

NLWJC- Kagan
Counsel - Box 002 - Folder 003

NFRC v. Glickman II [2]

**U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
APPELLATE SECTION
WASHINGTON, D.C. 20530
FAX NUMBER (202) 514-4240**

DATE: July 30, 1996

FROM: Albert Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 8 pages

PLEASE DELIVER TO:

Don Barry	208-4684
Bob Baum	208-3877
David Gayer	
Dinah Bear	456-0753
Brian Burke	720-4732
Mark Gaede	
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
Jim Sutherland(541)	465-6582
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
Tom Tuchmann (503)	326-6254
Sue Zike (503)	326-7742

MESSAGE:

ATTACHED ARE TWO ORDERS FROM THE COURT OF APPEALS

1. ORDER DENYING OUR REQUEST OF A STAY OF THE "NEXT HIGH BIDDER" INJUNCTION AS MOOT AND ORDERING THE CLERK TO ISSUE THE MANDATE IN THE CASES "FORTHWITH."
2. ORDER DENYING NFRC'S PETITION FOR REHEARING; REJECTING THE SUGGESTION FOR REHEARING EN BANC; AND DENYING SCLDF'S MOTION FOR CLARIFICATION.

TIME FOR FILING A PETITION FOR CERTIORARI EXPIRES ON OCTOBER 20, 1996. HOWEVER, WITH THE MANDATE ISSUED, THE DISTRICT COURT'S JANUARY 10, 1996 AND JANUARY 19, 1996 INJUNCTIONS HAVE NO FURTHER LEGAL EFFECT.

FILED

JUL 22 1996

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL,)
an Oregon corporation;)
SCOTT TIMBER CO.,)

Plaintiffs-Appellees,)

v.)

PILCHUCK AUDUBON SOCIETY; OREGON)
NATURAL RESOURCES CENTER; PORTLAND)
AUDUBON SOCIETY; BLACK HILLS)
AUDUBON SOCIETY; WESTERN ANCIENT)
FOREST CAMPAIGN; HEADWATERS; COAST)
RANGE ASSOCIATION; FRIENDS OF ELK)
RIVER; WASHINGTON ENVIRONMENTAL)
COUNCIL; SEATTLE AUDUBON SOCIETY,)

Intervenors-Appellants,)

v.)

DAN GLICKMAN, et al.,)

Defendant,)

v.)

WESTERN TIMBER COMPANY; VAAGEN)
BROTHERS LUMBER, INC.,)

Plaintiffs-Intervenors-)
Appellees.)

NORTHWEST FOREST RESOURCE COUNCIL,)
an Oregon corporation; SCOTT)
TIMBER CO.;)

Plaintiffs-Appellees,)

v.)

No. 96-35106

DC No. CV-95-06244-MRH

O R D E R

No. 96-35107

DC No. CV-95-06244-MRH

DAN GLICKMAN, in his official capacity as Secretary of Agriculture, et al.,)

Defendants)

and)

OREGON NATURAL RESOURCES CENTER; PILCHUCK AUDUBON SOCIETY; SIERRA CLUB, INC.; WESTERN ANCIENT FOREST CAMPAIGN; PORTLAND AUDUBON SOCIETY; BLACK HILLS AUDUBON SOCIETY; HEADWATERS,)

Intervenors-Appellants,)

and)

OREGON NATURAL RESOURCES CENTER, et al.,)

Defendants-Intervenors-Appellants.)

_____)

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation; SCOTT TIMBER CO.,)

Plaintiffs-Appellees,)

v.)

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

Defendants-Appellants,)

and)

OREGON NATURAL RESOURCES CENTER; PILCHUCK AUDUBON SOCIETY; PORTLAND AUDUBON SOCIETY; BLACK HILLS AUDUBON SOCIETY; WESTERN ANCIENT FOREST CAMPAIGN; HEADWATERS; COAST RANGE ASSOCIATION; FRIENDS OF ELK RIVER; WASHINGTON ENVIRONMENTAL COUNCIL; SEATTLE AUDUBON SOCIETY; SIERRA CLUB, INC.,)

Intervenors.)

_____)

No. 96-35123

DC. No. CV-95-06244-MRH

NORTHWEST FOREST RESOURCE COUNCIL,)
an Oregon corporation; SCOTT)
TIMBER CO.,)

No. 96-35132

DC No. CV-95-06244-MRH

Plaintiffs-Appellees,)

v.)

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

and)

OREGON NATURAL RESOURCES CENTER;)
PILCHUCK AUDUBON SOCIETY; BLACK)
HILLS AUDUBON SOCIETY; WESTERN)
ANCIENT FOREST CAMPAIGN;)
HEADWATERS; COAST RANGE)
ASSOCIATION; FRIENDS OF ELK RIVER;)
WASHINGTON ENVIRONMENTAL COUNCIL;)
SEATTLE AUDUBON SOCIETY; SIERRA)
CLUB, INC.,)

Intervenors,)

v.)

DAN GLICKMAN, et al.; BRUCE)
BABBITT,)

Defendants-Appellants.)

Before: GOODWIN and SCHROEDER, Circuit Judges, and ARMSTRONG,
District Judge.**

** Honorable Sandra Brown Armstrong, United States District
Judge for the Northern District of California, sitting by
designation.

The motion for stay pending issuance of the mandate or in the alternative for vacatur of the district court's injunction, filed in case no. 96-35123 is DENIED AS MOOT.

The mandate in the above cases shall issue forthwith.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 22 1996

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NORTHWEST FOREST RESOURCE COUNCIL,)
an Oregon corporation;)
SCOTT TIMBER CO.,)

Plaintiffs-Appellees,)

v.)

PILCHUCK AUDUBON SOCIETY; OREGON)
NATURAL RESOURCES CENTER; PORTLAND)
AUDUBON SOCIETY; BLACK HILLS)
AUDUBON SOCIETY; WESTERN ANCIENT)
FOREST CAMPAIGN; HEADWATERS; COAST)
RANGE ASSOCIATION; FRIENDS OF ELK)
RIVER; WASHINGTON ENVIRONMENTAL)
COUNCIL; SEATTLE AUDUBON SOCIETY,)

Intervenors-Appellants,)

v.)

DAN GLICKMAN, et al.,)

Defendant,)

v.)

WESTERN TIMBER COMPANY; VAAGEN)
BROTHERS LUMBER, INC.,)

Plaintiffs-Intervenors-)
Appellees.)

NORTHWEST FOREST RESOURCE COUNCIL,)
an Oregon corporation; SCOTT)
TIMBER CO.;)

Plaintiffs-Appellees,)

v.)

No. 96-35106

DC No. CV-95-06244-MRH

O R D E R

No. 96-35107

DC No. CV-95-06244-MRH

DAN GLICKMAN, in his official capacity as Secretary of Agriculture, et al.,

Defendants

and

OREGON NATURAL RESOURCES CENTER; PILCHUCK AUDUBON SOCIETY; SIERRA CLUB, INC.; WESTERN ANCIENT FOREST CAMPAIGN; PORTLAND AUDUBON SOCIETY; BLACK HILLS AUDUBON SOCIETY; HEADWATERS,

Intervenors-Appellants,

and

OREGON NATURAL RESOURCES CENTER, et al.,

Defendants-Intervenors-Appellants.

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation; SCOTT TIMBER CO.,

Plaintiffs-Appellees,

v.

DAN GLICKMAN, in his capacity as Secretary of Agriculture, and BRUCE BABBITT, in his capacity as Secretary of Interior;

Defendants-Appellants,

and

OREGON NATURAL RESOURCES CENTER; PILCHUCK AUDUBON SOCIETY; PORTLAND AUDUBON SOCIETY; BLACK HILLS AUDUBON SOCIETY; WESTERN ANCIENT FOREST CAMPAIGN; HEADWATERS; COAST RANGE ASSOCIATION; FRIENDS OF ELK RIVER; WASHINGTON ENVIRONMENTAL COUNCIL; SEATTLE AUDUBON SOCIETY; SIERRA CLUB, INC.,

Intervenors.

No. 96-35123

DC. No. CV-95-06244-MRH

NORTHWEST FOREST RESOURCE COUNCIL,
an Oregon corporation; SCOTT
TIMBER CO.,

Plaintiffs-Appellees,

v.

DAN GLICKMAN, in his capacity as
Secretary of Agriculture, and
BRUCE BABBITT, in his capacity as
Secretary of Interior;

and

OREGON NATURAL RESOURCES CENTER;
PILCHUCK AUDUBON SOCIETY; BLACK
HILLS AUDUBON SOCIETY; WESTERN
ANCIENT FOREST CAMPAIGN;
HEADWATERS; COAST RANGE
ASSOCIATION; FRIENDS OF ELK RIVER;
WASHINGTON ENVIRONMENTAL COUNCIL;
SEATTLE AUDUBON SOCIETY; SIERRA
CLUB, INC.,

Intervenors.

v.

DAN GLICKMAN, et al.; BRUCE
BABBITT,

Defendants-Appellants.

No. 96-35132

DC No. CV-95-06244-MRH

Before: GOODWIN and SCHROEDER, Circuit Judges, and ARMSTRONG,
District Judge.**

The panel has voted unanimously to deny the petition for
rehearing. Judge Schroeder has voted to reject the suggestion for
rehearing en banc, and Judges Goodwin and Armstrong so recommends.

** Honorable Sandra Brown Armstrong, United States District
Judge for the Northern District of California, sitting by
designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

The motion for clarification is DENIED.

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT & NATURAL RESOURCES DIVISION
 APPELLATE SECTION
 WASHINGTON, D.C. 20530
 FAX NUMBER (202) 514-4240

DATE: July 17, 1996

FROM: Albert Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 3 pages

PLEASE DELIVER TO:

Don Barry	208-4684
Bob Baum	208-3877
David Gayer	
Dinah Bear	456-0753
Brian Burke	720-4732
Mark Gaede	
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
Jim Sutherland(503)	465-6582
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
Tom Tuchmann (503)	326-6254
Sue Zike (503)	326-7742

MESSAGE:

ATTACHED IS A COPY OF THE GOVERNMENT'S MOTION FOR STAY PENDING ISSUANCE OF THE MANDATE OR IN THE ALTERNATIVE FOR VACUTUR OF THE DISTIRCT COURT'S INJUNCTION. THIS STAY ADDRESSES THE FIVE "NEXT HIGH BIDDER" SALES.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35123

NORTHWEST FOREST RESOURCE COUNCIL,
Plaintiff-Appellee

v.

DAN GLICKMAN and BRUCE BABBITT,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
CASE NO. 95-6244-HO

MOTION FOR STAY PENDING ISSUANCE OF THE MANDATE
OR IN THE ALTERNATIVE FOR VACATUR OF THE
DISTRICT COURT'S INJUNCTION

On June 14, 1996, this Court issued its opinion in No. 96-35123, in which it reversed the district court's order requiring the Secretaries of Agriculture and the Interior to release timber sales to other bidders even though the high bidder had rejected the award. At the present time five sales^{1/} fall within the injunction issued by the district court on January 10, 1996. Harvesting has begun on some of the sales. Harvesting may soon commence on the remaining sales. Because this Court's mandate will not issue until seven days after the Court issues a decision on NFRC's Petition for Rehearing, the district court's injunction remains in place directing that these sales be released. By this motion, the Secretaries seek to prevent

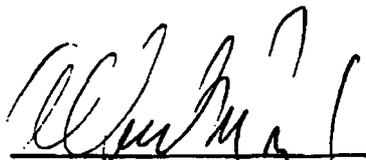
^{1/} The sales are located in the Umatilla National Forest (Eagle Ridge sale), the Wallowa-Whitman National Forest (Allen, Horn, and Banty sales), and the Winema National Forest (John Lodgepole sale).

further harvesting on these sales - sales which would not have been harvested but for the district court's January 10, 1996 order.

The Secretaries have previously sought a stay pending appeal on this category of sales. (See Emergency Motion for Stay Pending Appeal, filed on January 31, 1996). A panel of this Court (Judges Canby and Hawkins) denied the motion by order dated February 8, 1996. In that Emergency Motion and supporting affidavits, which the Secretaries incorporate by reference herein, the Secretaries outlined the harm likely to result from harvesting the sales in question. This Court's June 14, 1996 opinion establishes that the Secretaries are correct on the merits of their claim that nothing in Section 2001(k)(1) eliminated their discretion to choose not to offer the sales to any other bidders.

In light of this Court's decision, the Secretaries have determined not to allow the sales released to the "next high bidders" under the January 10, 1996, order to go forward. Under these circumstances, a stay of the district court's January 10, 1996 order, pending issuance of this Court's mandate, is warranted. In the alternative, this Court can prevent the harvesting by issuing an order that immediately vacates the district court's injunction.

Respectfully submitted,



ALBERT M. FERLO, JR.
Attorney, Appellate Section
Environment and Natural Resources
Division
Washington, D.C. 20530
(202) 514-2757

July 16, 1996

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: 9 (including cover)

DATE: July 15, 1996

FROM: Michelle Gilbert

Please find a notice of filing by Scott Timber Co. that just made its way to my desk. As you will note, it claims that no on the ground activity to provide replacement timber is occurring. It is dated the day before Judge Hogan's July 2 order on replacement timber.

Albert
COPY

HACLUND & KIRTLEY

ATTORNEYS AT LAW

ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204

TELEPHONE (503) 225-0777
FACSIMILE (503) 225-1257

July 1, 1996

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

Re: NERC v. Glickman, et al.
U.S. District Court for the District of Oregon
(Eugene Division)
Case No. 95-6244-HO (Lead)
Case No. 95-6267-HO (Consolidated)
Case No. 95-6384-HO (Consolidated)

Dear Clerk:

Enclosed for filing are the original and one copy of
Scott Timber Co.'s Notice of Filing and the Declaration of Harold
Rowe.

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

Sincerely,

Scott W. Horngrén
Scott W. Horngrén

Enclosures
cc w/enclosures: Counsel

90-1-1-2928

#218

1 Michael E. Haglund, OSB 77203
 2 Scott W. Horngren, OSB 88060
 3 Shay S. Scott, OSB 93421
 4 HAGLUND & KIRTLEY
 5 Attorneys at Law
 6 1800 One Main Place
 7 101 S.W. Main Street
 8 Portland, Oregon 97204
 9 (503) 225-0777

Attorneys for Scott Timber Co.

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

12 NORTHWEST FOREST RESOURCE)
 13 COUNCIL, an Oregon) No. 95-6244-HO (Lead)
 14 corporation,) No. 95-6267-HO (Consolidated)
 15) No. 95-6384-HO (Consolidated)

Plaintiff,

NOTICE OF FILING

v.

16 DANIEL R. GLICKMAN, in his)
 17 capacity as Secretary of)
 18 Agriculture, BRUCE BABBITT, in)
 19 his capacity as Secretary of)
 20 Interior,)

Defendants:

21 Please take note that plaintiff Scott Timber Co. files
 22 the Declaration of Harold Rowe explaining that no on²the ground
 23 activity is occurring at the district level to identify
 24 replacement volume.

Dated this 15th day of July, 1996.

HAGLUND & KIRTLEY

25 By Scott W. Horngren
 26 Scott W. Horngren
 Attorneys for Plaintiff

HAGLUND & KIRTLEY
 ATTORNEYS AT LAW
 ONE MAIN PLACE
 101 S.W. MAIN, SUITE 1800
 PORTLAND, OREGON 97204
 TELEPHONE (503) 225-0777

1 Michael E. Haglund, OSB 77203
 2 Scott W. Horngren, OSB 88060
 3 Shay S. Scott, OSB 93421
 4 HAGLUND & KIRTLEY
 5 Attorneys at Law
 6 1800 One Main Place
 7 101 S.W. Main Street
 8 Portland, Oregon 97204
 9 (503) 225-0777

Attorneys for Plaintiff Scott Timber Co.

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

12 NORTHWEST FOREST RESOURCE)
 13 COUNCIL, an Oregon)
 14 corporation,)

Plaintiff.

No. 95-6244-HO (Lead)
 No. 95-6267-HO (Consolidated)

v.

DECLARATION OF HAROLD ROWE

15 DANIEL R. GLICKMAN, in his)
 16 capacity as Secretary of)
 17 Agriculture, BRUCE BABBITT, in)
 18 his capacity as Secretary of)
 19 Interior.)

Defendants.

I, HAROLD ROWE, declare and state:

1. I am contract supervisor for Scott Timber Co. in
 the coast range area. I make this declaration based on my
 personal knowledge.

2. As contract supervisor, I am responsible for the
 scheduling and coordination of harvest activities for our
 federal, state, and private timber sales. I have been involved
 in the identification of replacement volume for the Forest

HAGLUND & KIRTLEY
 ATTORNEYS AT LAW
 ONE MAIN PLACE
 101 S.W. MAIN, SUITE 1800
 PORTLAND, OREGON 97204
 TELEPHONE (503) 225-0777

1 Service's Boulder Krab and the BLM's China Creek, and Wren N'
2 Doubt Timber Sales.

3 3. In the last week, I have discussed the status of
4 efforts to identify replacement volume for occupied murrelet
5 sales with the Ranger District staff who are responsible for
6 identifying replacement volume for Forest Service timber sales on
7 the Siuslaw and Siskiyou National Forests. The staff has
8 informed me that they are doing nothing to identify replacement
9 volume for any Forest Service timber sales. They have stated
10 they will not do anything until they are directed to by the
11 Forest Supervisor or Regional Offices.

