECTION 2001(K)(3)

14 A. Federal Defendants Seek Clarification
 15 Of The Meaning Of "Release" Of Alternative Timber

16 Federal defendants seek clarification regarding what agency
 17 actions to "identify and release" alternative timber the Court
 18 would deem consistent with the mandates of section 2001(k). As
 19 an initial matter federal defendants seek clarification of what
 20 actions would constitute "release" of subsection (k)(3) timber.
 21 Subsection 2001(k)(3) directs the Secretaries to "provide"
 22 alternative timber; unlike other subsections, it does not mandate
 23 the "release" of such timber. The difference in word choice
 24 makes sense. "Release" is used in the context of 2001(k) to
 25 apply to those situations where there has already been an award
 26 of a contract covering the subject timber. See Subsections
 2001(k)(1); 2001(k)(2). Alternative timber, however, is not the

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1 subject of a preexisting contract, but must be identified,
2 offered and an agreement executed. Accordingly, the term
3 "release" is inapplicable to such timber. Indeed, the heading to
4 subsection 2001(k)(3) refers to an "Alternative Offer" (emphasis
5 added), not award or release. Accordingly, federal defendants
6 seek clarification that the Court intended the agencies to
7 "provide" alternative timber within the Court-established
8 deadline, which could be satisfied by an "offer"^{1/} of timber
9 deemed to be of "like kind and value" by the agencies.

10 B. Federal Defendants Seek Clarification
11 Regarding The Extent To Which This Court
12 Deems Compliance With Environmental Laws
13 Consistent With The Mandates Of Section 2001(k)

14 Federal defendants further seek clarification as to the
15 actions the agencies have taken and are proposing to take to
16 provide alternative timber which Court deems consistent with
17 section 2001(k). In its Order, the Court initially stated that
18 the agencies' guidelines formulated "thus far are consistent with
19 any constraints created by section 2001(k)." Amended Order at 6.
20 Next, while suggesting that under certain circumstances
21 requirements of environmental laws such as the National

22 ^{1/} As there would be no auction of alternative timber and
23 acceptance of bids, the term "offer" is not used here in the
24 technical sense, as applied in subsection 2001(k)(1). Instead,
25 it refers to a proposal by the agency to provide an identified
26 sale unit or portion thereof, deemed by the agency to be of "like
kind and value," to the relevant purchaser. Additional
negotiating steps and public notice usually would be necessary to
bring the proposal to an actual contract.

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1 Environmental Policy Act (NEPA), the National Forest Management
2 Act (NFMA) and the Endangered Species Act (ESA) "may be
3 inconsistent with, and thus explicitly or implicitly preempted
4 by, section 2001(k)," the Court found no current case or
5 controversy and accordingly deemed it unnecessary to reach the
6 merits of the applicability of such laws. Amended Order at 6.

7 1. Steps taken to date

8 The agencies' guidelines formulated to date expressly direct
9 the application of environmental laws to the provision of
10 alternative timber.^{2/} Consistent with those guidelines, the
11 agencies have been taking the following actions. As to the
12 Forest Service, pursuant to a letter dated May 6, 1996, the
13 Forest Service Pacific Northwest Region sent a letter to Forest
14 Supervisors in the region to request assistance in identifying
15 potential replacement volume. Reynolds Dec. at ¶ 3. The May 6
16 letter identified the species and sizes of timber needing
17 replacement and directed the forests to identify potential
18 alternative volume in areas consistent with standards and
19 guidelines. Id. The forests completed the requested analysis
20 and provided the results to the Regional Office. An example of
21 the work required to comply with the May 6 request is seen by the

22 ^{2/} See May 31, 1996 Memorandum from Under Secretary of Natural
23 Resources and Environment, Department of Agriculture to USDA
24 Forest Chief, attached to June 3, 1996 Defendants' Notice of
25 Filing; July 23, 1996 Memorandum from Under Secretary to USDA
26 Forest Chief, attached as Ex. 1b Declaration of Gray F. Reynolds,
attached hereto as Ex. A.

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1 steps taken by the Siskiyou National Forest. The Siskiyou
2 convened a team of Forest Service and U.S. Fish and Wildlife
3 Service biologists, hydrologists, Graphic Information System
4 experts and timber experts to review the total Forest land base
5 and identify that portion that could be available as a source of
6 replacement timber consistent with agency guidelines and
7 applicable laws. Id. at ¶¶ 4, 5. In addition, to ensure a full
8 review of potentially available areas, the Forest Service
9 directed the Forests to identify potential replacement volume in
10 areas where watershed analyses had been completed and approved
11 consistent with the Northwest Forest Plan. Id. at ¶ 6.

12 After issuance of the Court's July 2 order, the Forest
13 Service continued to assess how to comply and proceed with
14 providing replacement timber in light of the then-pending motion
15 for rehearing on the Ninth Circuit's decision on "known to be
16 nesting" filed by plaintiff-appellee Northwest Forest Resource
17 Council (NFRFC). Id. at ¶ 7. The filing of the petition rendered
18 the Ninth Circuit's decision nonfinal and accordingly left the
19 universe of sales requiring replacement timber potentially
20 subject to change.

21 As the agencies were considering how best to continue in
22 light of this Court's order and the pending motion for rehearing,
23 on July 22, 1996, the Ninth Circuit denied the petition for
24 rehearing and ordered immediate issuance of the mandate. On July
25 23, 1996, the Under Secretary, Natural Resources and Environment,

26

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1 | USDA, issued the Direction for Replacement Timber. See Ex. 1b to
2 | Reynolds Dec. The directive required, inter alia, identification
3 | of replacement timber consistent with all environmental laws,
4 | including allowing for administrative appeals, and applicable
5 | standards and guidelines. Id. On July 30, 1996, the Chief of
6 | the Forest Service forwarded the July 23 directive to the Region,
7 | directing compliance. See Ex. 1a to Reynolds Dec. The Forest
8 | Service also issued letters on August 1 to purchasers requesting
9 | assistance in identifying any additional potential locations of
10 | replacement timber and requesting a meeting to discuss
11 | preferences, needs and priorities. See Declaration of Nancy
12 | Graybeal at ¶ 2, attached hereto as Ex. B.

13 | In addition, since issuance of the Court's Order, the Forest
14 | Service has engaged in various negotiations with certain
15 | purchasers regarding replacement timber. The Forest Service is
16 | in discussions with one purchaser to mutually cancel seven sales,
17 | containing approximately 34 MMBF of volume, that would otherwise
18 | require replacement volume. Reynolds Dec. at ¶ 10. In addition,
19 | on July 26, 1996, Department of Agriculture representatives and
20 | government lawyers met with attorneys representing the plaintiff
21 | in this case and a number of purchasers to discuss resolving
22 | alternative volume issues. Id. at ¶ 11.

23 | As to the BLM, the agency has executed agreements with the
24 | purchasers for alternative timber for two units and has
25 | identified and proposed alternative volume for all but two of the

26

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1 remaining 13 units. See Twenty-third Declaration of William
2 Bradley at ¶ 4, attached hereto as Ex. C. As to the two units
3 for which proposals of alternative timber have not been made,
4 these are units for which known to be nesting determinations were
5 only recently made and accordingly, the BLM has not been able to
6 make substantial progress in providing alternative volume for
7 those two units. Id. at ¶ 5.

8 2. Need for clarification

9 Federal defendants file this motion for clarification as it
10 is evident that the agencies cannot provide alternative timber
11 for all units withheld for "known to be nesting" determinations
12 by August 31, 1996, the last day of the court-ordered deadline.
13 After the June 14, 1996 ruling by the Ninth Circuit, the amount
14 of replacement volume for the Forest Service increased from
15 approximately 51 MMBF to approximately 225 MMBF. Reynolds Dec.
16 at ¶ 16. Even to the extent that Forest Service alternative
17 timber can be provided from the existing FY 1996 Pacific
18 Northwest Region timber program, because the administrative
19 appeal process needs to be completed, which would take
20 approximately 150 days, such timber cannot be provided within 60
21 days. See Reynolds Dec. at ¶¶ 15a, 16. Moreover, to the extent
22 that FY 1996 timber would not be available to satisfy all Forest
23 Service alternative timber obligations, sales would have to be
24 prepared through the process described in the Declaration of
25 Sterling Wilcox dated May 10, 1996, attached hereto as Ex. D.