12 4. Harvest of replacement volume will require road
13 reconstruction and road construction. If we cannot do this
14 during the summer, we will be precluded from harvesting the
15 replacement volume in the fall because of limited access.

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

18 Dated this 28 day of June, 1995.

19 
20 Harold Rowe
21

HAGLUND & KIRTLEY
ATTORNEYS AT LAW
ONE MAIN PLACE
101 S.W. MAIN, SUITE 1800
PORTLAND, OREGON 97204
TELEPHONE (503) 236-0777

SNH\BWNK7775

**U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
APPELLATE SECTION
WASHINGTON, D.C. 20530
FAX NUMBER (202) 514-4240**

DATE: July 9, 1996

FROM: Albert Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 23 pages

PLEASE DELIVER TO:

Don Barry	208-4684
Bob Baum	208-3877
David Gayer	
Dinah Bear	456-0753
Brian Burke	720-4732
Mark Gaede	
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
Jim Sutherland(503)	465-6582
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
Tom Tuchmann (503)	326-6254
Sue Zike (503)	326-7742

MESSAGE:

ATTACHED ARE TWO DOCUMENTS - BOTH OF WHICH REPLY TO SCLDF'S MOTION FOR CLARIFICATION FILED WITH THE NINTH CIRCUIT. AS YOU WILL RECALL, IT HAS BEEN DETERMINED THAT WE WILL NOT BE FILING A RESPONSE TO THE MOTION.

THE DOCUMENTS ARE:

- (1) SCOTT TIMBER CO.'S OPPOSITION TO MOTION FOR CLARIFICATION (relating to First and Last)
- (2) VAAGEN BROS. OPPOSITION TO MOTION FOR CLARIFICATION (relating to the Gaterson Sale)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PILCHUCK AUDUBON SOCIETY, et al.,

Plaintiffs-Appellants,

v.

DAN GLICKMAN, in his capacity as
Secretary of Agriculture, et al.,

Defendants,

and

NORTHWEST FOREST RESOURCE COUNCIL, an
Oregon corporation, et al.,

Defendant-Intervenors-
Appellees.

NORTHWEST FOREST RESOURCE COUNCIL, an
Oregon corporation,

Plaintiff-Appellee,

vs.

DAN GLICKMAN, in his capacity as
Secretary of Agriculture, et al.,

Defendants,

and

OREGON NATURAL RESOURCE COUNCIL, INC.,
et al.,

Defendants-Intervenors-
Appellants.

No. 96-35106

DC# CV-95-6244-MRH
Oregon (Eugene)

No. 96-35107

DC# CV-95-6244-MRH
Oregon (Eugene)

: : :

: : :

: : :

: : :

PILCHUCK AUDUBON SOCIETY, et al.,
Plaintiffs,

vs.

DAN GLICKMAN, in his capacity as
Secretary of Agriculture, et al.,
Defendants-Appellants,

and

NORTHWEST FOREST RESOURCE COUNCIL, an
Oregon corporation, et al.,
Defendant-Intervenors-
Appellees.

NORTHWEST FOREST RESOURCE COUNCIL, an
Oregon corporation,
Plaintiff-Appellee,

vs..

DAN GLICKMAN, in his capacity as
Secretary of Agriculture, et al.,
Defendants-Appellants,

and

OREGON NATURAL RESOURCE COUNCIL, INC.,
et al.,
Defendant-Intervenors.

No. 96-35123

DC# CV-95-6384-MRH
Oregon (Eugene)

No. 96-35132

DC# CV-95-6244-MRH
Oregon (Eugene)

SCOTT TIMBER CO.'S OPPOSITION TO MOTION FOR CLARIFICATION

I.

INTRODUCTION

In its Motion for Clarification of this Court's recent opinion in Northwest Forest Resource Council v. Glickman, 1996 U.S. App. Lexis 14518 (9th Cir. June 14, 1996), Pilchuck Audubon Society et al. ("Pilchuck Audubon") seeks to expand the opinion's

scope far beyond the Court's actual holding, and apply it to bar release of the First and Last timber sales on the Umpqua National Forest, owned by plaintiff-intervenor-appellee Scott Timber Co.

Section 2001(k) (1) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 240 (1995) ("Rescissions Act") provides, in relevant part, that "notwithstanding any other provision of law," the Secretaries of Agriculture and Interior should award, release and permit to be completed all timber sale contracts "offered" before July 27, 1995 in any unit of the National Forest System or district of the Bureau of Land Management "subject to section 318" of Public Law 101-121. Furthermore, "[t]he return of the bid bond of the high bidder shall not alter the responsibility of the Secretary to comply with this paragraph." *Id.*

In its recent decision, this panel was faced with deciding various questions about the effect of Section 2001(k) (1). Among these questions was the issue of whether Section 2001(k) (1) acted to release four sales -- Nita, South Nita, Cowboy, and Garden -- which had been enjoined for violations of their authorizing statute, Section 318. The government took the position that these four sales were not released by Section 2001, and this panel agreed. According to this panel, these sales "were never validly offered" under Section 318. 1996 U.S. App. LEXIS 14518 at *7-*8. Specifically, this panel wrote: "Nothing in Section 2001(k) (1) makes a valid sale out of sale which was not valid under its authorizing

statute." Id. (emphasis added). This panel concluded:

The record before us indicates the four sales at issue here were enjoined for violations of their authorizing statute, and were therefore never validly offered within the meaning of Section 2001(k)(1). These four sales are void ab initio, and are not revived by Section 2001(k)(1).

Id. (emphasis added).

Facts that have developed since Pilchuck filed its appeal are relevant to its Motion for Clarification. Due to the controversy over these sales, various parties have worked together to enable the Forest Service to provide substitute timber in exchange for the harvest units in the First and Last Timber Sale areas. All parties involved acknowledged that these sales were released to Scott Timber under Section 2001(k), including the Forest Service. U.S. Senator Ron Wyden and U.S. Representative Peter DeFazio jointly petitioned the Department of Agriculture to approve the exchange, recognizing Scott Timber's "sincere effort to find replacement volume." See letter from Wyden and DeFazio, attached hereto as Exhibit A, at p. 1. The Senator and Representative asked the Forest Service to try to ensure that the sales did not proceed, "while at the same time recognizing the contractual rights of the purchaser." Id. at p. 2 (emphasis added).

In response to the cooperative effort of Scott Timber, the Forest Service, and environmental groups, an exchange agreement was entered into whereby Scott Timber had the First and Last timber replaced by timber in a less environmentally

sensitive area. See U.S. Department of Agriculture press release, attached hereto as Exhibit B, noting that the agreement "reflects broad-based support from the administration, local environmental groups, the timber industry and the Forest Service." Id. at p. 1. That support is further reflected in the press release issued by Umpqua Watersheds, Inc. and the Umpqua Valley Audubon Society, attached hereto as Exhibit C, in which these environmental groups acknowledged that "[t]he Forest Service, Scott Timber Co. and the local environmental community all agreed that these previously withdrawn sales should be replaced." Id.

In reliance on the actions of the Forest Service and Umpqua Watersheds/Audubon Society, Scott Timber entered into the exchange agreement. Both the Forest Service and the environmental groups acknowledged Scott Timber's right to the substitute volume, as noted supra. They stood by while Scott Timber proceeded to harvest on the units exchanged for the First and Last volume. Indeed, currently, the First replacement volume has all been cut and about 33 percent of the Last replacement volume has been felled. Declaration of Peter C. Quast ("Quast Dec.").

Now, Pilchuck Audubon seeks to stop Scott Timber from harvesting the remainder of this replacement volume, based on its argument that the First and Last sales were not released by Section 2001(k)(1). Pilchuck bases this argument on the fact that this panel did not specifically direct that a court must

have held a sale to be in violation of Section 318 in order for it to be declared void ab initio on the basis no valid "offer" was ever made. Therefore, according to Pilchuck, the fact the Forest Service withdrew these sales because other similar sales were held to violate Section 318 is enough to make them "void ab initio."

However, this panel clearly meant, and logically must have meant, that there must be a court decision on which to base a determination that a sale is void ab initio. The specific holding of this panel was that Section 2001(k) acted to release four sales enjoined for violations of their authorizing statute, Section 318. This panel wrote:

The record before us indicates the four sales at issue here were enjoined for violations of their authorizing statute, and were therefore never validly offered within the meaning of Section 2001(k) (1). These four sales are void ab initio, and are not revived by Section 2001(k) (1).

1996 U.S. App. LEXIS 14518 at *8 (emphasis added).

The position argued by Pilchuck is simply incorrect. An agency cannot determine in any legal or final sense whether a sale violates Section 318 -- it can only render a decision subject to review and final determination by a court. To hold otherwise would run contrary to a fundamental principle of law; that is, that the federal courts determine the legality of actions under federal statutes, when brought before them in specific cases.

The Forest Service has interpreted Section 2001(k) (1)

as applying to the First and Last sales. This interpretation is consistent with the statute's plain meaning and is not an impermissible construction of the statute. The federal government itself concedes that it is only sales found "by a court" not to have complied with Section 318 which are exempted from Section 2001(k)(1). Federal Defendants' Response to Motion to Clarify and Enforce Judgment, filed October 25, 1995 in the case of Seattle Audubon Society, et al. v. Thomas, et al., Civ. No. C89-160-WD at p. 17. As stated by federal defendants, the Notice of Intent to Release First and Last Timber Sales was issued "[b]ecause this Court did not reach the merits of the First and Last Timber Sales' compliance with 318." Id. at p. 21.

Finally, whether the First and Last Timber Sales are void ab initio is irrelevant and moot because a new contract was created by the parties to conduct overstory removal of individual trees in an area over ten miles away. Quast Dec. Logging costs and timber values are significantly different and the volume is being completely reappraised. Id. The validity of the substitute agreement is a question for the Court of Federal Claims and not this Court to decide.

Indeed, whether there was a valid offer prior to award is an issue which plaintiffs have no standing to pursue and this Court has no jurisdiction to decide. The Circuit has already concluded that environmental appellants have no "significantly protectible interest" under the Rescissions Act to justify intervention of right. Northwest Forest Resource Council v.

Glickman, 1996 U.S. App. LEXIS 13143 at *33-*37 (9th Cir. May 30, 1996) (as amended). Where a party does not have a sufficient interest to intervene in the case, its interest is certainly not sufficient to confer standing. See Portland Audubon Society v. Hodel, 866 F.2d 302, 308 at n.1 (9th cir. 1989), cert. denied 492 U.S. 911 (1989); see also Murphy Timber Company, Inc. v. Turner, 776 F. Supp. 533, 538 (D. Or. 1991) (whether government may permissibly offer a timber sale also involves whether a purchaser has a contract with the United States and the Claims Court is the proper forum for plaintiff to resolve the issue).

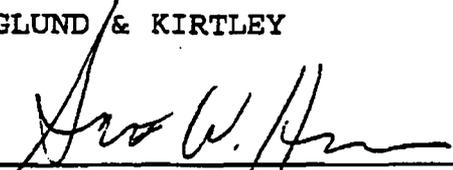
Appellants here are essentially questioning the award of a government contract to the high bidder Scott Timber Co. for the First and Last timber sales.¹ Whether the Court of Appeals has jurisdiction may be raised at any time in the proceedings. Fiester v. Turner 783 F.2d 1474, 1475 (9th Cir. 1992). This Circuit has squarely held that it has no jurisdiction to grant declaratory judgments or equitable relief to private parties challenging government contract awards and exclusive jurisdiction for such determinations rests with United States Court of Federal Claims. Price v. United States General Services Administration, 894 F.2d 323 (9th Cir. 1990). Furthermore, appellants do not have statutory rights under Section 2001(k)(1) vis-a-vis the First and Last timber sales. NFRC v. Glickman, 1996 U.S. App. LEXIS 13143 at *33-*37 (no protectible interest under Rescission

¹The Nita, South Nita, Cowboy, and Garden sales were never awarded to a purchaser.

Act to justify intervention), Northside v. Block, 753 F.2d 1482, 1485 (9th Cir. 1985), cert. denied, 474 U.S. 931 (1985) (district court and court of appeals have no jurisdiction in government contact case unless claim rests at bottom on statutory rights.) Thus, this Court has no jurisdiction to rule on the propriety of award of the First and Last timber sales.

Dated this 28th day of June, 1996.

HAGLUND & KIRTLEY

By 

Scott W. Horngren
101 S.W. Main, Suite 1800
Portland, OR 97204
Telephone: (503) 225-0777

Attorneys for Appellee
Scott Timber Co.

Congress of the United States**House of Representatives****Washington, DC 20515****March 22, 1996**

The Honorable James Lyons
Undersecretary
Department of Agriculture
14th Street and Independence Ave., S.W.
Washington, D.C. 20250

Dear Secretary Lyons:

As you know, four timber industry representatives from Douglas County, Oregon wrote to Secretaries Glickman and Babbitt on February 6 indicating a willingness to support changes to the salvage rider that would enable the federal government to offer less environmentally sensitive replacement timber volume for sales that could be devastating in their impacts. One of the letter's signers, Allyn Ford of Roseburg Forest Products, owns a number of very sensitive sales on the Siskiyou and Umpqua National Forests.

It is essential that you take steps to ensure that these and other environmentally sensitive old growth timber sales released under section 2001(k) of the 1995 budget rescissions bill are not harvested, while at the same time recognizing the government's legal obligation to purchasers who have made good faith efforts to negotiate with the Forest Service for less sensitive replacement timber volume.

One such sale, the Boulder Krab sale on Oregon's Elk River, has been the subject of months of negotiation between the purchaser and the Forest Service. The Elk River boasts one of the Northwest's most productive fisheries. It is known for its steep and unstable slopes. The Boulder Krab sale would harvest old growth timber in a roadless area of the Elk River watershed. The purchaser, Scott Timber, a subsidiary of Roseburg Forest Products, has made a sincere effort to find replacement volume for two sale units located in a roadless area.

Two other very sensitive sales were recently released and unless you take immediate action could be harvested in the very near future. The First and Last timber sales on the Umpqua National Forest are two of four timber sales clustered within the Boulder Creek drainage, a largely unroaded watershed that is a tributary of the South Umpqua River. The four sales will require the construction of 6.4 miles of road and will adversely impact the anadromous fisheries of the South Umpqua watershed. These sales were previously held up because they did not comply with the protections for ecologically significant old growth contained in section 318 of the FY90 Interior Appropriations bill.

Ex. A

March 22, 1996

Page 2

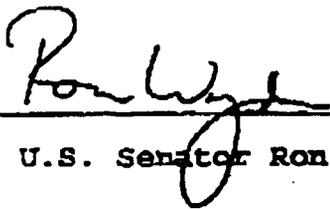
As you know, both the House and Senate have approved legislation that would give the Forest Service the authority it needs to find suitable replacement volume for all of these sales. Though we do not believe this legislation made the changes in law that are required, it would at least provide the agencies with enough flexibility to prevent some of the most damaging sales from proceeding.

The provision is included in a funding resolution intended to complete the appropriations cycle for the 1996 fiscal year. Though it is not yet possible to say with any certainty whether Congress and the President will agree on this particular funding bill, it seems reasonably certain that the timber sale provision providing agency flexibility will ultimately be passed into law before section 2001(k) expires.

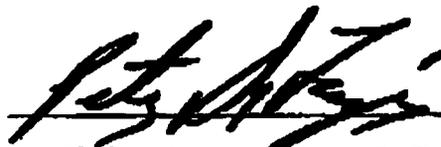
However, legislation may not be necessary. It is our understanding that discussions are underway that could result in an agreement that would allow a timber trade on the Umpqua National Forest to proceed administratively. The Forest Service believes it can find much more environmentally benign timber volume to trade for the sales in question, particularly from old shelterwood harvest sites. An agreement to allow such a trade to proceed administratively would protect South Umpqua fisheries and avoid a potentially unpleasant confrontation in the woods. Such an agreement could also provide the precedent needed to allow a similar trade to proceed for the Elk River sales.

We ask that you do everything in your power to ensure that the Boulder Krab, First and Last sales do not proceed, while at the same time recognizing the contractual rights of the purchaser. We would be happy to do everything in our power to help you in this matter.

Sincerely,



U.S. Senator Ron Wyden



U.S. Rep. Peter DeFazio

protect these fragile areas."

In order to offer the alternative timber, the Forest Service used new authority issued by Glickman to offer alternative timber outside the original timber sale area. Prior to the new authority, Forest Service regulations prevented the offering of alternative timber outside of a given sale area. In the case of the First and Last sales, and other 318 sales, environmentally-sound timber sales units are not available within timber sale boundaries.

The alternative timber offered to Scott Timber in lieu of First and Last is overstory trees in existing, roaded shelterwood harvest units within matrix lands on the Tiller Ranger District on the Umpqua National Forest.

"The community of Roseburg and the environment will benefit from this agreement," said James R. Lyons, under secretary for natural resources and environment. "Our intent now is to continue the dialogue we have started in hopes of preventing the harvesting of other environmentally-critical Section 318 sales in the Umpqua and Siskiyou national forests."

"We all share in the success," said Ostby. "I'd like to thank Forest Service employees on the Tiller Ranger District for a first-rate solution and the local community for their support. I also appreciate the effort expended by the Clinton Administration and the highest levels of the Forest Service for developing the framework that allowed this solution to happen."