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1 That process would be substantially longer. Wilcox Dec. at ¶¶ 4-
2 7. Indeed, even if no environmental laws were applied to the
3 preparation and provision of alternative timber, it would not be
4 physically possible for the Forest Service to lay out alternative
5 volume, establish the volume of timber being provided from Forest
6 Service lands, and provide sales within 60 days. Reynolds Dec.
7 at ¶ 16.

8 In the absence of a deadline for providing alternative
9 timber in the statute, federal defendants do not perceive an
10 inconsistency between their actions and the mandates of
11 subsection 2001(k)(3). Indeed, providing alternative timber that
12 is consistent with environmental laws helps ensure that the
13 purchasers ultimately can harvest the alternative as contemplated
14 by subsection 2001(k)(3). If sales are not in compliance with
15 environmental laws, they could be vulnerable to any of a number
16 of legal challenges. While plaintiffs argue that alternative
17 sales should be afforded the protections of the "notwithstanding
18 any other provision of law" language in 2001(k)(1), even if
19 deemed applicable, such protections expire September 30, 1996
20 under the statute, as NFRC and Scott Timber have both
21 acknowledged.^{3/} Even if such sales physically could be provided

22 ^{3/} See NFRC's Reply Memorandum in Support of Motion to Compel
23 Provision of Replacement Timber for Certain Sale Units at 3;
24 Appellee's Opposition to Motion for Stay Pending Appeal at 8
25 (dated October 23, 1995, relevant pages attached hereto);
26 Declaration of Peter Quast at ¶ 4, attached as Ex. A to Horngren
27 Declaration in support of Scott Timber Co.'s May 10 Motion to

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1 by August 31, 1996, there is no guarantee that they could be
2 completed by September 30, 1996. Thus, providing sales
3 consistent with environmental laws goes further to ensuring that
4 the purchasers ultimately will be able to harvest alternative
5 volume, consistent with the mandate of subsection 2001(k)(3).

6 However, in light of the court's 60-day deadline, a clash
7 between providing alternative timber within that time frame, or
8 by August 31, 1996, and compliance with the agencies' guidelines
9 is inevitable. Accordingly, federal defendants seek
10 clarification at this time as to what guidelines this Court deems
11 consistent, or inconsistent, with "any constraints created by
12 section 2001(k)."

13 II. ALTERNATIVELY, IF THE COURT DEEMS THAT COMPLIANCE WITH
14 ENVIRONMENTAL LAWS IS NOT CONSISTENT WITH 2001(K)(3),
15 FEDERAL DEFENDANTS REQUEST A STAY OF THIS COURT'S ORDER

16 Alternatively, if the Court clarifies that alternative
17 timber is to be offered within the 60-day deadline without
18 compliance with environmental laws, including NEPA, NFMA and the
19 ESA, federal defendants request a stay of the Court's order
20 mandating "identification and release" pending appeal of any such
21 decision to the Ninth Circuit.

22 Requiring release of alternative timber without
23 environmental review runs contrary to the intent of Congress in
24 initially authorizing the release of sales under Section 2001(k).

25 Compel Release of Replacement Timber.

26 DEFENDANTS' MOTION TO
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1 Congress expressly noted that all sales subject to release under
2 Section 2001(k)(1) had received a good deal of environmental
3 review. As Representative Taylor noted:

4 For instance, the section 318 timber, it is in
5 Washington and Oregon, this area has already met
6 all the environmental requirements. This is green
7 timber but it has not yet been released. It has
8 been waiting since 1990, over 5 years. And this
9 meets all the environmental requirements, and it
10 meets, it has already been approved to move * * *.

11 141 Cong. Rec. H 5558. See also 141 Cong. Rec. H 5559. This
12 review for these sales included, inter alia, NEPA, ESA and NFMA.
13 Whatever review had been conducted on these sales was deemed to
14 be sufficient under the "notwithstanding any other law" language
15 of Section 2001(k)(1). Here, however, requiring the "release" of
16 alternative timber without environmental review would constitute
17 a radically different action. It is one thing for Congress to
18 deem the environmental review of a known set of previously
19 "offered" sales sufficient in ordering their release; it is quite
20 another thing to deem environmental review for a completely
21 unknown set of alternative timber sale units sufficient in
22 directing their "release." Nothing in the statute suggests that
23 Congress intended that the volume of unidentified alternative
24 timber be provided regardless of whether such timber sale units
25 comply with applicable standards and guidelines or environmental
26 laws. Under such an interpretation, the scope of environmental
27 harm, a factor arguably part of the Congressional calculus in
28 enacting Section 2001(k)(1), cannot be immediately known.

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DEFENDANTS' MOTION TO
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1 For these same reasons, the Secretaries have demonstrated a
2 likelihood of success on the merits of this claim. Nothing in
3 Section 2001(k)(3) requires release of replacement timber within
4 a certain time and without compliance with environmental laws.
5 With the absence of such requirements in the statute, Congress
6 clearly left to the Secretaries' discretion the timing and level
7 of environmental review for any timber provided under Section
8 2001(k)(3). See NFRC v. Pilchuck, 9th Cir. Nos. 96-35106, 35107,
9 35123, 35132 (June 14, 1996) (Slip op. at 6956-6957); Chevron
10 U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S.
11 837, 843 (1984). Cf. Section 2001(b) and 2001(d) (which leave to
12 the discretion of the Secretaries the level of environmental
13 review to be afforded to timber released under those two
14 sections). Moreover, if the judgment of the Secretaries is not
15 given effect, it is not then appropriate to find an inconsistency
16 with environmental laws through the imposition of a court-imposed
17 deadline not found in the statute. See Jones v. Gordon, 792 F.2d
18 821, 826 (9th Cir. 1986) (finding that if the statute "does not
19 require [implementation] within any particular period," NEPA will
20 be applicable); see also Westlands Water District v. United
21 States Dep't of Interior, 43 F.3d 457, 459 (9th Cir. 1994).

22 Dated this 1st day of August 1996.

23
24
25
26
DEFENDANTS' MOTION TO
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Respectfully submitted,

KRISTINE OLSON
United States Attorney
JAMES L. SUTHERLAND
Assistant United States Attorney

LOIS J. SCHIFFER
Assistant Attorney General



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DEFENDANTS' MOTION TO
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TO STAY

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
Plaintiff,)	
)	
	)	Civil No. 95 6244-HO
v.	)	(lead case)
	)	Civil No. 95-6267-HO
CLICKMAN and BABBITT	)	(consolidated case)
Defendants,)	
	)	DECLARATION OF
OREGON NAT. RES. COUNCIL, et al.	)	GRAY F. REYNOLDS
Defendants-Intervenors)	
)	
)	

I, Gray F. Reynolds, do hereby depose and say that:

1. I am the Deputy Chief of the National Forest System in the Washington office of the Forest Service. I have previously filed a declaration in this matter.

2. On July 2, 1996, this court ordered the Forest Service to complete the identification and release of replacement timber for sale units which meet the "known to be nesting" criteria set

Ex. A, p. 1

forth in section 2001(k)(2) of the FY 1995 Rescissions Act (P.L. 104-19).

3. On May 6, 1996, the Forest Service Pacific Northwest Region sent a letter (attached to Federal Defendant's May 21, 1996, Motion to Include) to Forest Supervisors in the region to request assistance in identifying potential replacement volume. The Forests were directed to identify replacement volume on Matrix and Adaptive Management Area lands outside key watersheds that was in compliance with all applicable standards and guidelines in each Forest's land management plan. The Forests were also asked to identify potential replacement volume on these lands that was in compliance with the standards and guidelines for Riparian Reserves and avoided known occupied marbled murrelet stands, unsurveyed suitable marbled murrelet habitat, or known spotted owl activity centers. The letter included the species and sizes of timber needing to be replaced and included a reporting format to provide consistency in data.

4. Each forest that received the May 6, 1996, letter completed the requested analysis and provided the results of their analysis to the Regional Office. An example of how a national forest responded to the May 6, 1996, letter is seen in the work the Siskiyou National Forest did. The Siskiyou National Forest convened a team of Forest Service and U.S. Fish and Wildlife Service biologists, hydrologists, Graphic Information System (GIS) experts, and timber experts. The team started by

looking at the total Forest land base (1,092,360 acres), and eliminating areas that were not Matrix or Adaptive Management Area lands. This included elimination of Late Successional Reserves, Riparian Reserves for class 1, 2, and 3 streams, Congressionally designated areas, all unsuitable lands (according to NFMA definitions), stands occupied by marbled murrelets, acres harvested since GIS map base was installed, and buffers around each marbled murrelet survey point. This left 2,562 acres identified in the GIS data base.

5. The location of the potential replacement volume was then reviewed to eliminate additional unmapped riparian areas, currently sold volume, known protected wildlife, fish and plant sites, known archaeological sites, and land that, if harvested, would violate NFMA's adjacency standards. From this remaining potential replacement volume, the Forest Service identified accessibility options and visual management restrictions. This resulted in the Siskiyou National Forest being able to identify 6.82 million board feet of potential replacement volume.

6. On June 6, 1996, the Forest Service additionally requested the Forests to identify potential replacement volume within key watersheds where watershed assessments had been completed and approved pursuant to the Northwest Forest Plan. Any such potential replacement volume would be on lands where timber harvest is allowed and in full compliance with all standards and guidelines.

7. After this court's July 2, 1996, order the agency continued to assess how to comply with the court's order, and proceed with providing replacement volume in consideration of the continuing proceedings before the Ninth Circuit on plaintiff NERC's motion for rehearing of the Ninth Circuit's June 14, 1996, order. On July 27, 1996, the Ninth Circuit rejected NERC's motion.

8. On July 23, 1996, the Under Secretary of Agriculture for Natural Resources and Environment issued the direction (attached as Exhibit 1b) outlining the process for providing replacement timber in accordance with the July 2, 1992, order. On July 30, 1996, the Forest Service issued supplemental direction (attached as Exhibit 1a) to the Regional Forester.

9. Among other things, the July 23, 1996, guidance directed the Forest Service to:

a. provide replacement volume through the usual environmental assessment process to ensure they comply with all environmental laws including providing for appeals;

b. provide replacement volume from areas consistent with all standards and guidelines of the Northwest Forest Plan;

c. use any timber that has not been advertised in the FY 1996 Pacific Northwest Region timber program as the first source for replacement volume for purchasers who indicate a need this year; and

Ex.A, p.4

d. quickly prepare replacement volume and give priority to preparing replacement volume over all other timber sales;

10. The Forest Service is currently in discussions with one purchaser to mutually cancel seven sales subject to this court's July 2, 1996, order. The sales, which contain approximately 31 mmbf of volume, will now not be subject to replacement under the terms of 2001(k)(3).

11. On July 26, 1996, the Department of Agriculture representatives and government lawyers met with attorney and purchasers representing the plaintiffs in this case to discuss resolving alternative volume issues.

12. By close of business on August 1, 1996, the Forest Service will send letters to purchasers holding contracts requiring replacement timber under section 2001(k)(3) of the FY 1995 Rescissions Act notifying them of their eligibility for replacement timber, and requesting their assistance to identify additional potential locations of replacement timber, and requesting meetings with the purchasers to discuss their preferences, needs, and priorities for replacement timber.

13. Upon receiving input from purchasers, the Forest Service will compare the availability of replacement timber to the timber currently suspended.

14. Forest Service timber sale contract experts will meet with the Forests involved in providing replacement volume to

explain and emphasize the Department and Agency direction for meeting with the individual purchasers.

15. Providing replacement timber in compliance with existing environmental law and providing for administrative appeals is anticipated to take longer than 60 days to complete. The following criteria will guide those actions expected to require more than 60 days:

a. for purchasers who indicate an immediate need, replacement timber which comes from the existing FY 1996 Pacific Northwest Region timber program must initiate and complete notice, comment, and the administrative appeal process. This process will take approximately 150 days from the time the sale is identified;

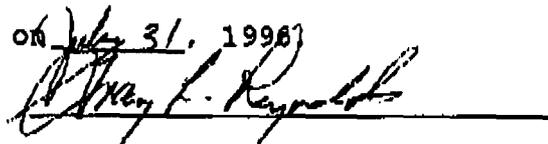
b. for purchasers who do not indicate a need for replacement timber this year, replacement timber will require environmental analyses that fully comply with all environmental laws including appeals. The process and timeframes for preparing this replacement volume are described in the May 10, 1996 declaration of Sterling Wilcox which is attached.

16. On March 28, 1996, in my previous declaration and on May 10, 1996, in Sterling Wilcox's declaration discussing Forest Service efforts to provide replacement volume, the amount of volume subject to replacement was approximately 51 mmhf. After the June 14, 1996, ruling by the Court of Appeals for the Ninth Circuit, the amount of replacement volume increased to

approximately 225 mmbf. It will not be physically possible to identify replacement volume that is consistent with environmental laws, including administrative appeals, within 60 days of the court's July 2, 1996, order. Even if no environmental law applied to replacement timber, it would not be physically possible to lay out alternative volume, establish the volume of timber being provided from Forest Service lands, perform contract modifications, and provide sales to purchasers within 60 days of the court's July 2, 1996, order.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C. on July 31, 1996



Gray F. Reynolds

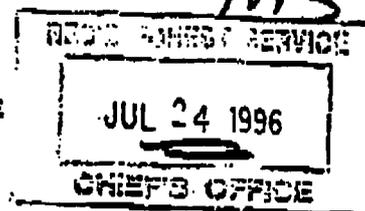
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93050429:7/10/10



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250



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MEMORANDUM TO JACK WARD THOMAS, FOREST SERVICE CHIEF

FROM: James R. Lyons
Under Secretary
Natural Resources and Environment

JUL 23 1996

SUBJ: Direction For Replacement Volume

On July 2, 1996, the District Court for the District of Oregon ordered the Forest Service to complete the identification and release of replacement timber for sale units which meet the "known to be nesting" criteria set forth in section 2001(k)(2) of the Fiscal Year 1995 Rescissions Act (P.L. 104-19).

You are to proceed with actions necessary to provide replacement volume for the subject sales or portions of such sales subject to 2001(k)(2) of the Fiscal Year 1995 Rescissions Act that meet the "known to be nesting" criteria. You may offer replacement volume from any national forest in Region 6.

You may delegate this authority to the Regional Forester with further Delegation to Forest Supervisors as you deem appropriate. Any inability to reach agreement on replacement volume on these sales should be communicated through the normal chain of command within the Forest Service, as soon as possible.

It is important that the Forest Service move quickly to provide the replacement volume for those sales with units which meet the "known to be nesting" criteria. In fulfilling that requirement, you are directed to take the following action:

1. Contact the timber sale purchasers involved with sales needing replacement volume to identify their preferences, needs, and priorities and to set the priorities for Forest Service actions.
2. Provide the replacement volume from areas that are consistent with the standards and guidelines of the National Forest Plans, as amended by the NW Forest Plan;
3. Use the remaining unadvertised FY 1996 Region 6 Northwest Forest Plan program as the first source for replacement volume for those purchasers who indicate a need this year.
4. For those purchasers whose preference is to have replacement volume from other than the FY 1996 Northwest Forest Plan timber sale program, an agreement must be completed (signed by the purchaser and the Forest Service) that includes process, timeframes, and general location for the replacement volume.
5. Replacement timber sales should receive priority over other timber sale preparation in the Northwest Forest Plan area.
6. Provide replacement volume through the usual environmental assessment process to ensure they comply with all environmental laws including providing for appeals.

Promptly issue any necessary direction to the Regional Forester to implement these actions.

KRISTINE OLSON OSB #73254
United States Attorney
JAMES L. SUTHERLAND, OSB# 68160
701 High Street
Eugene, OR 97401-2798024
541-465-6771

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P.O. Box 663
Washington, D.C. 202-272 8338
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,)	
	)	Civil No. 95-6244-HO
v.)	
	)	DECLARATION OF
DAN GLICKMAN, in his capacity as	)	NANCY GRAYBEAL,
Secretary of Agriculture,)	
BRUCE RABBITT, in his capacity as)	
Secretary of the Interior)	
)	
Defendants.)	

I, Nancy Graybeal, hereby declare the following to be true and correct:

1. I am the Deputy Regional Forester for the Pacific Northwest Region of the Forest Service, headquartered in Portland, Oregon. Among other duties, I am responsible for the Natural Resources program within this Region. I have served in this position for five years and have been employed by the Forest Service for twenty-two years.