* * *

Umpqua Watersheds HomeFirst/Last

For Immediate Release April 4, 1988

Umpqua Watersheds Inc. and Umpqua Valley Audubon Society

Umpqua Watersheds and the Umpqua Valley Audubon Society are pleased that negotiations have succeeded in protecting the watershed of the "First" and "Last" timber sales. This Ecologically Significant Old-Growth is critical habitat for endangered salmon in the headwaters of the South Umpqua River. This agreement reflects many long hours of negotiations on the part of the environmental community, the Forest Service, the Clinton Administration, and the purchaser, Scott Timber Co.

The "First" and "Last" timber sales will be traded for less environmentally sensitive timber volume outside of Late Successional Reserves under an interim rule published in the Federal Register yesterday by the Secretary of Agriculture. This authorization followed the proposed listing by the National Marine Fisheries Service of the Umpqua sea run cutthroat trout and Coho salmon. The Forest Service, Scott Timber Co. and the local environmental community all agreed that these previously withdrawn sales should be replaced. We regret, however, that many acres of precious old-growth had to fall while negotiations proceeded.

"We expect that cutting will stop immediately now that substitute volume has been explicitly authorized by the Department of Agriculture, identified by the Forest Service, and offered to Scott Timber Co.," said Ken Carloni, president of Umpqua Watersheds. "Allyn Ford indicated to me that he would stop cutting as soon as the Forest Service offered suitable substitute volume, and I am confident that he will abide by his word."

Logging of these vital stands in old growth reserves would have placed the Northwest Forest Plan in serious jeopardy. The trade, however, may allow the Forest Service to remain in substantial compliance with the Plan. Brian Kruse, president of Umpqua Valley Audubon Society stated that "We are gratified that this trade will maintain the integrity of the administration's Northwest Forest Plan."

The authorizing administrative rule will allow agreements to be negotiated on other Forests faced with similar destructive 318 sales. This rule confirms the position we have long taken that the Forest Service has the authority to negotiate modifications to these sales. No additional legislation, such as that proposed by Senators Hatfield and Gorton, is necessary.

Umpqua Watersheds and Umpqua Valley Audubon applaud the hard work and dedication of the Umpqua National Forest Supervisor and the interagency science team, who worked long hours to move this process forward. We also commend the dedication of the many forest activists who brought these extremely environmentally damaging sales to the attention of the public and to the Clinton administration. We hope that substitutions for future 318 sales can be negotiated without the further loss of critical habitat and without polarizing communities as this crisis has.

Ken Carloni, President Umpqua Watersheds (672-1914)

Brian Kruse, President Umpqua Valley Audubon Society (673-5933)

Umpqua Watersheds HomeFirst/Last

Ex. C

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
SCOTT TIMBER CO.'S OPPOSITION TO MOTION FOR CLARIFICATION on the
following parties:

Ms. Patti Goldman VIA REGULAR MAIL
Kristen L. Boyles
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

Attorneys for Plaintiffs-Appellants

Mr. Albert M. Ferlo, Jr. VIA REGULAR MAIL
Attorney, Appellate Section
Environment and Natural
Resources Division
Department of Justice
10th Street and Constitution
Avenue, N.W., Room 2339
Washington, D.C. 20530

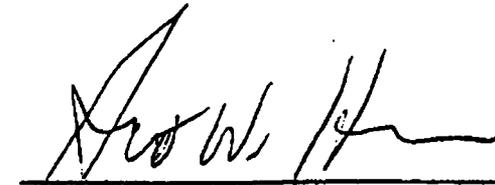
Attorneys for Defendants

Mr. Mark Rutzick VIA REGULAR MAIL
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204

Attorneys for Defendants-Intervenors-
Appellees, Northwest Forest Resource Council

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

DATED this 28th day of June, 1996.



Scott W. Horngren
Counsel for Defendant-
Intervenor-Appellee
Scott Timber Co.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PILCHUCK AUDUBON SOCIETY, et al.,)

Plaintiffs-Appellants,)

v.)

DAN GLICKMAN, in his capacity as)
Secretary of Agriculture, et al.,)

Defendants,)

and)

NORTHWEST FOREST RESOURCE COUNCIL, an)
Oregon corporation, et al.,)

Defendant-Intervenors-)
Appellees.)

NORTHWEST FOREST RESOURCE COUNCIL, an)
Oregon corporation,)

Plaintiff-Appellee,)

vs.)

DAN GLICKMAN, in his capacity as)
Secretary of Agriculture, et al.,)

Defendants,)

and)

OREGON NATURAL RESOURCE COUNCIL, INC.,)
et al.,)

Defendants-Intervenors-)
Appellants.)

: : :

: : :

: : :

: : :

No. 96-35106

DC# CV-95-6244-MRH
Oregon (Eugene)

No. 96-35107

DC# CV-95-6244-MRH
Oregon (Eugene)

PILCHUCK AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

DAN GLICKMAN, in his capacity as
Secretary of Agriculture, et al.,

Defendants-Appellants,

and

NORTHWEST FOREST RESOURCE COUNCIL, an
Oregon corporation, et al.,

Defendant-Intervenors-
Appellees.

NORTHWEST FOREST RESOURCE COUNCIL, an
Oregon corporation,

Plaintiff-Appellee,

vs.

DAN GLICKMAN, in his capacity as
Secretary of Agriculture, et al.,

Defendants-Appellants,

and

OREGON NATURAL RESOURCE COUNCIL, INC.,
et al.,

Defendant-Intervenors.

No. 96-35123

DC# CV-95-6384-MRH.
Oregon (Eugene)

No. 96-35132

DC# CV-95-6244-MRH
Oregon (Eugene)

VAAGEN BROS. OPPOSITION TO MOTION FOR CLARIFICATION

I.

INTRODUCTION

Under the guise of seeking clarification of this court's recent opinion in Northwest Forest Resource Council v. Glickman, 1996 U.S. App. LEXIS 14518 (9th Cir. June 14, 1996), Pilchuck Audubon Society et al. ("Pilchuck Audubon") seeks to

expand the opinion's scope far beyond this court's actual holding, without the benefit of complete briefing or consideration. The "clarification" sought by Pilchuck Audubon, if adopted by this panel, would run contrary to its own holding and eviscerate the meaning of Section 2001(k)(1) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 240 (1995) ("Rescissions Act").

Section 2001(k)(1) of the Rescissions Act provided, in relevant part, that "notwithstanding any other provision of law," the Secretaries of Agriculture and Interior should award, release and permit to be completed all timber sale contracts "offered" before July 27, 1995 in any unit of the National Forest System or district of the Bureau of Land Management "subject to section 318" of Public Law 101-121. Furthermore, "[t]he return of the bid bond of the high bidder shall not alter the responsibility of the Secretary to comply with this paragraph." Id.

In its recent decision, this panel was faced with deciding various questions about the effect of Section 2001(k). Among these questions was the issue of whether Section 2001(k)(1) acted to release four sales which had been enjoined for violations of their authorizing statute, Section 318. The government took the position that the four sales were not released by Section 2001. This Court agreed and held that these sales "were never validly offered" under Section 318. 1996 U.S. App. LEXIS 14518 at *7-9. Specifically, this panel wrote:

"Nothing in Section 2001(k)(1) makes a valid sale out of sale which was not valid under its authorizing statute." Id.

(emphasis added). This panel concluded:

The record before us indicates the four sales at issue here were enjoined for violations of their authorizing statute, and were therefore never validly offered within the meaning of Section 2001(k)(1). These four sales are void ab initio, and are not revived by Section 2001(k)(1).

Id. (emphasis added).

In its Motion for Clarification, Pilchuck Audubon attempts to turn this very specific holding to very broad use -- namely, invalidating the effect of Section 2001(k)(1) whenever a sale has been found to violate any statute applicable when sale was sold. As applied to the Gatorson sale, Pilchuck argues that the sale is not released under Section 2001(k) because it was "found invalid" after sale for violations of the National Environmental Policy Act (NEPA). Motion for Clarification at 3. Pilchuck argues that since the sale was found not to comply with NEPA, it was void ab initio, and "never validly offered," just like the Nita, South Nita, Cowboy and Garden sales. Motion for Clarification at p. 5.

Pilchuck's reasoning is based on an incorrect interpretation of this panel's decision. The decision's scope is limited, on its face, to offers which were found by a court to be violative of the very statute authorizing the offers -- Section 318. Pilchuck's argument thus fails on two critical grounds.

First, the Gatorson Timber Sale was never enjoined by any court for violating its authorizing statute. The federal government and environmental parties have conceded there is no permanent injunction against the Gatorson Timber Sale. Vaagen SER 244 at 11 n. 9 (federal parties); Vaagen SER 384 at 37 (environmental appellants). This panel's decision was premised on the existence of an injunction based on non-compliance with Section 318, the Interior and Related Agencies Appropriations Act for Fiscal Years 1989 and 1990, which authorized the Nita, South Nita, Cowboy, and Garden Timber Sales. While the Gatorson Timber Sale was sold within the geographic area of Section 318, it was not authorized by the fiscal year 1989 and 1990 Appropriations Act and was sold in fiscal year 1993. Not only is there no Section 318 violation alleged here, but there is also no injunction.

Statutes other than Section 318 which might apply to sales are supplanted by Section 2001(k)(1). This panel specifically held that the word "offered" in Section 2001(k) "does not exclude canceled or enjoined sales from Section 2001(k)(1)." (Emphasis added.) 1996 U.S. App. LEXIS at *7. This panel wrote:

Taking the above definition of "offered," the plain language of "all timber sale contracts offered" mandates the conclusion of the district court. To exclude enjoined, canceled or withdrawn sales would permit an implied exception which does not exist.

Id. (Emphasis added.) This panel could not have been clearer that Section 2001(k)(1), as a general rule, acted to release

sales which were enjoined or halted for possible violations of NEPA¹ or other statutes. In fact, the panel's specific holding reads:

We reverse the district court's order holding that timber sales offered in violation of § 318 fall within the scope of § 2001(k)(1).

Id. at *3 (emphasis added). Any expansion of the court's opinion beyond sales previously enjoined under Section 318, is clearly beyond the scope of its holding.

If Pilchuck's interpretation of this panel's opinion were to be adopted, any sale which was later found to violate any applicable statute at the time it was sold would fall outside Section 2001(k)(1), precisely the result this panel stated could not be supported by the language of the statute. Such a result would create an "exception where there is none." Furthermore, while the government sought exclusion from Section 2001(k)(1) of the sales enjoined as violative of Section 318, it does not seek such exclusion for sales found to be violative of other statutes such as NEPA.

The Forest Service Manual and regulations governing the sale of timber, modification of environmental documents, and administrative appeals do not make a sale void at its inception if there is a legal flaw with the environmental documentation for the sale. See Forest Service Handbook 1909.15 § 18.1, 57 Fed. Reg. at 43199 (Sept. 18, 1992). In Inland Empire Public Lands

¹ This is especially true because the lengthy NEPA processes conflicts with the 45-day release requirements of the Rescissions Act.

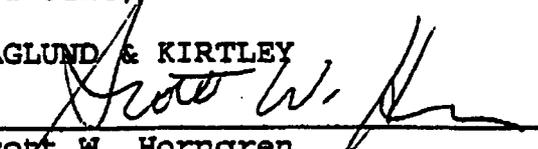
Council v. Schultz, 992 F.2d 977 (9th Cir. 1993), the Calispell Timber Sale was sold to Merritt Bros. Lumber Company, but not awarded because of an administrative appeal decision holding that the cumulative effects analysis was invalid. The Forest Service did not view the sale as void and reaffirmed the decision to proceed with the sale and awarded the contract following further analysis. Thus, simply because there is a legal flaw with the sale documentation upon which the offer of the sale was based, does not mean the sale is void ab initio.

Finally, whether there was a valid offer of the Gatorson Timber Sale is an issue which appellants have no standing to pursue. Mitchell Smith, who was a plaintiff in Smith v. Forest Service, 33 F.3d 1072 (9th Cir. 1994), was voluntarily dismissed from the Pilchuck case (Dkt. b 25). This is in contrast to the plaintiffs in Seattle Audubon Society v. Thomas, 89-160-WD who challenged the Nita, South Nita, Cowboy, and Garden Sales and are appellants here. For the foregoing reasons and the reasons outlined in Vaagen Bros. brief, Pilchuck's motion for clarification that the Gatorson sale is not released by Section 2001(k) should be denied.

DATED this 28th day of June, 1996.

HAGLUND & KIRTLEY

By


Scott W. Horngren
101 S.W. Main, Suite 1800
Portland, OR 97204
Telephone: (503) 225-0777

Attorneys for Plaintiff-Intervenor-
Appellee Vaagen Bros. Lumber, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing VAAGEN BROS. OPPOSITION TO 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

Mr. Mark Rutzick VIA REGULAR MAIL
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204

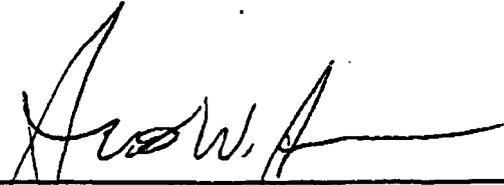
Attorney for NFRC

Mr. Albert M. Ferlo, Jr. VIA REGULAR MAIL
U.S. Department of Justice
ENR Division
Appellate Section
9th & Pennsylvania Avenue, N.W.
Room 2336
Washington, D.C. 20530

Attorneys for Defendants

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

DATED this 23rd day of June, 1996.



Scott W. Horngren
Attorneys for Plaintiff-Intervenor-
Appellee Vaagen Bros. Lumber, Inc.

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
APPELLATE SECTION
WASHINGTON, D.C. 20530
FAX NUMBER (202) 514-4240

DATE: July 9, 1996

FROM: Albert Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 18 pages

PLEASE DELIVER TO:

Don Barry	208-4684
Bob Baum	208-3877
David Gayer	
Dinah Bear	456-0753
Brian Burke	720-4732
Mark Gaede	
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
Jim Sutherland(503)	465-6582
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
Tom Tuchmann (503)	326-6254
Sue Zike (503)	326-7742

MESSAGE:

ATTACHED IS A COPY OF NFRC'S REPLY TO SCLDF'S
MOTION FOR CLARIFICATION FILED WITH THE NINTH
CIRCUIT.

Nos. 96-35106, 35107, 35123, and 35132

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon
corporation,

Plaintiff-Appellee,

vs.

DAN GLICKMAN, in his official capacity as Secretary
of Agriculture, et al.,

Defendants-Appellants,

and

OREGON NATURAL RESOURCES COUNCIL, INC., et al.,

Defendant-Intervenors-Appellants.

NORTHWEST FOREST RESOURCE COUNCIL'S
OPPOSITION TO PILCHUCK AUDUBON'S
MOTION FOR CLARIFICATION

Mark C. Rutzick
MARK C. RUTZICK LAW FIRM,
A Professional Corporation
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204-2089
(503) 499-4573

Of Attorneys for Plaintiff-
Appellee Northwest Forest
Resource Council

TABLE OF CONTENTS

	<i>Page</i>
INTRODUCTION	1
STATEMENT OF THE CASE	2
ARGUMENT	4
I. PILCHUCK IS NOT A PARTY TO THE SECRETARIES' APPEAL ON NFRC'S CLAIMS CONCERNING SECTION 2001(k) (1), AND MAY NOT SEEK RELIEF IN THAT APPEAL	4
II. PILCHUCK LACKS STANDING TO SEEK RELIEF AGAINST TIM- BER SALES RELEASED BY SECTION 2001(k)	4
III. PILCHUCK'S REQUEST FOR CLARIFICATION THAT ALL PREVI- OUSLY-ENJOINED TIMBER SALES ARE EXCLUDED FROM RE- LEASE UNDER SECTION 2001(k) (1) SHOULD BE DENIED BECAUSE THE COURT'S OPINION EXPRESSLY REJECTS THAT POSITION	7
IV. PILCHUCK'S REQUEST FOR CLARIFICATION THAT TIMBER SALES OFFERED IN VIOLATION OF ANY FEDERAL STATUTE OR REGULATION ARE EXCLUDED FROM RELEASE UNDER SECTION 2001(k) (1) EVEN THOUGH NO VIOLATION HAS EVER FOUND BY A COURT SHOULD BE DENIED BECAUSE SUCH AN IMPLIED EXEMPTION IS CONTRARY TO THE LANGUAGE AND PURPOSE OF SECTION 2001(k)	10
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Cases	
<i>Carson Harbor Village, Ltd. v. City of Carson,</i> 37 F.3d 468 (9th Cir. 1994)	5
<i>City of Tenakee Springs v. Franzel,</i> 960 F.2d 776 (9th Cir. 1992)	9
<i>Didrickson v. U.S. Dept. of Interior,</i> 982 F.2d 1332 (9th Cir. 1992)	6
<i>Godley v. U.S.,</i> 5 F.3d 1473 (Fed. Cir. 1993)	9, 10
<i>Johnson v. U.S.,</i> 15 Cl. Ct. 169 (Cl. Ct. 1988)	10
<i>Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.,</i> 42 F.3d 517 (9th Cir. 1994)	9
<i>Nevada Land Action Ass'n. v. U.S. Forest Service,</i> 8 F.3d 713 (9th Cir. 1993)	5, 6
<i>Northern Cheyenne Tribe v. Hodel,</i> 851 F.2d 1152 (9th Cir. 1988)	9
<i>Northwest Forest Resource Council v. Glickman,</i> - F.3d -, Nos. 95-36038 and 95-36042, slip op. 6444 (Order and Amended Opinion, May 30, 1996)	2, 5, 6, 11, 12
<i>Portland Audubon Society v. Hodel,</i> 866 F.2d 302 (9th Cir.), cert. denied 492 U.S. 911 (1989)	6
<i>Sierra Club v. Babbitt,</i> 65 F.3d 1502 (9th Cir. 1995)	9
<i>United States v. Amdahl Corp.,</i> 786 F.2d 387 (Fed. Cir. 1986)	10
<i>Westlands Water Dist. v. Firebaugh Canal,</i> 10 F.3d 667 (9th Cir. 1993)	5

Yniguez v. State of Arizona,
 939 F.2d 727 (9th Cir. 1991) 6

Statutes

Administrative Procedure Act,
 5 U.S.C. 551-706 5

National Environmental Policy Act,
 42 U.S.C. 4321 8, 9

Pub. L. 104-19, 109 Stat. 240-247
 (July 27, 1995) 1-8, 10-12

Section 318 of the Department of Interior and Related
 Agencies Appropriations Act, Fiscal Year 1990,
 Pub. L. 101-121, 103 Stat. 745 (1989) 8, 11, 13

Rules and Regulations

Circuit Rule 27-1 and 27-10 4

Fed. R. App. P. 27 4

Fed. R. App. P. 40 4

Fed. R. Civ. P. 24 6

Legislative History

141 Cong. Rec. H5013 (May 16, 1995) 13

H. Conf. Rep. 104-124 (May 16, 1995) 13

INTRODUCTION

Plaintiff-appellee Northwest Forest Resource Council ("NFRC") opposes Pilchuck Audubon's motion for clarification of the court's June 14, 1996 opinion. Pilchuck asks the court to change its interpretation of section 2001(k) in two significant ways: to exclude from release all timber sales that have been previously enjoined under any statute or regulation, and to exclude from release all timber sales that may previously have been offered in violation of any statute or regulation even though no court has found a violation to date. Pilchuck's motion is without merit and should be denied.