DECLARATION OF NANCY GRAYBEAL

Page 1

Ex B, p. 1

2. I am familiar with the issues of this case and have executed and caused to be placed in U.S. Mail on August 1, 1996, letters to the companies who hold timber sale contracts which require replacement volume pursuant to Section 2001(k)(3) of Pub. L. 104-19. These letters request the purchasers' assistance to identify locations of potential replacement volume, express their preferences, needs and priorities for replacement volume, and invites each purchaser to establish a mutual meeting date with the Regional Forester's representative. A sample letter is attached as Exhibit 1.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Portland, Oregon, on August 1, 1996


NANCY GRAYBEAL

DECLARATION OF NANCY GRAYBEAL

Page 2

Ex B, p. 2

SENT BY:

8- 1-96 : 4:25PM :

USDA. OGC. NKU

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United States
Department of
Agriculture

Forest
Service

Pacific
Northwest
Region

P.O. Box 3623
Portland, OR 97208-3623
333 S.W. First Avenue
Portland, OR 97204

File Code: 2450/1570

Date: August 1, 1996

Boise Cascade, Inc.
Attn: Mike Hicks
450 Pacific Avenue North
Monmouth, OR 97361

RE: Green Apple, Randall Salado, and Upperten 002 Timber Sales

Dear Sir:

On July 2, 1996, the District Court for the District of Oregon issued an order in the case NREC v. Glickman, requiring the Forest Service to take action to provide you with replacement volume for your timber sale[s] pursuant to section 2001(k) (3) of Public Law 104-19.

I need your assistance to identify locations of potential replacement volume on the above referenced sale[s]. I also need to understand your preferences, needs, and priorities for this replacement volume. Please contact Robert Devlin (503-326-2955) at your earliest convenience to establish a mutual meeting date.

Sincerely,

Robert W. Williams
ROBERT W. WILLIAMS
Regional Forester

cc:
Forest Supervisor: SIU

EXB, p. 3



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)
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Plaintiff,)
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v.)
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DAN GLICKMAN, in his capacity as)
Secretary of Agriculture,)
BRUCE BABBITT, in his capacity as)
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Civil No. 95-6244-HO
(lead case)
Civil No. 95-6267-HO
(consolidated case)

TWENTY-THIRD DECLARATION
OF WILLIAM L. BRADLEY

I, William L. Bradley do hereby depose and say that:

1. My name is William L. Bradley. I have previously prepared a declaration for this case, in which I described my position with the Bureau of Land Management (BLM) and the nature of my responsibilities.

Exc, p. 1

2. I am familiar with the Rescissions Act, Public Law 104-19 (109 Stat. 194), including the provisions regarding "Award and Release of Previously Offered and Unawarded Timber Sale Contracts," Section 2001(k).

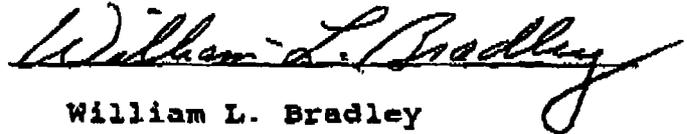
3. In its July 25, 1996, compliance report, the BLM identified 15 sale units of 8 sales which qualify for replacement volume under Section 2001(k)(3). Total volume for these units is approximately 31 MMBF.

4. The BLM has awarded replacement timber to Lone Rock for Unit No. 4 of Lost Sock (1.1 MMBF) and has modified Lone Rock's Olalla Wildcat sale contract to replace volume for Unit No. 5 (0.9 MMBF) of that sale. The attached table shows the status of BLM's efforts to provide replacement volume to purchasers of the remaining 13 sale units.

5. There are 2 sale units for which occupancy by marbled murrelets was not determined until recently. Occupancy for Tobe West Unit No. 3 (2.9 MMBF) was determined on June 20, 1996. This unit has been partially cut. The BLM is estimating that at least 1.5 MMBF of replacement volume will need to be provided. Occupancy for Bear Air Unit No. 1 (6.9 MMBF) was determined on July 19, 1996. The BLM has not had the opportunity to make substantial progress in providing replacement volume for these units.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Portland, Oregon, on August 1, 1996.


William L. Bradley

Exc, p.3

August 1, 1996
B23ATUL.DOC

STATUS OF REMAINING REPLACEMENT VOLUME - BUREAU OF LAND MANAGEMENT

DISTRICT	SALE NAME	PURCHASER	VOLUME IDENTIFIED	TENTATIVE PURCHASER AGREEMENT	NOTICE PUBLISHED	PROTEST RECEIVED/ PROTESTANT	STATUS	APPEAL
SALEM	TOBE WEST #1	HULL-OAKES	NO					
EUGENE	ROMAN DUNN #1	HULL-OAKES	YES	Purchaser rejected initial proposal				
	ROMAN DUNN #2	HULL-OAKES	YES	YES	YES	YES/ GARY AND SHERRIE KUHL, ET AL.	DENIED 7/18/96	Appeal period open
COOS BAY	BEAR AIR #1	MURPHY	NO					
	BEAR AIR #2	MURPHY	YES	YES	YES	YES/ MEDITE, Independent Forest Products Assoc.	Response being prepared	
	DEEP CREEK #1, #2	CLR	YES	YES	NO			
	NORTH FORK CHEYCO #1	CLR	YES	YES	NO			
	NORTH FORK CHEYCO #3	CLR	YES	NO	YES	NO	N/A	N/A
	WREN 'N DOUBT #2, #3, #7	LONE ROCK	YES	YES	YES	YES/ UMPQUA WATERSHEDS	Response being prepared	
	WREN 'N DOUBT #5	LONE ROCK	YES	NO	NO			

EXC, p.4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

v.

DAN GLICKMAN, in his capacity as
Secretary of Agriculture,
BRUCE HABBITT, in his capacity as
Secretary of the Interior

Defendants.

Civil No. 95-6244-HO

DECLARATION OF
STERLING WILCOX

I, Sterling Wilcox, do hereby depose and say that:

1. I am the Acting Deputy Chief of the National Forest System in the Washington office of the Forest Service.

2. I understand that plaintiffs in this matter have requested that the Court order the Forest Service to identify alternative volume by June 1, 1996, for Father Oak (unit 1), Fivemile Flume (unit 4), Formader 103 (unit 1), Indian Hook (Units 4 & 5), Skywalker (unit 6), Sulpher (unit 4) sale units in which marbled murrelets are "known to be nesting" under Section 2001(k)(2) of the 1995 Rescissions Act and the Court's order of January 19, 1996.

3. As stated in the Declaration of Gray F. Reynolds, March 28, 1996, within 60 days from such time as the Court may grant plaintiffs' request to release alternative timber for the 40 units subject to the Court's order of January 19, 1996, the Forest Service would:

a. identify and map the general locations of alternative timber, of like kind and value, on the National Forests in the Pacific Northwest Region of the Forest Service, outside suitable marbled murrelet nesting habitat and consistent with the standards and guidelines of the National Forest Plans, as amended by the NW Forest Plan;

b. request the assistance of purchasers of suspended units to identify locations of alternative timber of like kind and value; and

c. compare the availability of alternative timber to the kind and

ExD, p.1

value of timber currently suspended due to nesting of threatened and endangered birds.

4. In order for the alternative timber to comply with NEPA, ESA, NFMA and all other laws, the Forest Service will need to prepare environmental documents, a process that will take a minimum of six months assuming that adequate resources are available and unanticipated extensive analyses are not necessary. Where complex circumstances are encountered, preparation of environmental documents has in the past taken over two years.

5. After the NEPA document is prepared, a 30-day comment period is required by 16 U.S.C. 1612 (note) and 36 C.F.R. 215.6(a), and another 30 to 60 days is usually needed to respond to comments and prepare a decision document. If consultation or conferencing for proposed, endangered or threatened species is required, it can occur during this period, but delays in consultation or conferencing would delay preparation of the decision document.

6. After the environmental and decision documents are prepared, the decision document would be subject to administrative appeal under 36 C.F.R. 215, a process that can require 105 days to complete. An automatic stay of implementation applies from the publication of a notice of decision for appeal until the conclusion of the appeal under 36 C.F.R. 215.10. Simultaneous with the appeal process period, the Forest Service can work on tree marking, appraisal and sale preparation activities, which would require an estimated 60 to 90 days.

7. After the appeal process is completed, the final contract modification for alternative volume can be executed, unless delayed by judicial review.

8. If the sales in plaintiff's motion are given preferential treatment for alternative volume, the identification of the general location of potential alternative timber for the units they have requested could be assessed by June 1, 1996. The procedures in paragraphs four through seven would then need to be completed before the timber could be available for harvesting.

EX D, p. 2

9. Preparation and implementation of the FY 1996, FY 1997 and FY 1998 timber programs are utilizing all currently available personnel and resources. Unless additional personnel and resources are made available, preparation of alternative volume would divert personnel and resources from preparation and implementation of the FY 1996, FY 1997, and FY 1998 timber programs.

I declare under penalty of perjury that the foregoing is true and correct.
Executed in Washington, D.C. on May 10, 1996.


Sterling Wilcox

Ex D, p3



Office of the Assistant Attorney General

Washington, D.C. 20530

CONFIRMATION NUMBER: (202) 514-2701

FAX NUMBER: (202) 514-0557

NO. OF PAGES: _____ (INCLUDING COVER PAGE)

DATE: 8/2/96

TO: Elena Kagan

TELEPHONE NO.: 456-7594

FAX NO.: 456-1647

FROM: Allison Rumsey - DOJ/ENRD

MESSAGE: Attached please find a copy of the FS/DOJ

proposed settlement for replacement
timber and the Mark Rutzick's
initial response. ~~Here is~~ I will
send you any further documents as
this develops. Allison

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS RECEIVING THESE PAGES.



Working Draft - Agreement regarding replacement timber
Draft, 7/26/96

AGREEMENT

Under Sec.2001(k)(3) of the Rescissions Act of 1995, the Forest Service must provide alternative timber for certain timber sales where threatened or endangered bird species are "known to be nesting." Those sales ("Listed Sales") are set forth in Attachment 1.

By Amended Order of July 9, 1996, Judge Hogan has ordered the Forest Service to "identify and release" alternative timber within 60 days ("July Order"). In regard to the July Order, the Forest Service and NFRC on behalf of the purchasers of the Listed Sales, agree:

A. Schedule and Approach for Alternative Timber

1. Meeting period. Within 30 days after this Agreement is effective, the Forest Service Contracting Officer for each Listed Sale will meet with the Purchaser-Designated Representative to discuss the purchaser's interest and expectations as to assessment of volume, areas where alternative timber would be acceptable to purchaser, timing of alternative volume, and related matters.

2. Evaluation period. Within 120 days after this Agreement is effective, the Forest Service will evaluate information provided during the Meeting Period, available alternative timber, scheduling, and other information; will consult with the Level 1 teams; and based on that information and further informal consultation with purchasers, will develop a proposal for alternative timber for each purchaser of a Listed Sale. The proposals will seek to accommodate competing requests of different purchasers. The parties recognize that some flexibility by all parties is called for. By the end of the Evaluation Period, the Forest Service will report back to each purchaser of a Listed Sale a tentative plan for alternative timber that can form the basis for negotiations over an agreement with that purchaser for alternative timber.

3. Tentative Agreement Period. Within 180 days after the effective date of this Agreement, the Forest Service will negotiate with each purchaser of a Listed Sale on the basis of the plans developed during the Evaluation Period to develop a Tentative Agreement regarding alternative timber. All parties will work diligently and in good faith to reach a tentative agreement for each sale. The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales.

4. Agreement Period. As soon as a tentative agreement is reached for a sale under Par. A.3 above, the Forest Service will begin the process of preparing the tentative agreement area for sale, including laying out the sale (subject to weather and like seasonal constraints), NEPA compliance, and ESA consultation. The Forest Service will move expeditiously to complete this preparation process for each sale, and enter into an agreement for alternative timber for the sale. A typical schedule for such steps is Attachment 2 here.

B. Conditions for Replacement Timber

The following conditions apply to alternative timber the Forest Service will provide under this Agreement:

1. Timber will comply with all laws, including environmental laws.

2. Timber will comply with Standards and Guidelines under the President's Forest Plan, as they may be modified, and any other Standards and Guideline issued by the Forest Service or other Federal agency.

3. The Forest Service will obtain agreement from Level 1 consultation teams as to alternative volume.

4. Alternative timber will be beyond the program volumes for the year the timber is provided. The Forest Service will list alternative volume as a separate line in annual work plans for the years 1997, 1998, and 1999, and will track alternative volume separately as part of the work plans for those years.

5. Alternative timber may be in a Forest other than that of the original purchase.

6. Alternative timber must be "an equal volume of timber, of like kind and value, which shall be subject to terms of the original contract...." (Rescissions Act, Sec. 2001(k)(3)).

C. Other terms

1. To assure that alternative timber is provided expeditiously, the Forest Service will evaluate what additional resources of personnel and money are necessary, and will provide for transfer of resources from other projects or areas to meet the need, or will request additional resources from OMB.

2. To reduce the possibility that selected alternative timber becomes the subject of legal challenge, the Forest Service will use alternative timber that has the approval of Level 1 teams, that complies with all laws, and that meets the President's Forest Plan and other applicable standards and guidelines.

3. Also to reduce the possibility that selected alternative timber becomes the subject of legal challenge, once timber is the subject of a tentative agreement (Par. A. 3 above), the Forest Service will consult with local environmental and local community groups about that alternative volume.

4. In the event that alternative timber is the subject of legal challenge, the Forest Service will immediately enter into further negotiations with the purchaser of any such sale to determine whether volume acceptable to the purchaser and not likely to be challenged can promptly be made available instead.

5. The parties will file this Agreement with the District Court; will jointly move the court to vacate the July Order; and will request that the court retain continuing jurisdiction over the case of NFRC v. Glickman and Babbitt, No. 95-6244-HO and 95-6267-HO, to help assure compliance with this agreement.

6. To further assure compliance with this Agreement, the Forest Service will report to the parties and the Court every 30 days for the first 180 days after the effective date of this Agreement, and every 3 months thereafter, as to progress in providing alternative timber.

7. NFRC will dismiss with prejudice its claim that it is entitled to alternative volume under terms and conditions other than those specified here.

[signatures and effective date--date of last signature]

LEBOEUF, LAMB, GREENE & MACRAE

L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

KOIN Center

222 S.W. Columbia Street, Suite 1600

Portland, OR 97201

Telephone No.: (503) 294-3095

Facsimile No.: (503) 294-3895

Date: August 1, 1996

To: Honorable Lois J. Schiffer

From: Mark C. Rutzick

Fax No.: (202) 514-0557

Comments/Message:

Page 1 of 2

Client/Matter Number: 00235/779

LEBOEUF, LAMB, GREENE & MACRAE
L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATION

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A LONDON MEMBER FIRM
MULTINATIONAL PARTNERSHIP

WRITER'S DIRECT DIAL:

August 1, 1996

Honorable Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources Division
Washington, D.C. 20530

Re: NFRC v. Glickman, No. 95-6244-HO (D. Or.)

Dear Lois:

This letter is a response from both NFRC and Scott Timber Co. to your draft agreement of July 29, 1996.

In order to respond quickly, we have consulted with the key industry leaders who participate in NFRC, and they are favorably inclined toward the settlement framework outlined in your draft agreement. However, because the proposed settlement directly affects existing statutory and contractual rights regarding specific timber sales, NFRC will need to contact each of the approximately 18 companies holding one or more of the affected sales to determine their willingness to accept the proposed settlement.

Since this process is somewhat cumbersome, we thought it would be easier for us to try to resolve some negotiating points before we initiate the contact with the 18 companies. We would like to be able to present an agreed settlement which would be recommended by NFRC to the companies, with the concurrence of Scott Timber Co.

Sections A(2) and (3): We are concerned at the length of time that will pass before any field work or environmental analysis will start. We would like to change the Evaluation Period from

DOE 99980 100 797.1
8/1/96 2:33pm

Honorable Lois J. Schiffer
Assistant Attorney General
August 1, 1996
Page 2

120 days to 90 days, and to change the Tentative Agreement Period from 180 days to 120 days.