The motion is procedurally and jurisdictionally defective. Pilchuck has been denied intervention in NFRC's action, and may not seek relief in the government's appeal in the NFRC case. In its own companion case, Pilchuck lacks standing to seek relief, and in any event the issues on which it seeks clarification are beyond the scope of the claims in its case.

On the merits, Pilchuck's proffered interpretation of the court's opinion conflicts with the text of the opinion. Its suggestion that Congress intended to allow *post facto* litigation over every timber sale released under section 2001(k) is contrary to the language and purpose of the statute.¹

¹ NFRC has petitioned for rehearing of the June 14 decision, with suggestion for rehearing en banc.

STATEMENT OF THE CASE

The procedural posture of this litigation bears directly on Pilchuck's motion. NFRC filed an action against the Secretaries of Agriculture and Interior seeking relief under section 2001(k)(1) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. 104-19, 109 Stat. 240-247 (July 27, 1995). NFRC later amended its complaint to seek additional relief under section (k)(2).

The district court denied Pilchuck Audubon's motion to intervene on the (k)(1) claims.. This court has affirmed that decision in *Northwest Forest Resource Council v. Glickman*, - F.3d -, Nos. 95-36038 and 95-36042, slip op. 6444 (Order and Amended Opinion, May 30, 1996) (hereafter "NFRC I"). In the NFRC case, the Secretaries conceded that previously-enjoined and challenged timber sales are subject to release under the statute except for four sales enjoined by Judge Dwyer in 1990 which they contended were exempt from release.

Pilchuck subsequently filed its own action against the Secretaries on section (k)(1), which was consolidated with NFRC's case. Pilchuck's two claims were that section (k)(1) "does not apply: (1) to timber sales that had been withdrawn or cancelled by the U.S. Forest Service or the Bureau of Land Management before July 27, 1995, the date that the Rescissions Act was enacted, or (2) to timber sales that were offered prior to October 23, 1989" Pilchuck Excerpts of Record, ER

C:\ATTY\N01-9506\1RB91211.1MH

3

1b, ¶ 1. Pilchuck made no claim concerning sales offered in violation of a statute or regulation.

On January 10, 1996 the district court decided all remaining issues concerning section (k)(1), ruling that all previously enjoined, challenged or cancelled sales offered in the relevant time period and geographic area must be awarded and released, including the Gatorson, Tip, Tiptop, First and Last sales discussed in Pilchuck's pending motion and the four sales enjoined by Judge Dwyer.

The Secretaries filed a notice of appeal in NFRC's case (No. 96-35107), and Pilchuck filed a notice of appeal in its case (No. 96-35106). The two appeals were consolidated with the two other appeals concerning section (k)(2) (Nos. 96-35123 and 96-35132), which are not involved in Pilchuck's motion for clarification.

As to sales that were previously enjoined or challenged in court, the Secretaries only appealed the district court's declaratory judgment requiring award and release of the four sales enjoined by Judge Dwyer in 1990 (Cowboy, Nita, South Nita and Garden). The Secretaries did not appeal the district court's order requiring award and release of the First and Last sales, nor its declaratory judgment as to other previously-enjoined sales, since they had conceded in the district court that these sales are subject to release under the statute.

Pilchuck appealed the dismissal of its claim that all previously-cancelled sales are excluded from (k)(1). Pilchuck presented no argument on appeal that sales offered in violation of a statute or regulation are excluded from (k)(1). Opening Brief of Plaintiffs-Appellants Pilchuck et al. at 30-39.

ARGUMENT

I. PILCHUCK IS NOT A PARTY TO THE SECRETARIES' APPEAL ON NFRC'S CLAIMS CONCERNING SECTION 2001(k)(1), AND MAY NOT SEEK RELIEF IN THAT APPEAL.

Pilchuck is not a party in the Secretaries' appeal of the district court's rulings on section (k)(1) in NFRC's case against the Secretaries (No. 96-35107). Pilchuck's intervention on NFRC's (k)(1) claims was denied. Pilchuck may not seek clarification of any ruling made in that appeal since it is not a party. Fed. R. App. P. 27; Circuit Rule 27-1 and 27-10 (motions); Fed. R. App. P. 40 (rehearing).

II. PILCHUCK LACKS STANDING TO SEEK RELIEF AGAINST TIMBER SALES RELEASED BY SECTION 2001(k).

Thus, if Pilchuck has any right to seek clarification of the court's ruling on (k)(1), that right must arise from its own appeal (No. 96-35106) in its companion case against the Secretaries. Yet Pilchuck has no claim in its case and no issue in its appeal concerning sales in violation of statute or regulation.

Even if it had pleaded such a claim, Pilchuck has no standing to seek relief blocking the release of timber sales

C:\ATTY\N01-9506\1RB91211.1MH

5

under section 2001(k)(1). This court's prior decision in *NFRC I* affirming the denial of Pilchuck Audubon's motion to intervene forecloses Pilchuck's standing under this statute.

Standing is an element of subject matter jurisdiction, *Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468, 475 (9th Cir. 1994), which can be challenged at any time. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 673 (9th Cir. 1993).

Standing to sue under the APA requires a plaintiff to "assert an interest 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Nevada Land Action Ass'n. v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993) (citation omitted).

In *NFRC I*, the court recognized that Pilchuck (which sought intervention along with Oregon Natural Resources Council ("ONRC")) claimed an interest under various environmental laws, but affirmed the denial of intervention in this case because its interest does not "relate to the litigation in which it seeks to intervene." Slip op. at 6471. The court stated:

In this case, the statute under which the declaratory action arises explicitly preempts other laws. The environmental laws that ONRC and others claim they have supported cannot protect ONRC's various interests with respect to NFRC's claims under Section 2001(k)(1).

. . . [W]e conclude that ONRC has not shown a sufficient interest to warrant intervention in this action.

C:\ATTY\N01-9506\1RB91211.1MH

6

Slip op. at 6471-72.

Pilchuck's lack of sufficient interest in section 2001(k)(1) to support intervention under Rule 24 necessarily means it lacks standing to sue independently on that statute. The law in this circuit is that intervention under Fed. R. Civ. P. 24(a) does not require the intervenor to establish standing to sue. *Portland Audubon Society v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir.), cert. denied 492 U.S. 911 (1989). A "significantly protectable interest" is sufficient for intervention, and "[n]o specific legal or equitable interest need be established." *NFRC I*, slip op. at 6470.

Since intervention does not require standing, this court has reasoned that an interest sufficient for Rule 24 intervention does not necessarily establish standing: "An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties." *Didrickson v. U.S. Dept. of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) (same).

In this case, the court's finding that Pilchuck "has not shown a sufficient interest to warrant intervention in this action," *NFRC I*, slip op. at 6471-72, necessarily establishes that Pilchuck does not have "an interest 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,'" *Nevada Land Action*

C:\ATTY\N01-9506\1RB91211.1MH

7

Ass'n. v. U.S. Forest Service, 8 F.3d at 716, and therefore lacks standing to sue under section 2001(k)(1). Lacking standing, Pilchuck therefore may not seek to block additional sales through the expansion of the court's ruling that it now seeks.

III. PILCHUCK'S REQUEST FOR CLARIFICATION THAT ALL PREVIOUSLY-ENJOINED TIMBER SALES ARE EXCLUDED FROM RELEASE UNDER SECTION 2001(k)(1) SHOULD BE DENIED BECAUSE THE COURT'S OPINION EXPRESSLY REJECTS THAT POSITION.

In its merits brief, Pilchuck presented in detail the argument that all previously cancelled sales are excluded from release under section (k)(1). The court explicitly rejected that argument:

The use of the word "offered" in § 2001 (k)(1) means any timber sale where the bids were opened at auction. This language does not exclude cancelled or enjoined sales from § 2001(k)(1) because the bids would have been opened before the cancellation or injunction occurred. . . .

Taking the above definition of "offered," the plain language of "all timber sale contracts offered" mandates the conclusion of the district court. To exclude enjoined, cancelled or withdrawn sales would permit an implied exception which does not exist.

Slip op. 6950 (emphasis added). Notwithstanding this seemingly clear conclusion, Pilchuck asks the court to reverse itself and "clarify" that all previously-enjoined sales are excluded from release under section (k)(1).

The court ruled that the four timber sales enjoined by Judge Dwyer in 1990 based on a violation of section 318 are exempt from release under section 2001(k)(1). Slip op. at 6950. The court indicated it was responding to "[t]he Secretaries['] argu[ment]" on these four sales. *Id.* The Secretaries presented their argument as follows:

The government makes a crucial distinction between sales that were enjoined for having violated Section 318 and sales that were enjoined for violations of other statutes, such as NEPA. Unlike NEPA, Section 318 provides the very authority to offer and award these sales. Statutes such as NEPA apply to a timber sale only where the Forest Service or BLM have already decided to take action under whatever statute authorizes the sale in the first place.

Federal Appellants' Opening Brief at 54-55. The Secretaries limited their argument (and their appeal) to the four sales enjoined by Judge Dwyer, and the court limited its ruling to those four sales.

Pilchuck's argument that the court's logic should apply to sales such as Gatorson, Tip and Tiptop that were previously subject to court orders (either injunctive orders, remand orders or reconsideration orders) under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321, or other statutes is contrary to the Secretaries' argument that was accepted by the court, and is flatly contradicted by the court's very clear conclusion that section (k)(1) "does not exclude cancelled or enjoined sales." Slip op. at 6950.

C:\ATTY\N01-9506\1RB91211.1MH

9

Further, as the Secretaries argued, Pilchuck's argument proceeds from a flawed premise: federal environmental statutes such as NEPA are not an "authorizing statute" for timber sales, and therefore do not fall within the language in the court's opinion cited by Pilchuck. It is well-settled that "NEPA does not mandate particular substantive results, but instead imposes only procedural requirements." *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994). Courts are not required to enjoin agency action taken in violation of NEPA, *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988), and courts have exercised their discretion to permit timber sales to proceed despite NEPA violations. *City of Tenakee Springs v. Franzel*, 960 F.2d 776, 779 (9th Cir. 1992). Nor does the Endangered Species Act authorize agency action such as timber sales. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995).

Pilchuck also proceeds from a flawed understanding of government contracting law: it is not true that any contract awarded in violation of a law or regulation is void *ab initio*, as Pilchuck suggests. The void *ab initio* rule applies to contracts "tainted by fraud or wrongdoing." *Godley v. U.S.*, 5 F.3d 1473, 1475 (Fed. Cir. 1993). The court explained:

A contract without the taint of fraud or wrongdoing, however, does not fall within this rule. Illegal acts by a Government contracting agent do not alone taint a contract and invoke the void *ab initio*

rule." Rather, the record must show some causal link between the illegality and the contract provisions.

Id. at 1476. Thus, it is simply incorrect that a timber sale contract awarded without compliance with a statute or regulation is necessarily void *ab initio*. The contractor is to be given the benefit of any reasonable doubt, and government contracts are to be enforced whenever possible despite errors in the government contracting process. *Johnson v. U.S.*, 15 Cl. Ct. 169 (Cl. Ct. 1988). Enforceability of a government contract is a factual inquiry dependent on the circumstances of each contract: "Determining whether illegality taints a contract involves questions of fact." *Godley v. U.S.*, 5 F.3d at 1476. Further, even as to contracts that are void *ab initio* or voidable, part performance of the contract creates liabilities on the part of the government. *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986). Since timber sales that may have been offered without compliance with a statute or regulation are not necessarily void *ab initio* or even voidable, Pilchuck's request for clarification on this point should be denied.

IV. PILCHUCK'S REQUEST FOR CLARIFICATION THAT TIMBER SALES OFFERED IN VIOLATION OF ANY FEDERAL STATUTE OR REGULATION ARE EXCLUDED FROM RELEASE UNDER SECTION 2001(k)(1) EVEN THOUGH NO VIOLATION HAS EVER FOUND BY A COURT SHOULD BE DENIED BECAUSE SUCH AN IMPLIED EXEMPTION IS CONTRARY TO THE LANGUAGE AND PURPOSE OF SECTION 2001(k).

Pilchuck's most sweeping request is for the court to rule that any timber sale is excluded from release under section

2001(k) (1) if the sale violated any statute or regulation even though no court has ever found such a violation. While Pilchuck frames this issue in terms of the First and Last sales,² the ruling it seeks could potentially trigger massive new litigation affecting dozens of other sales released under section 2001(k).³ Such an implied exemption is contrary to the language and purpose of the statute.

Section (k) addresses a universe of timber sales that by definition were offered but never completed. These sales were not completed for many reasons, often because legal issues had arisen under various federal environmental issues.

The core purpose of section (k) is to release and complete these sales "[n]otwithstanding any other provision of law." As the court observed in *NFRC I*, "Section 2001(k) (1) does not defy or violate existing environmental laws; rather, it explicitly

² The purchaser of First and Last reached agreement with the Secretary of Agriculture to accept replacement timber elsewhere rather than log the original sales. Whether the original sales violated section 318 or any law is now moot in light of the agreed substitution of timber. Pilchuck's interest in litigating this moot question to "help the parties decide the future of the timber substituted for the First and Last timber sales," Motion for Clarification at 3 n.2, is insufficient to create an actual controversy, especially since neither party to the substitution agreement seeks the "help" Pilchuck has offered.

³ *NFRC* in no way suggests that other sales released under section 2001(k) violate any statute or regulation. However, given Pilchuck's history of vigorously litigating challenges to federal timber sales, it is not hard to imagine that Pilchuck could contend that such violations have occurred.

C:\ATTY\N01-9506\1RB91211.1MH

12

preempts them with its phrase "[n]otwithstanding any other provision of law." Slip op. 6471.

Congress directed the release of the sales "[n]otwithstanding any other provision of law", precisely for the purpose of making the previous legal status of the sales irrelevant. The fact that a sale may previously have been offered without complying with a law or regulation (or that an agency may have thought a sale might not comply with a law or regulation) has no bearing whatever on the operation of section (k).

Although Pilchuck offers no mechanism for determining whether the section (k) sales may have violated some law or regulation in the past, the judicial process is the standard mechanism for making such decisions. Pilchuck may have in mind filing a legal challenge against every section (k) timber sale asking a court to decide whether each sale previously violated a law or regulation. Indeed, there would be no other way for Pilchuck to stop the sales it wishes to halt.

Section (k) directed the award and release of all timber sales within 45 days of enactment of the statute. It is simply unimaginable that Congress intended to trigger a litigation frenzy within that 45 day period in which opponents of logging could ask a court to review every section (k) timber sale and determine which of them may previously have been out of compliance with a law or regulation. The "notwithstanding any other provision of law" directive in (k)(1) very clearly forecloses

such an outburst of litigation. As Congress stated in the conference report on the 1995 Rescissions Act: "For . . . sales in Section 318 areas, the bill contains language which deems sufficient the documentation on which the sales are based [T]he sufficiency language is provided so that sales can proceed." H. Conf. Rep. 104-124 at 136, reprinted at 141 Cong. Rec. H5013 (May 16, 1995). Congress could not have intended the litigation frenzy Pilchuck now seeks to invite.

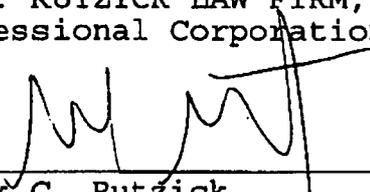
CONCLUSION

Pilchuck's motion for clarification should be denied.

Dated this 1st day of July, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: _____


Mark C. Rutzick
Attorney for Plaintiff-
Appellee Northwest Forest
Resource Council

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing NORTHWEST FOREST RESOURCE COUNCIL'S OPPOSITION TO PILCHUCK AUDUBON'S MOTION FOR CLARIFICATION on:

Albert M. Ferlo
U.S. Department of Justice
10th & Pennsylvania Avenue N.W.,
Room 2339
Land & Natural Resources Division
Washington, D.C. 20530

Patti A. Goldman
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

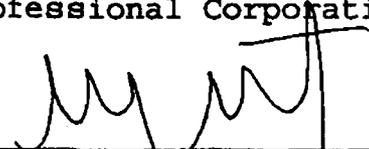
on July 1, 1996, by delivering to said attorneys via Federal Express true copies thereof, certified by me as such, contained in sealed envelopes, prepaid, addressed to said attorneys at said attorneys' last known addresses, and deposited with Federal Express in Portland, Oregon, on said day, and on:

Scott Horngren
Haglund & Kirtley
Attorneys at Law
One Main Place
101 S.W. Main, Suite 1800
Portland, Oregon 97204

by mailing to said attorney a true copy thereof, certified by me as such, contained in sealed envelope, with postage paid, addressed to said attorney at said attorney's last known address, and deposited in the post office at Portland, Oregon, on said day.

Dated this 1st day of July, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: 

Mark C. Rutzick
Of Attorneys for Plaintiff-
Appellee Northwest Forest
Resource Council

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
APPELLATE SECTION
WASHINGTON, D.C. 20530
FAX NUMBER (202) 514-4240

DATE: June 26, 1996

FROM: Albert Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 16 pages

PLEASE DELIVER TO:

Don Barry	208-4684
Bob Baum	208-3877
David Gayer	
Dinah Bear	456-0753
Brian Burke	720-4732
Mark Gaede	
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
Jim Sutherland(503)	465-6582
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
Tom Tuchmann (503)	326-6254
Sue Zike (503)	326-7742

MESSAGE:

Attached is a copy of NFRC's Petition for Rehearing and suggestion for rehearing en banc. The petition addresses the (k)(2) issues with only passing reference to the "next high bidder" and "enjoined sales" issues.

Under the rules, we may not respond unless and until the court requests a response. I will let you know if the court requests a response.



Nos. 96-35106, 35107, 35123, and 35132

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon
corporation,

Plaintiff-Appellee,

vs.

DAN GLICKMAN, in his official capacity as Secretary
of Agriculture, et al.,

Defendants-Appellants,

and

OREGON NATURAL RESOURCES COUNCIL, INC., et al.,

Defendant-Intervenors-Appellants.

NORTHWEST FOREST RESOURCE COUNCIL'S
PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

Mark C. Rutzick
MARK C. RUTZICK LAW FIRM,
A Professional Corporation
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204-2089
(503) 499-4573

Of Attorneys for Plaintiff-
Appellee Northwest Forest
Resource Council

C:\ATTY\N01-9506\1RB91207.1MD

1

INTRODUCTION

In the judgment of the undersigned counsel, the decision of the court in this appeal overlooked material points of law and creates apparent conflict with other decisions of the court which was not addressed in the opinion.

STATEMENT OF THE CASE

Plaintiff-Appellee Northwest Forest Resource Council ("NFRC") - a coalition of timber and logging companies in Oregon and Washington - filed this action to compel the Secretary of Agriculture and Secretary of Interior to release timber sales under 2001(k) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. 104-19, 109 Stat. 240-247 (July 27, 1995).

In the initial phase of the case, the district court ordered the Secretaries to release a group of timber sales offered in fiscal years 1991-95 in certain national forests and Bureau of Land Management ("BLM") districts in Oregon and Washington. The Secretaries had withheld these sales based on their erroneous interpretation of subsection (k)(1) of the statute. Finding the plain language of the statute contrary to the Secretaries' interpretation, this court affirmed the district court. *Northwest Forest Resource Council v. Glickman*, - F.3d -, Nos. 95-36038 and 95-36042, slip op. 6444 (Order and Amended Opinion, May 30, 1996).

C:\ATTY\N01-9506\1RB91207.1MD

2

In the second phase of the case (the subject of these four consolidated appeals), the district court ordered the Secretaries to release an additional group of 45 timber sales, containing approximately 180 million board feet of timber, that they had withheld based on their interpretation of subsection (k)(2) of the statute, which provides:

No sale unit shall be released or completed under this subsection if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.

The Secretaries' interpretation of this law is set forth in a three page informal memorandum issued on August 23, 1995 by the under secretary of agriculture and the acting director of the BLM. (Attachment A hereto.) It interprets the section to withhold release of every timber sale unit that is located within a forest stand that has been given an "occupancy" determination under an unpublished protocol used in recent years to survey for marbled murrelets (a threatened species).

The district court rejected this interpretation as contrary to the plain language of the statute, finding that the statute requires evidence of nesting within the boundary of a timber sale unit, and is not satisfied by nesting that occurs outside a sale unit within the same forest stand.

This court reversed the district court. The court found the language and legislative history of the subsection (k)(2) do not clearly reveal its meaning. The court ruled that under

C:\ATTY\N01-9506\1RB91207.1MD

3

Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc. ("Chevron"), 467 U.S. 837 (1984), "if the statute is ambiguous, 'the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" Slip op. at 6958, quoting *Chevron*, 467 U.S. at 843. Finding the interpretation in the August 23 informal memorandum permissible, the court upheld that interpretation without determining the meaning of the statute.

REASONS FOR GRANTING REHEARING

I. THE PANEL DECISION ERRONEOUSLY GRANTED CHEVRON DEFERENCE TO AN INFORMAL AGENCY DIRECTIVE, IN CONFLICT WITH FOUR OTHER COURTS OF APPEALS THAT HAVE LIMITED CHEVRON DEFERENCE TO FORMALLY-ADOPTED LEGISLATIVE RULES, AND IN CONFLICT WITH EXISTING PRECEDENTS IN THIS CIRCUIT.

A. The panel decision conflicts with decisions of four other courts of appeals.

In *Chevron*, the Supreme Court pronounced a two-step process for judicial review of an agency interpretation of a statute that is expressed in a formally-adopted agency rule. In the first step, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 842 n.9. If the statute and legislative history do not reveal congressional intent, the court proceeds to step two of the *Chevron* analysis, where "a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is

C:\ATTY\N01-9506\1RB91207.1MD

4

unreasonable." *Amtrak v. Boston & Maine Corp.*, 503 U.S. 407, 417-18 (1992).

Chevron represented a change from the traditional rule, expressed originally in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that the weight which courts give an administrative interpretation of a statute "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 149; see *Elizabeth Blackwell Health Center For Women v. Knoll*, 61 F.3d 170, 190-94 (3d Cir. 1995) (Nygard, J., dissenting) (discussing *Chevron* and *Skidmore* standards of review).

Since *Chevron*, four courts of appeals have expressly held — in conflict with the panel decision in this case — that courts do not give *Chevron* deference to agency interpretative rules and other less formal agency directives — such as the August 23 memorandum at issue in this case.

1. In *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437 (7th Cir. 1994) (en banc), *aff'd*, — U.S. —, 116 S. Ct. 595, 133 L. Ed. 2d 535 (1996), the Seventh Circuit limited *Chevron* deference to formally-adopted legislative rules, and ruled that interpretive rules and other informal agency decisions are "undeserving of substantial deference under *Chevron*":

C:\ATTY\N01-9506\1RB91207.1MD

5

. . . The Supreme Court made clear in *Chevron* . . . that only statutory interpretations by agencies with rule-making powers deserve substantial deference. . . .

In instances in which the agency does not have rule-making authority, however, we consider the agency's application of statutory provisions "interpretive rules."

This is not to say that interpretive rules, while undeserving of substantial deference under *Chevron*, do not warrant any deference from a reviewing court. . . . Whatever degree of deference due these interpretive rules is dictated by the circumstances surrounding the agency's adoption of its statutory interpretation. . . . In short, we look to "the thoroughness, validity, and consistency of the agency's reasoning."

Id. at 441-42 (citations omitted).

2. In *Headrick v. Rockwell Intern. Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994), the Tenth Circuit held that "[a] purely interpretative rule, unpromulgated under the Administrative Procedure Act . . . does not carry the force of law and we are in no way bound to afford it any special deference under *Chevron*." *Id.* at 1282.

3. In *O'Connell v. Shalala*, 79 F.3d 170 (1st Cir. 1996), the First Circuit refused to give *Chevron* deference to an informal agency decision, holding that "the [*Chevron*] rule of deference traditionally applies when the agency's interpretation is a 'product of delegated authority for rulemaking,' *Stinson v. United States*, 508 U.S. -, 113 S. Ct. 1913, 1918, 123 L. Ed. 2d

C:\ATTY\N01-9506\1RB91207.1MD

6

598 (1993), a sphere that ordinarily encompasses legislative rules and agency adjudications." *Id.* at 178-79.

4. In *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996), the Federal Circuit refused to give *Chevron* deference to an informal agency decision, holding that *Chevron* deference is only due "where Congress has authorized an agency to promulgate substantive rules under a statute it is charged with administering" *Id.* at 1549.

The Fourth Circuit has held to similar effect that an interpretive rule "certainly would be entitled to less deference than a formal agency interpretation." *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1141 (4th Cir. 1995), cert. denied, No. 95-1569, 1996 WL 163924 (U.S. Jun 24, 1996).

Only the Third Circuit has held that full *Chevron* deference should be given to an interpretive rule, prompting a lengthy dissent. *Elizabeth Blackwell Health Center For Women v. Knoll*, 61 F.3d 170; *see id.* at 185, et seq.

The Supreme Court has held that "[interpretive rules are] not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers" *Martin v. Occ. Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991). Citing *Skidmore*, the court held that an informal agency decision is merely entitled to "some weight on judicial review." *Id.* The court has declined to decide "whether an agency interpretation expressed in a memorandum . . . is

C:\ATTY\N01-9506\1RB91207.1MD

7

entitled to any less deference under *Chevron* than an interpretation adopted by rule published in the Federal Register, or by adjudication." *Chicago v. Environmental Defense Fund*, - U.S. -, 114 S. Ct. 1588, 128 L. Ed. 2d 302, 312 n.5 (1994).

The August 23 memorandum involved in this case is not a legislative rule, was not adopted with notice and comment, and was not published in the Federal Register even as an interpretive rule. There is no administrative record supporting the memorandum. Far from delegating to the Secretaries the power to fill gaps in section 2001 through rulemaking, Congress enacted the statute over the objections of the administration, over the initial veto of the President, and largely to counteract the Secretaries' failure to release the sales in question. The August 23 memorandum is not entitled to *Chevron* deference under the reasoning of the Seventh, Tenth, First and Federal Circuits, and should not have been given such deference in this case.¹

B. The panel decision conflicts with existing precedents of this circuit applying *Skidmore* review to agency interpretive rules.

The Ninth Circuit has not addressed the application of *Chevron* deference to informal agency decisions. But see *Briggs v. Sullivan*, 954 F.2d 534, 542 (9th Cir. 1992) (Reinhardt, J., dissenting) ("Because . . . procedures have not been promulgated

¹ NFRC presented this argument at pages 31-32 and 42-43 of its brief on the merits, but it was not addressed in the June 14 opinion.

C:\ATTY\N01-9506\1RB91207.LMD

8

by regulation in the Federal Register they are not entitled to deference under *Chevron*.").

However, Ninth Circuit decisions both before and after *Chevron* have applied the *Skidmore* standard of review to informal agency decisions, in conflict with the decision in this case. Before *Chevron*, this court expressly applied *Skidmore* review to agency interpretative rules:

In reviewing an interpretative rule, we are "free to substitute [our] own judgment on the validity of the rule in the light of the statute and the regulations." . . . The weight we give an interpretative rule varies from case to case and depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co., Inc.*

Louisiana-Pacific Corp. v. Block, 694 F.2d 1205, 1212 (9th Cir. 1982) (citations omitted); accord, *Good Samaritan Hospital v. Mathews*, 609 F.2d 949, 954 (9th Cir. 1979). These cases have never been overruled.

Since *Chevron*, this court has at least once expressly and once impliedly employed the *Skidmore* standard to review an agency's informal interpretation of a statute. *Wilmot Psychiatric/Medicenter Tucson v. Shalala*, 11 F.3d 1505, 1508 (9th Cir. 1993) (express); *Sierra Club v. Department of Transp.*, 948 F.2d 568, 573 (9th Cir. 1991) ("[t]he degree of deference to an agency's interpretation turns on the manner in which the

C:\ATTY\N01-9506\1RB91207.1MD

9

agency advances its interpretation"); also see *California Rural Legal Assistance, Inc. v. Legal Services Corporation*, 937 F.2d 465 (9th Cir. 1991) (Farris, J. concurring) (declining to give Chevron deference to agency interpretation of statute where agency has no expertise in interpreting statute); *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276-77 (9th Cir. 1993) (noting that court has "generally reviewed agency regulations under [Chevron] standard"; questioning applicability to regulation not expressly authorized by statute); cf. *Briggs v. Sullivan*, 954 F.2d at 538.

The only Ninth Circuit case cited by the panel does not support the application of Chevron in this case. See slip op. at 6958-59. That case, *Almero v. I.N.S.*, 18 F.3d 757 (9th Cir. 1994), involved a formal regulation adopted with notice and comment under the APA, *id.* at 763; it does not support extension of Chevron to informal directives.

C. The August 23 memorandum is not entitled to any deference under the proper Skidmore standard of review.

The August 23 memorandum does not in any appreciable way have the "power to persuade, if lacking power to control" required for deference under *Skidmore*, 323 U.S. at 140. It cites none of the legislative history on the statute, and discusses no cases or other legal authorities to support its interpretation. Its view of the statute appears to be largely a matter of political convenience designed to blunt the effect

of a statute the administration had opposed. The August 23 memorandum is entitled to no deference at all under *Skidmore*. Rehearing should be granted to correct this error.

II. THE COURT OVERLOOKED THREE OF THE MOST DIRECTLY RELEVANT PORTIONS OF LEGISLATIVE HISTORY IN FINDING NO CLEAR CONGRESSIONAL INTENT IN SUBSECTION (k)(2).

The court's application of Chevron deference in this case was based on its conclusion that the language and legislative history of subsection (k)(2) do not "answer the question of what type of evidence the agency is to use in making a 'known to be nesting' determination." Slip op. at 6955.

In reaching this conclusion, the court overlooked (at least as far as the opinion reveals) three of the most relevant pieces of legislative history that bear on this issue.²

A. The author's authoritative explanation of the statute.

The court completely overlooked the most important piece of legislative history: the explanation of subsection (k)(2) by its author, Senator Gorton of Washington, on the floor of the Senate immediately before the Senate passed the final bill. The remarks of the sponsor of a bill "are particularly valuable in determining the meaning of [the bill]" and provide "an authoritative guide to the statute's construction." *Rice v. Rehner*, 463 U.S. 713, 728 (1983). "[A] statement of one of the legisla-

² NFRC presented these points at pages 38-42 of its opposition brief, but the June 14 opinion does not address any of the points.

C:\ATTY\N01-9506\1RB91207.1MD

11

tion's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Church of Scientology v. U.S. Department of Justice*, 612 F.2d 417, 424 n.13 (9th Cir. 1979).

On the floor of the Senate, Senator Gorton spoke directly to the issue in this appeal:

Roughly 300 mbf of timber sales have been held up due to agency gridlock over the marbled murrelet. The administration asked the House and Senate to include in (k) (2) its definition of "occupancy." That change in Subsection (k) (2) of the Emergency Salvage Timber provision would undermine the ability to move these sales forward. That suggestion was soundly rejected by the House and Senate authors of the provision.

141 Cong. Rec. S10463-64 (daily ed. July 21, 1995), SER 32, Exhibit 14. Senator Gorton's statement that the administration's "definition of 'occupancy'" had been "soundly rejected" by Congress in subsection (k) (2) completely discredits the August 23 memorandum's use of that "definition of occupancy" as the interpretation of subsection (k) (2).

B. The subsequent Senate Report endorsing the district court's decision.

The court also evidently overlooked the Senate's recent explicit endorsement of the district court's interpretation of subsection (k) (2). On March 19, 1996 the Senate approved, by a vote of 79-21, Senate Report 104-236 on S. 1594, Making Omnibus Consolidated Rescissions And Appropriations For the Fiscal Year Ending September 30, 1996 And For Other Purposes. 142 Cong.

Rec. S2309 (daily ed. March 19, 1996). The Senate Report approved the district court rulings in this case:

SEC 325. . . . The Committee agrees with the interpretations of section 2001(k) made by the Federal district court in Oregon on September 13, 1995, December 5, 1995 and January 17, 1996, and agrees with that court's January 19, 1996 ruling insofar as it determined that the administration's interpretation of subsection (k)(2) was in error.

S. Rep. 104-236 at 46 (emphasis added). The January 19, 1996 order approved in the Senate report is the subject of this appeal. The appropriations bill to which the Senate Report was attached was ultimately signed into law, although without the amendment to section (k) originally included in the Senate bill.