Section A(3): We want the Tentative Agreement to include a date when the alternative timber will be available, or is intended to be available. While this is to be discussed in the initial meeting (see A(1)), it should be included in A(3). In addition, we want it clarified that if the purchaser and the Forest Service are unable to agree on replacement timber, the purchaser can seek the assistance of the court if the purchaser believes the Forest Service has not lived up to the good faith pledge contained in this section. We believe this is implicit in the court's continuing jurisdiction in section C(5), but we would like it made explicit.

Section A(4): We believe that following the initial meeting, the Forest Service should begin the field work and sale preparation for the sale, so that the preliminary work will already be largely done when the Tentative Agreement is reached. This will significantly speed up the process of getting the contract modified.

Sections B(1) and (2): We have no objection to the Forest Service's intention to comply with all applicable laws, standards and guidelines then in effect when it offers alternative timber (and we understand that the Forest Service has this obligation whether or not we agree to it), but we do not see any reason for the purchasers to have to agree that this will be true. I am concerned that putting these conditions in the agreement will shift this obligation from the Forest Service to the purchasers. We would not object to an expression that "the Forest Service intends that all alternative timber will be provided in compliance with all applicable laws [etc.]"

In addition, we do not believe that any discretionary standards and guidelines should be imposed on alternative timber after the contract is modified. We would like a sentence that reads: "Once a contract for alternative timber is signed, no new discretionary standards and guidelines will be applied to the alternative timber." We also would like language clarifying that alternative timber will not be subject to survey and manage requirements that take effect starting in 1997.

ridiculous -> FS has its oblig. to purch have them. Δ's it seems open that apply {reopens of whether laws are applicable

can't be what does this mean? how we can agree that laws don't apply - if would otherwise apply.

POR 99980 100 797.1
8/1/96 3:32pm

Honorable Lois J. Schiffer
Assistant Attorney General
August 1, 1996
Page 3

Section B(3): None of us seems to know what a "Level 1 team" is. In any event, as with complying with laws, we have no objection if the Forest Service wants to obtain the agreement of the Level 1 team, but we do not want a clause in the agreement in which purchasers agree that this agreement is required. We do think it would be helpful to have one responsible official in the Forest Service regional office designated to oversee the entire process and to be accountable for the Forest Service's performance under the agreement.

*really
one thing*

Section B(4): As you know, this is a very important provision for us. We want this language to be very clear and precise. For example, in place of the first sentence the clause might read: "All alternative timber provided under section 2001(k)(3) in any national forest shall be in addition to the annual programmed volume of timber sales in that forest under the applicable land management plan, and the annual programmed volume of timber sales on a national forest shall not be reduced in any fiscal year because alternative volume under section 2001(k)(3) is also provided from that forest." The concepts in the second and third sentences are satisfactory.

Section B(5): We understand that alternative timber may in some cases have to come from a different forest, but we want to make it clear that this must be agreed to by the purchaser. We would therefore add at the beginning of the sentence "Upon agreement of the purchaser" Because higher transportation costs reduce the stumpage price of timber, it is in the government's interest to try to offer alternative timber as close as possible to the original sale.

Section B(6): This clause seems unnecessary both since it is covered under B(1) (comply with all laws) and it is true whether or not we agree to it. We would delete it.

Section C(1): Our comment here is a little more substantive. We need more of a commitment to provide necessary resources. It just isn't satisfactory for us to let the Forest Service off the hook merely by asking OMB for additional resources, since OMB would have no incentive to approve the additional resources if there is no consequence to its failing to do so. We would like to delete the last clause of the sentence, starting with "or will request ..."

FOX 99980 100 797.1
8/1/96 2:51pm

Honorable Lois J. Schiffer
Assistant Attorney General
August 1, 1996
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Section C(2): This seems to say the same thing as B(1), (2) and (3), and should therefore be eliminated.

Section C(3): While we understand that the Forest Service can and does consult with many local groups about timber sales, we do not want to endorse any specific process concerning these sales. We do not object to "Forest Service intends" language, but we don't want to express our agreement to this point.

Section C(4): The general concept here is satisfactory, and I believe it was included at our request. But we don't want the Forest Service to too quickly abandon a replacement sale simply because a few people object, since that would delay the process substantially. We would like to make this more of a purchaser option.

Section C(5): The court's continuing jurisdiction should extend until the alternative sales are completed, in case there are any disruptions in the course of completing the contracts. We also want the Forest Service to commit to attempting to transfer to Judge Hogan any legal challenge filed against an alternative timber sale in another court, so that, to the extent possible, Judge Hogan can resolve all such challenges.

*- We make
good faith
offer
then et al.
case.*

Section C(7): We don't believe that a dismissal "with prejudice" is either justified or procedurally possible in the context of the court retaining continuing jurisdiction (since as long as the case remains open there is technically nothing to dismiss). We are willing to agree to withdraw our pending motions (NFRC's and Scott Timber's) concerning alternative timber, and to agree not to renew the motions or assert any claim concerning alternative timber as long as the Forest Service is complying with the agreement. This should fully protect the Forest Service's concerns. But if the Forest Service does not in the future comply with the agreement, we would reserve the right to renew our claim if necessary. We would agree to give the Forest Service 30 days notice before renewing the claim in the future, and to give the Forest Service a chance to cure any non-compliance before going back to court. But we want to preserve our claim that alternative timber need not comply with environmental laws in case there is any litigation by citizen groups challenging any of the sales that the Forest Service and a purchaser may agree to.

*] Dinah
- no
way.*

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8/1/96 3:32pm

Honorable Lois J. Schiffer
Assistant Attorney General
August 1, 1996
Page 5

Additions to Section C:

(1) We would like to give purchasers the option of paying for a new cruise of a sale to obtain an up to date calculation of the volume to be replaced. To do that, we would like to adapt the procedure that was used on the First and Last sales, with language as follows:

"An independent recruise of a sale shall occur upon purchaser's request and purchaser's deposit of sufficient funds with the Forest Service to pay an independent cruiser to recruise the original sale units. The Forest Service will contract with an independent cruiser to recruise to the original cruising and quality standards. The result of the recruise will be binding on both parties and will be used to determine the amount of the volume to be substituted."

(2) The Forest Service has the authority to adopt expedited appeal procedures for these decisions. We would like the Forest Service to adopt a rule requiring appeal decisions within 30 days of an administrative appeal.

*Dirck -
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could negot*

(3) We will need the following paragraph added to the settlement:

"Nothing in this agreement shall prejudice any claim or defense concerning the government's suspension of any affected contract including the claims presently raised in Scott Timber Co. v. United States, Civ. No. 94-784-C and 96-204-C (Ct. Fed. Claims)."

Finally, could you please send us a proposed Attachment 1 and Attachment 2 (referenced in your draft agreement) as soon as

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8/1/96 3:32pm

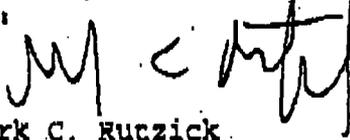
Honorable Lois J. Schiffer
Assistant Attorney General
August 1, 1996
Page 6

they are available so we can confirm the list of sales and assess
the proposed schedule.

Very truly yours,

LeBoeuf, Lamb, Greene & MacRae, L.L.P.

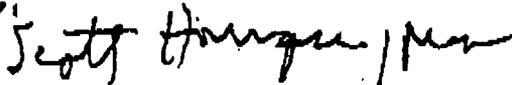
By:



Mark C. Rutzick

Haglund & Kirtley, L.L.P.

By:



Scott Horngren

FOR 99980 100 797.1
8/1/96 3:31pm

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT AND NATURAL RESOURCES DIVISION
 GENERAL LITIGATION SECTION
 601 PENNSYLVANIA AVENUE, N.W.
 WASHINGTON, D.C. 20004
 FAX NUMBER (202) 305-0429, -0506
 CONFIRMATION NUMBER (202) 305-0503

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	David Gayer	
	Dinah Bear	456-0753
	Brian Burke	720-4732
	Mark Gaede	
	Jeremy Heep	514-4231
	Peter Coppelman	514-0557
	Lois Schiffer	
	Jim Simon	
	Al Ferlo	514-4240
	Greg Frazier	720-5437
	Mike Gippert,	690-2730
	Jay McWhirter	
	Jim Perry	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Gerry Jackson	208-6916
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Kris Clark	
	Roger Nesbit (503)	231-2166
	Diane Hoobler	
	Chris Nolin	395-4941
	Jason Patlis (301)	713-0658
	Rick Prausa	205-1045
	Jim Sutherland(503)	465-6582
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 12 (including cover)

DATE: July 30, 1996

FROM: Michelle Gilbert

MESSAGE: NFRC v. Glickman

We just received this morning.