This court has previously held that a subsequent conference report approving a district court interpretation of a statute "provide[s] some evidence of Congress's earlier intent." *Edwards v. Bowen*, 785 F.2d 1440, 1442 (9th Cir. 1986). This court routinely considers such post-enactment history in searching for congressional intent. *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 808 (9th Cir. 1989) (subsequent legislative history is "entitled to some weight" and "cannot be disregarded"); *Morgan Guar. Trust Co. v. American Sav. and Loan*, 804 F.2d 1487, 1492 (9th Cir. 1986), cert. denied, 482 U.S. 929 (1987) ("[a]lthough such subsequent legislative history is not conclusive, we are entitled to give it weight when the meaning of the statute and original congres-

sional intent are in doubt"); *Montana Wilderness Association v. U.S. Forest Service*, 655 F.2d 951, 957 (9th Cir. 1981) (subsequent conference report was "decisive"), cert. denied, 455 U.S. 989 (1982); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of subsequent Congress shortly after enactment of statute entitled to "significant weight").

C. The Senate's vote against repeal of subsection (k).

The court also overlooked the Senate's vote against repeal of subsection (k), by a vote of 54-42, following a debate in which the district court's rulings were extensively discussed. 142 Cong. Rec. S2005-28 (daily ed. March 14, 1996).

The Senate's vote against repeal is a clear indication that Congress approved the district court's interpretation of the statute which this court overturned. When, as here, a judicial or administrative interpretation of a statute has been the subject of intense debate and scrutiny in Congress, Congress' refusal to overrule the interpretation shows its approval. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 137 (1985); *Lewis v. United States*, 663 F.2d 889, 891 (9th Cir. 1981) (Congress' failure to amend statute after Supreme Court decision shows approval of decision), cert. denied, 457 U.S. 1133 (1982).

III. THE COURT CREATED A CONFLICT WITH THE PANEL DECISION IN THE PRIOR APPEAL IN THIS CASE BY DISREGARDING A PIECE OF LEGISLATIVE HISTORY THAT THE PRIOR PANEL HAD EXPRESSLY RECOGNIZED AS RELEVANT.

The court disapproved the district court's consideration of a fourth piece of legislative history bearing on this appeal -- a July 27, 1995 letter from six committee chairman to the Secretaries of Agriculture and Interior written on the day the Rescissions Act was signed into law by the President. Slip op. at 6955. The letter addressed the issue in this appeal:

. . . [W]e refused to agree that evidence of occupancy would qualify a timber sale as "known to be nesting" under subsection (k)(2). The legislative history is explicit on this point.

To the contrary, we intended the requirement that a threatened or endangered bird be "known" to be nesting to require actual direct evidence of nesting, and does not allow an inferential conclusion from possible occupancy. Actual direct evidence would be observation of an active nest, fecal ring or eggshell fragments.

Letter to Secretary Dan Glickman and Secretary Bruce Babbitt from Senators Frank Murkowski, Larry Craig and Slade Gorton and Representatives Don Young, Charles Taylor and Pat Roberts (July 27, 1995), SER 32, Exhibit 4. The court held that the letter should be given no weight.

In the first appeal in this case, the court identified this same letter as a "piece of legislative history relevant to Section 2001(k)(1)." Slip op. 6467. The prior court considered

C:\ATTY\N01-9506\1RB91207.1MD

15

the letter, giving it reduced weight based on "the principle that post-enactment legislative history merits less weight than contemporaneous legislative history." Slip op. 6468. Yet this court faulted the district court for applying that very doctrine to the July 27 letter. Rehearing is required to bring this court's decision in line with the precedent established in the prior appeal.³

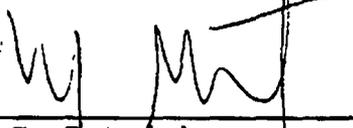
CONCLUSION

Rehearing should be granted. En banc rehearing is appropriate to resolve the conflict between this decision and precedents of the Seventh, Tenth, First and Federal circuits, and to resolve the conflict between this decision and existing precedents of this circuit. On rehearing the decision of the district court should be affirmed.

Dated this 25th day of June, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: _____


Mark C. Rutzick
Attorney for Plaintiff-
Appellee Northwest Forest
Resource Council

³ NFRC also seeks en banc rehearing of the court's rulings on subsection (k) (1) based on the court's failure to give the phrase "notwithstanding any other provision of law" its plain meaning, and based on the importance of the issues.

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
APPELLATE SECTION
WASHINGTON, D.C. 20530
FAX NUMBER (202) 514-4240

DATE: June 24, 1996

FROM: Albert Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 6 pages

PLEASE DELIVER TO: Bob Baum 208-3877
David Gayer (please deliver to FWS)
Dinah Bear 456-0753
Mike Gippert, 690-2730
Jay McWhirter
Tim Obst (please deliver to FS)
Jeff Handy (503) 326-3807
Gerry Jackson 208-6916
Elena Kagan 456-1647
Don Knowles (503) 326-6282
Jim Sutherland(503) 465-6582
Karen Mouritsen 219-1792
Kris Clark (please deliver to BLM)
Roger Nesbit (503) 231-2166
Diane Hoobler
Chris Nolin 395-4941
Jason Patlis (301) 713-0658
Tom Tuchmann (503) 326-6254

MESSAGE:

Attached is a copy of a motion for clarification filed by SCLDF. The motion seeks to include other sales within the court's "void ab initio" analysis. We argued, and the court agreed, that the Cowboy, Nita, South Nita and Garden sales were void ab initio because a court had found the sales to be in violation of the sales' authorizing statute (for those 4 sales, the authorizing statute was Section 318). SCLDF seeks to extend the court's decision to include First, Last, Tip, Tiptop, and Gaterson. We are not obligated to respond. Any response must be filed by July 1, 1996.

Al Ferlo

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35106 & 96-35123

PILCHUCK AUDUBON SOCIETY, et al,
Plaintiffs-Appellants,
v.
DAN GLICKMAN, in his official capacity as Secretary of
Agriculture, et al.,
Defendants-Appellants,
and
NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, et al.,
Defendant-Intervenors-Appellees.

Nos. 96-35107 & 96-35132

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon Corporation,
Plaintiff-Appellee,
v.
DAN GLICKMAN, in his official capacity as Secretary of
Agriculture, et al.,
Defendants-Appellants,
and
OREGON NATURAL RESOURCES COUNCIL, INC., et al.,
Defendant-Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
Civ. Nos. 95-6244-MRH, 95-6384-MRH,
& 95-6267-MRH

MOTION FOR CLARIFICATION

PATTI A. GOLDMAN (WSB# 24426)
KRISTEN L. BOYLES (WSB# 23806)
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104
(206) 343-7340

Attorneys for Pilchuck Audubon Society

INTRODUCTION

Pilchuck Audubon Society et al. (collectively "Pilchuck Audubon") respectfully requests clarification of a portion of the Court's opinion in Northwest Forest Resource Council v. Glickman, Nos. 96-35106, 96-35107, 96-35123, 96-35132 (9th Cir. June 14, 1996).^{1/} In particular, Pilchuck Audubon seeks clarification of the section of the opinion that discusses timber sales which were never validly offered. Although the Court's analysis of timber sales which are "void ab initio" covers a larger group of sales, the Court only named four specific timber sales. Because the four named timber sales are not the only timber sales that were never validly offered, there is a gap between the Court's analysis and its holding. In order to prevent confusion and further litigation over a point the Court has already considered, Pilchuck Audubon respectfully requests that the Court clarify its opinion to indicate that any and all timber sales that were invalidly offered are not covered by § 2001(k)(1).

CLARIFICATION IS NECESSARY BECAUSE
THE COURT'S ANALYSIS IS BROADER THAN
THE FOUR TIMBER SALES SPECIFICALLY MENTIONED.

In its review of § 2001(k)(1) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 240 (1995), this Court analyzed the statutory language concerning timber sale offers. See slip op. at 6950. The Court concluded that § 2001(k)(1) covered all timber sales where bids were opened at auction. Id.

^{1/} Circuit Judges Goodwin and Schroeder and District Judge Armstrong heard this case.

However, the Court also concluded that the offers at issue had to be valid offers:

This does not require the release of timber sales under § 2001(k)(1) which were never validly offered. The Secretaries argue that four sales enjoined by the Western District of Washington for violations of § 318 (Cowboy, Nita, South Nita and Garden) are "void ab initio" because there never was a valid offer under § 318. Nothing in § 2001(k)(1) makes a valid sale out of a sale which was not valid under its authorizing statute. If, for example, agency employees made a mistake and offered timber that was not authorized by statute for harvest, § 2001(k)(1) does not validate that mistake.

Id. (emphasis added). It is important to note that this analysis does not hinge on any action by a court or administrative body. According to this Court, any timber sale that was invalidly offered is not revived by § 2001(k)(1).

In the next paragraph the Court states that:

The record before us indicates the four sales at issue here were enjoined for violations of their authorizing statute, and were therefore never validly offered within the meaning of § 2001(k)(1). These four sales are void ab initio, and are not revived by § 2001(k)(1).

Id. While this holding is correct, it is also incomplete. Several other sales at issue in this case were never validly offered and are also not revived by § 2001(k)(1). Pilchuck Audubon asks the Court to clarify its ruling in order to include all timber sales that were "void ab initio."

At a minimum, the list of "void ab initio" timber sales includes the First and Last timber sales on the Umpqua National Forest, see Pilchuck Audubon Opening Brief at 10, the Gatorson timber sale on the Colville National Forest, see id. at 12, and the Tip and Tiptop timber sales on the Wenatchee National Forest,

see id. at 13. These sales, and perhaps yet-to-be identified others, were all invalid when originally offered. Because these sales are in the same legal position as Cowboy, Nita, South Nita, and Garden, § 2001(k)(1) cannot "validate that mistake." Slip op. at 6950.

The First and Last timber sales contained the same violations of § 318 as did the four named timber sales -- the only difference being that the Forest Service cancelled First and Last before the district court considered injunctive motions. However, it was not the district court ruling that made Cowboy, Nita, South Nita, and Garden "void ab initio," see slip op. at 6950, it was the fact that they violated § 318 -- the authorizing statute. The same reasoning must also apply to First and Last.^{2/}

The Gatorson, Tip, and Tiptop timber sales were all found to violate the National Environmental Policy Act ("NEPA").^{3/} For these sales, "agency employees made a mistake and offered timber that was not authorized by statute for harvest." Slip op. at 6950. Like the four named sales, they are "void ab initio."

This result is required by the Court's ruling with respect to the Cowboy, Nita, South Nita, and Garden timber sales. Those

^{2/} The First and Last timber sales are not now being logged because they were swapped for other timber sales in an agreement between the purchaser and the federal government. However, since First and Last should never have been revived by § 2001(k)(1) in the first place, the exchange should not have occurred and need not be completed. Clarification of the Court's ruling will help the parties decide the future of the timber substituted for the First and Last timber sales.

^{3/} The courts found that Gatorson, Tip, and Tiptop violated NEPA while the Forest Service itself (as a result of administrative appeals) has found that other sales violated NEPA and/or other federal statutes.

four sales violated § 318. See slip op. at 6950. As the Supreme Court noted in Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407 (1992), § 318 temporarily replaced the legal standards of NEPA, the National Forest Management Act, and the Migratory Bird Treaty Act. Id. at 1413. If a violation of § 318, the temporary substitute for these statutes, renders an offer "void ab initio," then so too must a violation of the underlying statutes for which § 318 was a substitute.

The Forest Service and BLM derive their authority to proceed with timber sales from an array of statutes and implementing regulations. See, e.g. 16 U.S.C. § 472a; 16 U.S.C. § 528 et seq.; 16 U.S.C. § 1600 et seq. Under these laws, the agencies cannot simply sell timber anywhere without regard to the consequences; instead, the authorizing statutes require that the agencies comply with other applicable laws. See 16 U.S.C. § 472a(a) (timber sales shall be designed consistent with 16 U.S.C. § 1604); 16 U.S.C. § 1604(g) (land management plans must be prepared in accordance with NEPA); 36 C.F.R. § 223.30 (timber sales must be consistent with land management plans and environmental quality standards).

Failure of a contracting officer to comply with statutory or regulatory requirements renders an offer invalid. "To permit otherwise would be to nullify those very statutes, regulations, and determinations -- a result clearly contrary to the public interest." United States v. Amdahl Corp., 786 F.2d 387, 392 (Fed. Cir. 1986). See also Alabama Rural Fire Ins. Co. v. United States, 572 F.2d 727, 732-33 (Ct. Cl. 1978) (illegality prevents

enforceable agreement from arising and nullifies contract award).

In this respect, the Gatorson, Tip, and Tiptop timber sales are in the same posture as the four named sales. Absent compliance with NEPA, these sales were never validly offered.⁴ Any other holding would make it legal to offer a sale in an illegal manner.

CONCLUSION

For the reasons stated above, Pilchuck Audubon respectfully asks that the Court clarify that any sale that was never validly offered -- including sales that were "void ab initio" through a violation of an underlying environmental law -- cannot be revived by § 2001(k)(1).

DATED this 20th day of June, 1996.

Respectfully submitted,


PATTI A. GOLDMAN (WSB# 24426)
KRISTEN L. BOYLES (WSB# 23806)
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104
(206) 343-7340

Attorneys for Pilchuck Audubon Society

506CLARI.MOT

4/ See also Friends of the Earth v. Hall, 693 F. Supp. 904 (W.D. Wash. 1988) (holding Clean Water Act § 404 permit issued in reliance on an inadequate EIS invalid and concluding further that "no [§ 404] permit exists." Id. at 914-15.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE
COUNCIL, an Oregon corporation;
SCOTT TIMBER CO.,
Plaintiffs-Appellees,

v.

PILCHUCK AUDUBON SOCIETY;
OREGON NATURAL RESOURCES
CENTER; PORTLAND AUDUBON
SOCIETY; BLACK HILLS AUDUBON
SOCIETY; WESTERN ANCIENT FOREST
CAMPAIGN; HEADWATERS; COAST
RANGE ASSOCIATION; FRIENDS OF
ELK RIVER; WASHINGTON
ENVIRONMENTAL COUNCIL; SEATTLE
AUDUBON SOCIETY,
Intervenors-Appellants,

No. 96-35106
D.C. No.
CV-95-06244-MRH

OPINION

v.

DAN GLICKMAN, et al.,
Defendants,

v.

WESTERN TIMBER COMPANY;
VAAGEN BROTHERS LUMBER, INC.,
Plaintiffs-Intervenors-Appellees.

Filed June 14, 1996

Before: Alfred T. Goodwin and Mary M. Schroeder,
Circuit Judges, and Sandra Brown Armstrong,
District Judge.**

Opinion by Judge Goodwin

SUMMARY

COUNSEL

Patti A. Goldman, Sierra Club Legal Defense Fund, Seattle, Washington, for Oregon Natural Resources Council and Pilchuck Audubon Society, et al.

Albert M. Ferlo, Jr., United States Department of Justice, Washington, D.C., for the federal government.

Mark C. Rutzick, Portland, Oregon, for Northwest Forest Resource Council.

Scott W. Horngren, Haglund & Kirtley, Portland, Oregon, for Scott Timber Co., Vaagen Bros. Lumber, Inc.

OPINION

GOODWIN, Circuit Judge:

This is a consolidated appeal of two separate injunctions releasing government timber for sale pursuant to S 2001(k) (1) and (2) of the 1995 Supplemental Appropriations for Disaster Assistance and Rescissions Act. Pub. L. No. 104-19, S 2001(k), 109 Stat. 194, 240-47. The first order, dated January 10, 1996, rejected a challenge to the constitutionality of the statute and found that certain timber sales were covered by S 2001(k) (1) and ordered their immediate release.

The second order, issued January 19, 1996, was stayed by this court pending appeal. That order rejected the Forest Service and Bureau of Land Management's implementation of S 2001(k) (2), using a scientific protocol, as not in compliance

with the statute's language which exempts certain timber sales where endangered and threatened birds are "known to be nesting."

We affirm the district court's determination that the statute is constitutional, and the determination that the statute applies to timber sales previously enjoined or cancelled before the passage of S 2001(k) (1).

We reverse the district court's order holding that timber sales offered in violation of S 318 fall within the scope of S 2001(k) (1). We reverse the order holding, with respect to certain specific sales, that the statute requires the "previously offered sales" to be offered to all original bidders. We also reverse the district court's determination that the agencies' use of the PSG protocol for determining when marbled murrelets are "known to be nesting" is inconsistent with the plain language of the statute.

I. Factual and Procedural History .

On July 27, 1995, the President signed the 1995 Rescissions Act. Section 2001 of the Act sets out an emergency salvage timber program which directs the Secretaries of Agriculture and Interior (Secretaries) to expedite the award of timber harvesting contracts on federal lands in three ways. Section 2001(b) establishes expedited procedures for the release of "salvage" timber sales on a nationwide basis. Section 2001(d) directs the Secretaries to award timber sales on Federal lands described in a specific Record of Decision under The Northwest Forest Plan. Section 2001(k) requires the release and harvesting of certain timber sales which Congress had previously authorized in the Northwest Timber Compromise of 1989, also known as S 318. The background and constitutionality of S 318 are discussed in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).

Section 2001(k) is the only section of the Rescissions Act at issue in this appeal:

(1) AWARD AND RELEASE REQUIRED

Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sales contracts offered before that date [July 27, 1995] in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121. The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary to comply with this paragraph.

(2) THREATENED OR ENDANGERED BIRD SPECIES

No sale unit shall be released or completed under this subsection if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.

(3) ALTERNATIVE OFFER IN CASE OF DELAY

If for any reason a sale cannot be released and completed under the terms of this subsection within 45 days after the date of the enactment of this Act, the Secretary concerned shall provide the purchaser an equal volume of timber, of like kind and value, which shall be subject to the terms of the original contract and shall not count against current allowable sale quantities.

Section 2001(k), Pub. L. No. 104-19, 109 Stat. 194, 240-47.