1 Mark C. Rutzick, OSB #84336
 LeBOEUF, LAMB, GREENE & MACRAE, L.L.P.
 2 KOIN Center, Suite 1600
 222 S.W. Columbia
 3 Portland, Oregon 97201
 (503) 294-3095
 4
 5 Attorney for Plaintiff
 6

7 IN THE UNITED STATES DISTRICT COURT
 8 FOR THE DISTRICT OF OREGON
 9

10	NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
	COUNCIL, an Oregon corporation,	)	Lead Case
)	
11	Plaintiff,	)	Civil No. 95-6267-HO
		)	Civil No. 95-6384-HO
12	and	)	Consolidated Cases
)	
13	SCOTT TIMBER CO., VAAGEN BROS.)	
	LUMBER INC., and WESTERN TIMBER)	
14	CO.,)	
)	
15	Plaintiff-intervenors,)	
)	
16	vs.)	
)	
17	DAN GLICKMAN, in his capacity)	
	as Secretary of Agriculture;)	
18	BRUCE BABBITT, in his capacity)	
	as Secretary of the Interior,)	
19)	
	Defendants,)	
20)	
	and)	
21)	
	OREGON NATURAL RESOURCES)	
22	COUNCIL, et al.,)	
)	
23	Defendant-intervenors.)	

24
 25 NFRCS MEMORANDUM IN SUPPORT OF
 26 MOTION FOR FURTHER INJUNCTIVE RELIEF
 AS TO TWO TIMBER SALES

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STATEMENT OF FACTS 1

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Argument 4

THE COURT SHOULD EXERCISE ITS EQUITABLE POWER TO EXTEND
THE LEGAL SUFFICIENCY PERIOD FOR THE HORSE BYARS AND
SHADY TIMBER SALES TO REMEDY THE GOVERNMENT'S VIOLA-
TIONS OF SECTION 2001(k) (1) 4

CONCLUSION 9

Page

i - NFRC'S MEMORANDUM IN SUPPORT OF MOTION FOR FURTHER INJUNCTIVE RELIEF AS TO TWO TIMBER SALES

LEBOEUF, LAMB, GREENE & MACRAE
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TABLE OF AUTHORITIES

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Cases	
<i>Burr v. Ambach</i> , 863 F.2d 1071, 1078 (2d Cir. 1988), vacated and remanded on other grounds sub nom. <i>Sobol v. Burr</i> , 492 U.S. 902 (1989), reaff'd, 888 F.2d 258 (2d Cir. 1989), cert. denied, 494 U.S. 1005 (1990)	7
<i>Catholic Social Servs. v. Thornburgh</i> , 956 F.2d 914 (9th Cir. 1992), cert. granted sub nom., <i>Barr</i> <i>v. Catholic Social Servs.</i> , 505 U.S. 1203 (1992), vacated and remanded on other grounds, 509 U.S. 43 (1993)	6
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1 Plaintiff Northwest Forest Resource Council ("NFRC") seeks
 2 additional injunctive relief relating to the Horse Byars and
 3 Shady timber sales to compensate for the defendants' delay in
 4 awarding these two sales under section 2001(k)(1) of Public Law
 5 104-19. Defendants awarded Horse Byars to Freres Lumber Co. of
 6 Lyons, Oregon 100 days after the statutory deadline of Septem-
 7 ber 10, 1995, and awarded Shady to Timber Products Company of
 8 Medford, Oregon 46 days after the statutory deadline.

9 Neither purchaser will be able to complete operations on
 10 the sales by September 30, 1996 as a result of seasonal re-
 11 strictions imposed on the sales this summer by the defendants.
 12 To afford the purchasers the period of legal sufficiency in-
 13 tended by Congress in section 2001(k)(1), NFRC seeks an order
 14 prohibiting the defendants from suspending or interfering with
 15 the completion of the Horse Byars timber sale for 100 days
 16 after September 30, 1996 - through January 8, 1997, and from
 17 suspending or interfering with the completion of the Shady
 18 timber sale for 46 days after September 30, 1996 - through
 19 November 15, 1996.

20 STATEMENT OF FACTS

21 *Horse Byars*

22 The Willamette National Forest offered the Horse Byars
 23 timber sale, which contains about 5.7 million board feet of
 24 timber, at an auction in 1990 under the terms of section 318 of
 25 Public Law 101-121. Freres Lumber Co. of Lyons, Oregon was the
 26 high bidder. Declaration of Robert Freres, Jr., ¶ 2. The sale

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1 was not awarded for a variety of reasons. *Id.*, ¶ 3.

2 Although the defendants never denied that Horse Byars is -
3 subject to section 2001(k)(1), the Forest Service, without
4 explanation, did not award and release the sale by September
5 10, 1995 as required by section 2001(k)(1). NFRS thereafter
6 sought an injunction compelling award and release of the sale.
7 On September 27, 1995 the defendants responded to NFRS's motion
8 by announcing their intention to award and release the Horse
9 Byars sale. Declaration of Jerry Hofer, ¶ 4.

10 However, the Forest Service did not in fact issue an award
11 letter to Freres Lumber Co. until December 19, 1995 - 100 days
12 after the September 10, 1995 statutory deadline. Freres Dec.,
13 ¶ 5.

14 The operating season on the Horse Byars sale began June 1,
15 1996. On May 8 the Forest Service advised Freres that it was
16 imposing a seasonal restriction on the operation of units 6 and
17 9 through September 30, 1996 due to the presence of a northern
18 spotted owl near the sale area. Freres Dec., ¶ 6. Approxi-
19 mately two months later, around July 8, 1996, the Forest Ser-
20 vice lifted the seasonal restriction. But as a result of the
21 two month suspension on these units, it will be difficult for
22 Freres to complete falling the timber on the sale by September
23 30, 1996, and impossible to complete yarding by that date.
24 *Id.*, ¶ 8.

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2 - NFRS'S MEMORANDUM IN SUPPORT OF MOTION
FOR FURTHER INJUNCTIVE RELIEF AS TO TWO
TIMBER SALES

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1 **Shady**

2 The Bureau of Land Management ("BLM") offered the Shady
3 timber sale, containing 7.8 million board feet of timber, at an
4 auction in 1991. Timber Products Co. of Medford, Oregon was
5 the high bidder. Declaration of Joseph Gonyea III, ¶ 2. The
6 sale was not awarded because of concerns relating to a northern
7 spotted owl near the sale area. *Id.*, ¶ 3.

8 The BLM did not award the sale by September 10, 1995
9 because of its mistaken belief that section 2001(k)(1) does not
10 apply to sales offered in fiscal years 1991-95. After this
11 court ruled otherwise and ordered the award and release of
12 those sales, and after the Ninth Circuit denied a stay of that
13 order, the BLM awarded the Shady sale on October 26, 1995 - 46
14 days after the September 10, 1995 deadline. *Id.*, ¶ 5.

15 The Shady contract, which allows 36 months for logging the
16 sale, contains a seasonal restriction on seven units, which
17 prohibits logging between March 1 and September 30 each year in
18 order to provide protection to spotted owls. Those seven units
19 contain about 2.683 million board feet of timber. While Timber
20 Products has been advised that the BLM may lift the seasonal
21 restriction for those units around August 15 based on an evalu-
22 ation by its biologists, even if the BLM does so it will be
23 very difficult for Timber Products to complete logging on the
24 sale by September 30, 1996. *Id.*, ¶¶ 6-8.

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3 - NFRC'S MEMORANDUM IN SUPPORT OF MOTION
FOR FURTHER INJUNCTIVE RELIEF AS TO TWO
TIMBER SALES

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1 **Argument**

2 **THE COURT SHOULD EXERCISE ITS EQUITABLE POWER TO EX-**
3 **TEND THE LEGAL SUFFICIENCY PERIOD FOR THE HORSE BYARS**
4 **AND SHADY TIMBER SALES TO REMEDY THE GOVERNMENT'S**
5 **VIOLATIONS OF SECTION 2001(k)(1).**

6 This court found that the defendants violated section
7 2001(k)(1) by failing to award and release the Horse Byars and
8 Shady timber sales (among others) by September 10, 1995. The
9 court issued declaratory and injunctive relief as a remedy, and
10 the Ninth Circuit has affirmed the court's orders. *Northwest*
11 *Forest Resource Council v. Glickman*, No. 95-36042, 1996 U.S.
12 *App. LEXIS 13143*, at *3-4 (9th Cir. May 30, 1996).