In an earlier case under S 2001(k)(1) this court held that the section covers timber sales offered by either the Forest Ser-

vice (FS) or Bureau of Land Management (BLM) in any national forest in Washington and Oregon and any of the six BLM districts in western Oregon between the effective date of S 318 and the effective date of S 2001(k). NFRC v. Glickman, 1996 WL 194826 (9th Cir. 1996).

In the cases presently before this court the district court determined that S 2001(k) (1) applied to sales cancelled prior to July 27, 1995 as a result of legal challenges and to sales cancelled because of the high bidder's inability or unwillingness to proceed with the sale. The Secretaries of Interior and Agriculture, timber industry representatives and several environmental organizations (Pilchuck) appeal.

II. Section 2001(k) (1)

Three separate issues concerning S 2001(k) (1) were before the district court. Appellants argued: 1) the statute is unconstitutional, 2) the statute does not apply to timber sales previously enjoined or cancelled before the passage of 2001(k) (1), and 3) the statute requires only that the "previously offered sales" be offered to the original high bidder.

A. Constitutionality of the Statute

[1] Pilchuck's argument that S 2001(k) (1) violates separation of powers by permitting Congress to resurrect sales that had been enjoined by federal courts was answered by the Supreme Court in *Seattle Audubon Soc. v. Robertson*, 503 U.S. 429 (1992). Separation of powers is violated where 1) Congress has impermissibly directed certain findings in pending litigation, and 2) did not change any underlying law. *Id.* The district court applied *Seattle Audubon v. Robertson* and correctly determined that the S 2001(k) (1) is constitutional.

B. Previously enjoined or cancelled sales

[2] Because S 2001(k) is constitutional, we must review whether all sales "offered" since the effective date of S 318

are included under the mandate of S 2001(k)(1), as held by the district court. The use of the word "offered" in S 2001(k)(1) means any timber sale where the bids are opened at auction. This language does not exclude cancelled or enjoined sales from S 2001(k)(1) because the bids would have been opened before the cancellation or injunction occurred. The Secretaries concede that opening the bids constitutes an "offer" of a timber sale. This is a reasonable interpretation of "offer" in the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Taking the above definition of "offered," the plain language of "all timber sale contracts offered" mandates the conclusion of the district court. To exclude enjoined, cancelled or withdrawn sales would permit an implied exception which does not exist.

This does not require the release of timber sales under S 2001(k)(1) which were never validly offered. The Secretaries argue that four sales enjoined by the Western District of Washington for violations of S 318 (Cowboy, Nita, South Nita and Garden) are "void ab initio" because there never was a valid offer under S 318. Nothing in S 2001(k)(1) makes a valid sale out of sale which was not valid under its authorizing statute. If, for example, agency employees made a mistake and offered timber that was not authorized by statute for harvest, S 2001(k)(1) does not validate that mistake.

[3] The record before us indicates the four sales at issue here were enjoined for violations of their authorizing statute, and were therefore never validly offered within the meaning of S 2001(k)(1). These four sales are void ab initio, and are not revived by S 2001(k)(1).

C. Award of Timber Sales to other than the High Bidder

[4] On September 13, 1995, the district court issued an order requiring the release of all sales offered in the region

defined by S 318. The Secretaries proceeded to offer the sales to previously identified high bidders. In cases where the high bidders were unwilling, unable or unqualified to take advantage of the renewed offer, the Secretaries determined that nothing in S 2001(k)(1) required them to seek out unsuccessful bidders and release the sales to these unsuccessful bidders.

Timber industry representatives have challenged this interpretation of S 2001(k)(1) in these combined cases. The district court held that the statute requires the Secretaries to release failed sales to other bidders where no high bidder is available. The district court found that any regulations that obstruct the statutory objectives of S 2001(k)(1) are preempted, including the regulations which permit the Secretaries to reject unqualified bidders. The district court noted that "[r]egulations which give the agency discretion not to try and award an offered sale to other bidders would frustrate section 2001(k)(1)'s objectives."

[5] The Forest Service and BLM each have extensive statutes and regulations which govern timber sales. The Forest Service is governed by the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 472a et seq and regulations found in 36 C.F.R. part 223. BLM is governed by 43 U.S.C. 1181a, 1700 et seq and 43 C.F.R. part 5000. Under both agencies' regulations, the agency retains the discretion to award or refuse to award a sale where the high bidder is ineligible.

In order to find that S 2001(k)(1) preempts the regulatory authority of the Secretaries, we must find that the two acts are in "irreconcilable conflict, [so that] the later act to the extent

of the conflict constitutes an implied repeal of the earlier one." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1970). Such an implied repeal must be based on "clear and manifest" intent. *Id.* Implied repeals are not favored by the courts "and will only be found when the new statute is clearly repugnant, in words or purpose, to the old statute . . ."
Grindstone Butte Project v. Kleppe, 638 F.2d 100, 102 (9th

Cir. 1981), cert. denied, 454 U.S. 965 (1981) (internal quote omitted). An implied repeal is especially disfavored when the claimed repeal relies on an appropriations act. *TVA v. Hill*, 437 U.S. 153, 190 (1978).

The Secretaries argue there is no irreconcilable conflict between S 2001(k)(1) and the contract authorities established under the agencies' organic acts which require the FS and BLM to take no further action on timber sales beyond an award to the successful high bidder. The district court simply concluded that the "notwithstanding" language preempts all regulations that "obstruct the subsequent statute's objectives." That conclusion goes too far.

The district court did not determine whether the repeal of the contract authority of the Secretaries was to the "minimum extent necessary" to serve a "clear and manifest demonstration of legislative intent." The "notwithstanding" clause is not necessarily preemptive. *E.P. Paup Co. v. Director*, 999 F.2d 1341, 1348 (9th Cir. 1993) (finding that "notwithstanding any other provision of law" is not necessarily preemptive where legislative history reveals no intent to preempt).

[6] Section 2001(k)(1) requires the agencies to "act to award, release, and permit to be completed" all timber sales offered prior to the Act's enactment. The statute is silent on the question of to whom the award must be made. The purpose of the section is to release S 318 timber sales held up by "subsequent environmental actions." Remarks of Senator Gorton, 141 Cong. Rec. 4875 (March 30, 1995). Congress was also concerned about the liability involved in contract cancellation. H. Rep. 104-71 at 15 (Mar. 8, 1995) ("release of these sales will remove tens of millions of dollars of liability from the government for contract cancellation"). Nothing in the language of S 2001(k)(1), however, implies the preemption of the existing regulations governing the award of contracts, or the duty of the Secretaries to protect government

property by requiring successful bidders to meet standard qualifications.

[7] 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. See *In re Glacier Bay*, 944 F.2d at 582 (finding the phrase "notwithstanding any other provision of law" is not dispositive where other laws are included by reference). The agencies have regulations which tell them what these words mean and how to form such contracts.

[8] Section 2001(k)(1) is not clearly repugnant, in words or purpose, to the contract regulations established under the agencies' organic acts. Indeed, S 2001(k)(1) incorporates the original contract terms and requires the Secretaries to look to their regulations in making the awards. As there is no irreconcilable conflict S 2001(k)(1) does not preempt the Secretaries' regulations governing the award of timber sales, regulations which grant the Secretaries discretion in deciding whether to make awards to entities other than the high bidders.

III. Section 2001(k)(2) "Known to be Nesting"

[9] The California, Washington and Oregon populations of marbled murrelets were added to the federal list of threatened species on Oct. 1, 1992. Following this listing, the Forest Service initiated consultation under the ESA with the Fish and Wildlife Service (FWS) regarding the effect of the remaining S 318 sales on marbled murrelets. Of the 7.3 billion board feet of timber sold by the FS under S 318, approximately 250 million board feet were affected by the murrelet consultation.

[10] The Forest Service concluded further logging of 77 of the sales would jeopardize continued existence of murrelets. The FS premised this determination on application of the

"PSG Protocol." The PSG Protocol is designed to detect presence or probable absence of murrelets in a forest stand. Federal agencies, research institutions and private industry developed this protocol because the behavior of marbled murrelets makes it difficult for human observers to locate actual murrelet nests.¹ This protocol is "the generally accepted scientific methodology employed to determine whether marbled murrelets are located in, or making use of, a particular inland forested site for nesting purposes." *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1350-51 n. 15 (N.D. Cal. 1995). In developing the protocol, the biologists analyzed various types of murrelet behavior to distinguish nesting and breeding activities from mere presence in a particular stand of trees. Nesting and breeding activities are classified as "occupancy" under the protocol.

Section 2001(k), as originally passed by the House, mandated the release of all remaining S 318 sales without exception. Section 2001(k)(2) was added by the Senate. There were no committee hearings. The PSG protocol was never mentioned, and Congress took no scientific testimony. Congress gave the agencies no additional guidance beyond the phrase "known to be nesting within the acreage that is the subject of the sale unit" to determine which timber sales were to be exempted from S 2001(k)(1) and compensated for under S 2001(k)(3).

If a statute is ambiguous, or unclear, the legislative history can be examined to see if it expresses the intent of Congress. The legislative history of S 2001(k) is cited extensively by the district court and the parties. It is not particularly helpful, due in part to the fact that this bill was an appropriations act rider

and was not reviewed by a committee. There are floor statements on the bill in the Senate, and a conference report. There

¹ The authors of the protocol were appointed by the Pacific Seabird Group (PSG), a professional scientific organization which takes a lead role in coordinating and promoting research on marbled murrelets.

are also post-enactment statements and statements made during debate on the failed "Murray Amendment." ² This legislative history does not answer the question of what type of evidence the agency is to use in making a "known to be nesting" determination.

Relying on a footnote from *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1086 n. 10 (9th Cir. 1986), the district court incorrectly concluded that a post-enactment letter from six members of Congress cannot be ignored. The letter stated that S 2001(k)(2) is much more narrow than the PSG definition of "occupied." In *Religious Technology* the history at issue was a floor statement made in the Senate on similar legislation the following term. A letter from a handful of Senators and Representatives after enactment cannot substitute for legislative history. "Material not available to the lawmakers is not considered, in the normal course, to be legislative history." *Gustafson v. Alloyd Co.*, 115 S.Ct. 1061, 1071 (1995).

The Secretaries attempted to apply the "known to be nesting" standard using the PSG Protocol and the survey data collected under the protocol. The Secretaries believe that the protocol is consistent with the requirements of S 2001(k)(2) and the only prudent means to determine the presence of nesting murrelets. Scott Timber Company and Northwest Forest Resource Council challenge the Secretaries interpretation of S 2001(k)(2). They argue for an interpretation that would allow a determination of "nesting" only if there is physical evidence such as eggshell fragments, fecal rings or dead chicks present on or below a tree.

The district court rejected both interpretations of S 2001(k)(2) and formulated its own. The court found that the PSG protocol was "inconsistent" with the plain language of

² The so-called Murray Amendment was offered by Senator Murray of Washington on March 30, 1995. 141 Congressional Record S4869.

S 2001(k)(2) to the extent that it "permits nesting determination to be based on circling, calling, or other evidence that cannot be located within the acreage that is the subject of the sale unit."

[11] While rejecting the Secretaries' interpretation of the PSG protocol, the district court also found that the statute "does not specify the evidence necessary to sustain a 'known to be nesting determination.'" The district court was correct in its determination that the "known to be nesting" language is unclear. Known to whom? is a reasonable question. Congress gave no answer.

[12] The district court was also correct in observing that the legislative history fails to address what "known to be nesting" means. The district court erred, however, in failing to defer, in the face of uncertainty, to the Secretaries' interpretation, and in substituting its own judgment on a question requiring highly specialized or scientific expertise.³

The plain language of S 2001(k)(2) does not require a "nest" to be found before this section would apply to a timber sale. Rather the statute uses the phrase "known to be nesting" which encompasses a range of activity associated with nesting. It is exactly this type of legislation, aimed at administrative agencies of government, for which Chevron requires

³ The district court acknowledged its obligation under the Chevron doctrine, but then gave no deference to the protocol, relying instead on the post-enactment letter and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

The district court's reliance on *Bowen* is misplaced. In *Bowen*, the court declined to give any deference to a statutory interpretation espoused by the agency's counsel that the agency had not implemented. The Supreme Court said that despite this novel interpretation of deference, the court has "never applied the principle of . . . [Chevron] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen*, 488 U.S. at 212. The PSG protocol is more than an agency litigating position.

deference to agency biologists' expertise. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (when a statute is unclear or ambiguous, the district court is required to defer to the agencies' interpretation of the statute, so long as it is "based on a permissible construction of the statute"). The power of the Secretaries to administer the Congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Id.* at 843 citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Under the PSG Protocol, the Secretaries consider "occupied" behavior to be synonymous with actual nesting due in part to the particular behavior of this species of bird. According to agency biologists, a determination that a particular stand of trees is a nesting stand is based on a statistical analysis of the number and character of murrelet detections in a particular tree stand. The types of evidence include: (1) detection of an active nest or recent nest by a fecal ring or eggshell fragments; (2) the more readily observed activity of birds flying in, out or through the canopy; or (3) birds circling directly over or under the canopy. Detection of a murrelet flying overhead across a tree stand is not considered to be a behavior indicating nesting or breeding in that stand. Further investigation to locate a nest is not required under the protocol or Forest Service policy, and has not been pursued in the timber sales at issue in this case.

For the past five years, the FS, the FWS and independent scientists have accepted the "occupancy" determination under the PSG protocol as the criterion for establishing nesting use of forested stands. *Marbled Murrelet v. Pacific Lumber Co.*, 880 F.Supp. at 1350-51 n.15. Evidence in the record indicates that the determinations under the protocol are 95-100% accurate in predicting nesting behavior. According to the agencies' experts, there is no other reliable scientifically accepted and tested method for identifying nest stands.

After passage of S 2001(k)(2), the Secretaries issued direction regarding implementation of the section. Survey data collected pursuant to the protocol was considered the best available scientific information upon which to base a determination of whether murrelets were known to nesting in a sale unit. The agencies then issued determinations under S 2001(k)(2).

The question we must answer is not whether Congress intended to adopt the PSG protocol, but whether, in the absence of clear statutory language, the Secretaries' use of an "occupancy" determination under the PSG protocol is a reasonable interpretation of the statute's requirement that threatened or endangered birds are "known to be nesting" within the boundaries of a sale unit. Agency experts have concluded that, with respect to marbled murrelets, "nesting" is "completely synonymous" with a finding that a sale unit is occupied.

The PSG protocol was not adopted by the agencies as a formal regulation pursuant to the Administrative Procedures Act. However, the agencies had been applying the PSG protocol at least from the time marbled murrelets were listed in 1992. Their biologists had participated in the development of the protocol, and the record supports the conclusion that the agencies had endorsed and applied the protocol to nesting determinations.

The Secretaries' interpretation may be rejected only if it is contrary to clear congressional intent and frustrates the purpose of S 2001(k)(2). If the statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

[13] The court must defer to the Secretaries' interpretation if it "is a permissible and reasonable one even if it is not the best one or the one this court might choose in the absence of

a prior administrative interpretation." *Almero v. INS*, 18 F.3d 758 (9th Cir. 1994) (Judge Rymer dissenting) citing *U.S. v. 313.34 Acres of Land*, 923 F.2d 698, 701 (9th Cir. 1991). The location and determination of what birds are doing in which location is the type of program that has to be designed and implemented by agency experts unless there is clear Congressional intent to the contrary.

[14] Congress gave the agencies 45 days to award the timber sales. It seems implausible that Congress intended the Secretaries to create and implement a new system for determining whether threatened and endangered birds were "known to be nesting" within a given sale unit within that time period. Rather, the Senate added S 2001(k)(3) which allows for the provision of alternative timber where a specific sale is prohibited by S 2001(k)(2). Given the language of the statute and time-frame for implementation, the Secretaries' resort to a natural-history protocol which predated the current controversy in making nesting determinations under S 2001(k)(2) is a reasonable interpretation of the statute.

IV. Conclusion

The district court's determination that the statute is constitutional is **AFFIRMED**. The district court's determination that the statute applies to timber sales previously enjoined or cancelled before the passage of 2001(k)(1) is **AFFIRMED**. The district court's determination that timber sales offered in violation of their authorizing statutes are within the scope of S 2001(k)(1) is **REVERSED**. The district court's determination that the statute requires the "previously offered sales" be offered to all previous bidders is **REVERSED**. The district court's determination that the Secretaries' use of the PSG protocol for determining when marbled murrelets are "known to be nesting" violates the statute is **REVERSED**.

**NO PARTY TO RECOVER COSTS OR ATTORNEY
FEES ON APPEAL**

6959

the end

1 KRISTINE OLSON
 2 United States Attorney
 JAMES L. SUTHERLAND
 3 Assistant United States Attorney
 701 High Street
 4 Eugene, OR 97401
 (541) 465-6771
 5 LOIS J. SCHIFFER
 Assistant Attorney General
 6 MICHELLE L. GILBERT
 JEAN WILLIAMS
 7 EDWARD A. BOLING
 U.S. Department of Justice
 8 Environment and Natural Resources Division
 P.O. Box 663
 9 Washington, D.C. 20044-0663
 Telephone: (202) 305-0460

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

13	NORTHWEST FOREST RESOURCE COUNCIL,)	
	Plaintiff,)	
14	)	Civil No. 95-6244-HO
	v.)	(lead case)
15	)	Civil No. 95-6267-HO
	)	(consolidated case)
16)	
17	GLICKMAN and BABBITT,)	Defendants' Notice
	Defendants,)	of Filing of
	)	May 31, 1996
18	OREGON NAT. RES. COUNCIL, et al.)	Memorandum On
	Defendants-Intervenors)	Section 2001(k)(3)
19	)	Timber
)	

20
 21 Attached for filing is the May 31, 1996 Memorandum from
 22 James R. Lyons, Under Secretary, Natural Resources and
 23 Environment, United States Department of Agriculture, to Jack
 24 Ward Thomas, Chief of the Forest Service, clarifying the
 25 standards that apply to alternative timber to be provided under
 26 Section 2001(k)(3).