13 For the Horse Byars and Shady timber sales, the declarato-
14 ry and injunctive relief granted by the court has not provided
15 a full remedy for the defendants' violations of section
16 2001(k). In addition to requiring the award and release of
17 timber sales by September 10, 1995 the statute also requires
18 the Secretary "[n]otwithstanding any other provision of law,"
19 to "permit [the sale] to be completed in fiscal years 1995 and
20 1996" Thus, the statute guarantees, at a minimum, the
21 period of September 10, 1995 through September 30, 1996 — a
22 period of 386 days — to operate the sales with complete legal
23 sufficiency.

24 Freres Lumber Co. and Timber Products Company have not
25 received the statutory 386 day period of legal sufficiency for
26 the Horse Byar and Shady timber sales because of the
defendants' delay in awarding the sales. Freres lost 100 days

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1 of legal sufficiency, and Timber Products lost 46 days.

2 The lost period of legal sufficiency is critical to both
3 sales. While many other section 2001(k) sales will likely be
4 completed by September 30, 1996, these two sales will probably
5 not be completed by September 30 because of the seasonal re-
6 strictions imposed by the defendants this summer for the pro-
7 tection of spotted owls. The loss of operating time last fall,
8 when the seasonal restrictions would not have been in place,
9 has prevented the two sales from being completed by September
10 30, 1996 as Congress intended.

11 This court has the authority to grant further injunctive
12 relief as to these two sales to provide a complete remedy for
13 the defendants' violation of section 2001(k)(1). The Ninth
14 Circuit has held that courts have the authority to extend a
15 statutory deadline in order to remedy a violation of a statute
16 when the violation denies citizens a statutory benefit intended
17 by Congress:

18 1. In 1986 Congress enacted an immigration reform act
19 giving certain aliens the right to apply for legalization
20 within 12 months. The Immigration and Naturalization Service
21 (INS) interpreted the statute to exclude some aliens, and for
22 part of the 12 month statutory period did not allow them to
23 apply. After the 12 month legalization period ended, courts
24 ruled that the INS interpretation was unlawful. The question
25 was: what remedy was available to the courts since the statu-
26 tory 12-month legalization period had already expired? In a

1 series of cases, the Ninth Circuit allowed the aliens to apply
2 for U.S. citizenship after the expiration of the 12-month
3 period. *Catholic Social Servs. v. Thornburgh*, 956 F.2d 914,
4 922-23 (9th Cir. 1992), cert. granted sub nom., *Barr v. Catho-*
5 *lic Social Servs.*, 505 U.S. 1203 (1992), vacated and remanded
6 on other grounds, 509 U.S. 43 (1993); *Legalization Assistance*
7 *Project v. I.N.S.*, 976 F.2d 1198, 1215 (9th Cir. 1992), appli-
8 cation granted, 510 U.S. 1301 (1993), vacated and remanded on
9 other grounds, 510 U.S. 1007 (1993); *Zambrano v. I.N.S.*, 972
10 F.2d 1122, 1125 (9th Cir. 1992), vacated and remanded on other
11 grounds, 509 U.S. 918 (1993). In *Catholic Social Servs.*, the
12 court explained:

13 The INS misinterpreted the [statute]
14 and the plaintiffs acted quickly to remedy
15 the misinterpretation. Congress intended
16 for aliens to have a twelve-month period in
17 which to apply for legalization
18 The INS's erroneous interpretation of the
19 Act in reality deprived the aliens of the
20 full twelve-month application period Con-
21 gress had provided for them. It would be
22 contrary to congressional intent to fore-
23 close these aliens' applications.

19 *Catholic Social Servs.*, 956 F.2d at 922.

20 On appeal, the Supreme Court vacated the *Catholic Social*
21 *Servs.* decision on jurisdictional grounds without addressing
22 the question of equitable remedy. *Reno v. Catholic Social*
23 *Servs.*, 509 U.S. 43, 46 (1993). In dissent, three members of
24 the Court agreed that the Ninth Circuit's remedy was proper:

25 Twelve months, Congress determined, would
26 be long enough for frightened aliens to
come to understand the program and step

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forward

The problem, of course, is that the full 12-month period was never made available to respondents. For [certain plaintiffs], the 12-month period shrank to precisely 12 days during which they were eligible for legalization Accordingly, congressional intent required an extension of the filing deadline, in order to make effective the 12-month application period critical to the balance struck by Congress.

Id. at 83 (Stevens, White and Blackmun, JJ., dissenting).

2. Courts have also recognized a similar equitable power to remedy a violation of the Education of the Handicapped Act, 20 U.S.C. 1400, et seq., which gives handicapped children the right to a free public education between the ages of 3 and 21. Sometimes school districts fail to provide that education, and the children have to sue. Many times a case is not decided until after the child becomes 21 and the statutory eligibility for free education has ended.

The federal courts have uniformly ruled that when a school district violates this law, a court can order compensatory education for the child after the age of 21 even though the statutory eligibility period has ended. *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 189-90 (1st Cir. 1993); *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991); *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), vacated and remanded on other grounds sub nom. *Sobol v. Burr*, 492 U.S. 902 (1989), reaff'd, 888 F.2d 258 (2d Cir. 1989), cert. denied, 494 U.S. 1005 (1990).

1 3. The Ninth Circuit has recognized that courts have
 2 this discretionary equitable power. *Parents of Student W. v.*
 3 *Puyallup School Dist., No. 3*, 31 F.3d 1489, 1496-97 (9th Cir.
 4 1994) (recognizing discretionary authority to grant compen-
 5 satory relief but affirming district court's decision not to
 6 grant such relief under specific factual circumstances).

7 The Ninth Circuit has also held that timber companies are
 8 entitled to the benefit of this doctrine when, as with section
 9 2001(k), a Congress enacts a statute to provide timber compa-
 10 nies with immediate relief. As part of the 1984 Timber Sale
 11 Modification Act, 16 U.S.C. 617 et seq., the Forest Service was
 12 required to issue regulations within 90 days of the date of
 13 enactment of the statute, relating to releasing obligations
 14 under certain timber sales. The Forest Service was 74 days
 15 late issuing the regulations. When the timber companies sued,
 16 the district court allowed them to release their sales as of
 17 the effective date of the statute as a remedy for the Forest
 18 Service's 74 day violation of the statute. The Ninth Circuit
 19 affirmed this remedy even though it went beyond the rights
 20 granted by the statute:

21 . . . [W]e find nothing in the statute
 22 to indicate that Congress intended to di-
 23 vest the courts of their inherent equitable
 24 powers. . . . [E]nforcing the deadline
 25 would serve the statutory purpose of pro-
 26 viding immediate relief for timber purchas-
 ers. . . . We hold that the district
 courts had authority to order an equitable
 adjustment to the release date under the
 Act.

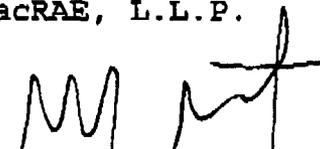
1 Sierra Pacific Indus. v. Lyng, 866 F.2d 1099, 1112 (9th Cir.
2 1989).

3 **CONCLUSION**

4 The court should grant the further injunctive relief
5 requested by NFRC as to the Horse Byars and Shady timber sales.
6 The court should enjoin the defendants, their officers, agents,
7 servants, employees and attorneys and those in active concert
8 or participation with them from suspending, disrupting or
9 interfering in any way with the operations or completion of the
10 Horse Byars Timber Sale through and including January 8, 1997
11 and from suspending, disrupting or interfering in any way with
12 the operation or completion of the Shady Timber Sale through
13 and including November 15, 1996.

14 Dated this 29th day of July, 1996.

15 LeBOEUF, LAMB, GREENE
16 & MacRAE, L.L.P.

17
18 By: 

19 Mark C. Rutzick
20 Attorney for Plaintiff
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