DEFENDANTS' NOTICE
 OF FILING

1 Dated this 3rd day of June, 1996.

2 Respectfully submitted,

3 KRISTINE OLSON
4 United States Attorney
5 JAMES L. SUTHERLAND
6 Assistant United States Attorney

7 LOIS J. SCHIFFER
8 Assistant Attorney General

9 

10 MICHELLE L. GILBERT
11 JEAN WILLIAMS
12 EDWARD BOLING
13 United States Department of Justice
14 Environment and Natural
15 Resources Division
16 General Litigation Section
17 P.O. Box 663
18 Washington, D.C. 20044-0663
19 (202) 305-0460

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
Office of the Solicitor
United States Department of the Interior
Washington, D.C.

DEFENDANTS' NOTICE
OF FILING



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

MEMORANDUM TO JACK WARD THOMAS, USDA FOREST SERVICE CHIEF

From: *(for)* James R. Lyons *Mark E. Gede*
Under Secretary
Natural Resources and Environment

31 MAY 1996

SUBJ: Alternative Timber Pursuant to P.L. 104-19, Section 2001(k)(3)

Alternative timber to be provided under 2001(k)(3) must accord with applicable environmental and natural resource laws, except for competitive bidding requirements. Use the process outlined in the May 10, 1996, declaration to the Court by Sterling Wilcox (copy enclosed). Any timber sales, or portions thereof, that are offered as alternative timber pursuant to section 2001(k)(3) must meet the standards and guidelines of the applicable forest plan, including the amendments under the Northwest Forest Plan.

As needed, alternative timber may include some volume from those sales currently prepared, or in preparation, under the Northwest Forest Plan. However, all timber offered as alternative timber under section 2001(k)(3) will be clearly differentiated from sales made under the probable sale quantity objective of the Northwest Forest Plan, and will not count against current allowable sale quantities.

Please immediately issue any necessary direction to the Regional Forester to clarify this issue.

Enclosure

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 RABBITT, 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

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.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 3, 1996 she caused one copy of the foregoing FEDERAL DEFENDANTS' NOTICE OF FILING OF MAY 31, 1996 MEMORANDUM ON 2001(K)(3) TIMBER to be served by first class mail upon the counsel of record hereinafter named:

MARK RUTZICK
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
Telephone: (503) 499-4572
Fax : (503) 295-0915

PATTI A. GOLDMAN
ADAM J. BERGER
KRISTEN L. BOYLES
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
Fax : (206) 343-1526

SCOTT HORNGREN
1800 One Main Place
101 S.W. Main St.
Portland, OR 97204
Telephone: (503) 225-0777
Fax: (503) 225-1257

MARIANNE DUGAN
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
Telephone: (503) 485-2471
Fax: (503) 485-2457



Michelle L. Gilbert

1 KRISTINE OLSON
 United States Attorney
 2 JAMES L. SUTHERLAND
 Assistant United States Attorney
 3 701 High Street
 Eugene, OR 97401
 4 (541) 465-6771

5 LOIS J. SCHIFFER
 Assistant Attorney General
 6 ELLEN M. ATHAS
 MICHELLE L. GILBERT
 7 TED BOLING
 U.S. Department of Justice
 8 Environment and Natural Resources Division
 P.O. Box 663
 9 Washington, D.C. 20044-0663
 Telephone: (202) 305-0460

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

13	NORTHWEST FOREST RESOURCE COUNCIL,)	
	Plaintiff,)	
14		Civil No. 95-6244-HO
	v.)	(lead case)
15		Civil No. 95-6267-HO
		(consolidated case)
16		
17	GLICKMAN and BABBITT,)	FEDERAL DEFENDANTS'
	Defendants,)	OPPOSITION TO
18	OREGON NAT. RES. COUNCIL, et al.)	NFRC'S MOTION TO
	Defendants-Intervenors)	COMPEL TIMBER AND
19		RESPONSE TO REPLY BRIEF
20		

21 Federal defendants oppose plaintiff Northwest Forest
 22 Resource Council's (NFRC's) motion for mandamus directing the
 23 Secretaries to release alternative timber under section
 24 2001(k)(3) as not properly before this Court, incorporating by
 25 reference the arguments made in defendants' May 10 opposition to
 26 plaintiff Scott Timber Company's motion to compel the release of

1 alternative timber. If the Court decides that there is no
2 jurisdiction to review the (k)(3) issues raised by NFRC, that
3 will conclude this inquiry. If, however, the Court decides
4 otherwise, federal defendants request consideration of this
5 memorandum which will focus on new arguments raised by NFRC's May
6 13 reply and not previously briefed by federal defendants.¹

7 Notwithstanding the absence of a complaint for relief under
8 subsection 2001(k)(3),² eight months after filing its original
9 complaint, NFRC has raised a number of complex and significant
10 new claims arguing for the abandonment of applicable laws in
11 connection with a wholly new set of timber sale units to be
12 provided under (k)(3). Contrary to NFRC's theory, the plain
13 language of section 2001(k) does not mandate that the Secretaries

15 ¹ As explained in the government's May 16 filing, federal
16 defendants did not have the opportunity to respond to NFRC's
17 motion and reply brief prior to the May 14 oral argument
originally set on Scott Timber's motion.

18 ² In response to the government's argument that the
19 numerous issues involving alternative timber under 2001(k)(3)
20 have not been presented by any complaint before this Court, NFRC
21 claims that its motion "relates to the existing third and fourth
22 claims for relief" NFRC's Reply Memo. at 2, note 2. By
23 those claims NFRC sought to compel the "award and release of the
24 murrelet sales" allegedly unlawfully withheld under section
25 2001(k)(2). NFRC's claims were decided by this Court's order
26 dated January 19, 1996 granting NFRC's motion for summary
judgment "as to its third and fourth claims for injunctive and
declaratory relief." Federal defendants have appealed that
order, which has been stayed pending further order by the Ninth
Circuit. Accordingly, even assuming arguendo that 2001(k)(3)
claims have been alleged by virtue of NFRC's third and fourth
claims for relief under 2001(k)(2), sole jurisdiction relating to
such issues rests with the Court of Appeals for the Ninth
Circuit.

1 ignore environmental laws and general standards and guidelines in
2 preparing and offering subsection 2001(k)(3) alternative timber
3 sale units. Unlike subsection 2001(k)(1) sales, which at a
4 minimum had been previously identified and planned, alternative
5 timber sale units under (k)(3) generally must be initially
6 identified and developed.³ Under NFRC's theory, the Secretaries
7 would be left with little, if any guidance, for preparing these
8 brand new timber sale units. As explained below, basic rules of
9 statutory construction do not support such a result.

10 Notably, the phrase "notwithstanding any other provision of
11 law" in subsection (k)(1) is not carried through to, or
12 referenced in, subsection (k)(3). In the absence of a mandate to
13 offer and release (k)(3) sale units "notwithstanding any other
14 provision of law," in preparing such sale units, the Secretaries
15 must comply with applicable laws that normally govern timber sale
16 preparation. Indeed, the only qualifier in the statute as to how
17 (k)(3) sale units are to proceed is the directive that they be
18 "subject to the terms of the original contract." Such terms
19 unequivocally authorize the Secretary to comply with applicable
20 laws.

21
22
23 ³ Unless they consist of previously planned sales already
24 in the process of being prepared, but not yet sold, alternative
25 sale units must be prepared from scratch. See generally
26 Declaration of Sterling Wilcox dated May 10, 1996, attached to
Federal Defendants' Motion to Strike, or in the Alternative,
Opposition to Scott Timber Co.'s Motion to Compel Timber.

1 I. The "Notwithstanding Any Other Provision Of Law" Protections
2 Of Subsection 2001(k)(1) Do Not Carry Through To Subsection
3 2001(k)(3)'s Directions For Providing Alternative Timber

4 NFRC argues that alternative timber sales need not comply
5 with environmental laws such as the National Environmental Policy
6 Act (NEPA) and the National Forest Management Act (NFMA),
7 allegedly because the protections of "notwithstanding any other
8 provision of law" in subsection 2001(k)(1) apply to alternative
9 timber sale units provided under the separate subsection
10 2001(k)(3). NFRC Reply at 2-3. NFRC bears a heavy burden of
11 proof to support such an interpretation that effectively would
12 exempt this whole new set of timber sale units from statutorily
13 mandated environmental protections. See Mount Graham Coalition
14 v. Thomas, 53 F.3d 970, 975 (9th Cir. 1995). The plain language
15 of the statute does not support finding such an exemption here.

16 The touchstone of all legislative interpretation is the
17 plain meaning of the statutory language. See Chevron U.S.A., Inc.
18 v. Natural Resource Defense Council, Inc., 467 U.S.837, 843
19 (1984). The relevant language of section 2001(k) states:

20 (k) AWARD AND RELEASE OF PREVIOUSLY OFFERED AND UNAWARDED
21 TIMBER SALE CONTRACTS. --

22 (1) AWARD AND RELEASE REQUIRED.--Notwithstanding
23 any other provision of law, within 45 days after
24 the date of the enactment of this Act, the
25 Secretary concerned shall act to award, release,
26 and permit to be completed in fiscal years 1995
and 1996, with no change in originally advertised
terms, volumes, and bid prices, all timber sale
contracts offered or awarded before that date . .
. . .

1 (2) THREATENED OR ENDANGERED BIRD SPECIES.--No sale
2 unit shall be released or completed under this
3 subsection if any threatened or endangered bird species
is known to be nesting within the acreage that is the
subject of the sale unit.

4 (3) ALTERNATIVE OFFER IN CASE OF DELAY.--If for any
5 reason a sale cannot be released and completed under
6 the terms of this subsection within 45 days after the
7 date of the enactment of this Act, the Secretary
concerned shall provide the purchaser an equal volume
8 of timber, of like kind and value, which shall be
subject to the terms of the original contract and shall
not count against current allowable sale quantities.

9 The plain language of section 2001(k) demonstrates that
10 Congress did not intend to carry through "notwithstanding any
11 other provision of law" in subsection (k)(1) to the separate
12 subsection (k)(3). Most notably, the phrase itself is absent in
13 subsection (k)(3). Where Congress uses a particular phrase in
14 one section of a statute but omits it in another, the difference
15 in language is presumed to be intentional. Deberry v. Sherman
16 Hospital Association, 769 F. Supp. 1030 (N.D. Ill. 1991) (citing
17 Russellov. v. United States, 464 U.S. 16, 21 (1983); Donovan v.
18 United States, Through Farmers Home Administration, 807 F. Supp.
19 560 (S.D. 1992), aff'd, 19 F.3d 1267 (8th Cir. 1994); see also
20 The Export Group v. Reef Indus., 54 F.3d 1466 (9th Cir.
21 1995) ("there is a presumption that Congress would not enumerate
22 specific exceptions in [one] section . . . but leave the
23 exceptions in another section of the same statute to judicial
24 interpretation").

25 This presumption can only be overcome by a strong indication
26 of contrary intent. No such intent can be found here.

1 Subsection (k)(3) explicitly requires the provision of
2 alternative timber when a sale cannot be released and completed
3 "under the terms of this subsection" Such terms would
4 include (k)(1)'s direction to award and release sales
5 "notwithstanding any other provision of law." Thus, alternative
6 sale units under (k)(3) are not to be released pursuant to the
7 "notwithstanding" language of (k)(1). The statute's only
8 qualifier as to how alternative sale units are to proceed is that
9 they shall be "subject to the terms of the original contract."
10 Such terms explicitly authorize the Secretary to comply with
11 standards and guidelines and applicable environmental laws.⁴ See
12 Forest Service Contract Provisions C6.25, C8.2, C8.3 (standard
13 provisions attached hereto as Ex. A).

14 Moreover, Congress placed the "notwithstanding" phrase in
15 the first of two sentences of subsection (k)(1). Subsections
16 (k)(2) and (k)(3) are distinctly separate provisions, linked only
17 by subject matter. Each consists of a complete sentence and has
18 an independent heading. Grammatically, therefore, the
19 "notwithstanding" phrase applies only to the sale contracts

21 ⁴ NFRC argues that the phrase "notwithstanding any other
22 provision of law" somehow gets inserted into the sale contract,
23 and therefore carries through to the provision of alternative
24 sales subject to the original contract's terms. NFRC Reply at 2-
25 3. Not only does this interpretation misread the language of
26 subsection (k)(3) discussed above, but it mischaracterizes the
language of subsection (k)(1). The phrase "notwithstanding any
other provision of law" applies to subsection (k)(1)'s mandate to
the Secretaries to act to award, release and permit to be
completed previously offered sales in accordance with originally
advertised terms. It does not become a term of the contract.

1 referred to in subsection (k)(1).⁵ See 2A Sutherland's Statutory
2 Construction §47.15; Idaho v. Nab, 739 P.2d 438 (Idaho Ct.App.
3 1987); see also Resolution Trust Corp. v. Love, 36 F.3d 972, 976
4 (10th Cir. 1994) (statute should be construed as mandated by
5 grammatical structure); In re Pacific-Atlantic Trading Co., 64
6 F.3d 1292, 1302(9th Cir. 1995) (court should interpret subsections
7 written in disjunctive as setting out separate and distinct
8 alternatives); Shaver v. Shaver, 799 F.Supp. 576, 579 (E.D. N.C.
9 1992) (use of different words in different subsections should be
10 given meaning).

11 To read the "notwithstanding" phrase into subsection (k)(3)
12 would require grammatical gymnastics. To apply to subsection
13 (k)(3), the "notwithstanding" phrase would have to modify each of
14 the three subsections in section 2001(k), unless it were to
15 somehow skip over subsection (k)(2). Because subsection (k)(2)
16 creates an exception to subsection (k)(1)'s exemption from
17
18

19 ⁵ NFRC argues that the Forest Service is not allowed to
20 comply with environmental laws in connection with (k)(3)
21 alternative timber sales because the agency did not do so when
22 entering into mutual modifications for 2001(k)(1) sales pursuant
23 to a new regulation. See 61 Fed. Reg. 14618 (April 3, 1996).
24 The Forest Service's actions in connection with these few (k)(1)
25 sales does not support NFRC's arguments as applied to (k)(3)
26 sales. First, NFRC ignores the critically distinguishing fact
that the mutual modifications pursuant to the new regulation were
for (k)(1) sales. Accordingly, the "notwithstanding" protections
more logically applied. Also, as these sales were not withheld
under subsection 2001(k)(2), absent agreement on a mutual
modification pursuant to the new regulation, purchasers were
prepared to harvest the more environmentally damaging (k)(1)
sales, precluding time for compliance with all applicable laws.

1 environmental laws, application of the "notwithstanding" phrase
2 to subsection (k)(2) would be nonsensical.

3 Nor does subsection (k)(3) contain any other terms that
4 would indicate congressional intent to exempt alternative timber
5 sale contracts from environmental laws. Unlike subsection (k)(1)
6 which requires the Secretaries, "notwithstanding any other
7 provision of law," to act "within 45 days," subsection (k)(3)
8 does not provide an express time frame within which alternative
9 timber sale units must be initially offered and released. NFRC
10 recognizes the absence of any such express deadline.⁶ The
11 absence of the same short deadline for offering replacement sale
12 units makes sense, as unlike (k)(1) sales which previously had
13 been offered and were therefore ready to be released, (k)(3) sale
14 units must be identified and planned. It is illogical to argue,
15 as NFRC now does, that certain of the same deadlines that apply
16 to (k)(1) sales should apply to (k)(3) sale units.

17 The conclusion that the Secretaries are not required to
18 ignore the laws and guidelines typically applicable to new timber
19 sales when providing alternative timber makes sense from a purely
20 practical standpoint. As alternative sale units typically will
21 not have been previously identified and developed, the agencies
22 must be able to rely on forest plan standards and guidelines and
23 environmental laws to provide the guiding framework by which the
24

25 ⁶ See NFRC Memorandum in Support of Motion to Compel
26 Replacement Timber at 5 (hereafter "NFRC Memo.").

1 sale units can be prepared. Were the waiver of applicable laws
2 to apply to alternative timber, because (k)(3) sale units had not
3 been previously identified, unlike (k)(1) sales, the "Secretary
4 concerned" would have almost unfettered discretion to
5 unilaterally declare which lands are exempted from the laws that
6 would otherwise govern. As agencies owe their capacity to act to
7 a statutory delegation of authority, such an interpretation would
8 not be favored. See generally Railway Labor Exec. Ass'n. v.
9 National Mediation Bd., 29 F.3d 655, 670-71 (D.C.Cir. 1994).

10 II. The Legislative History Does Not Support
11 NFRC's Claim And Cannot Be Read To
12 Override The Plain Language Of The Statute

13 In the absence of any statements in the congressional
14 record, NFRC relies exclusively on the July 27 post-enactment
15 letter from six lawmakers to argue that the Secretaries should
16 not comply with environmental laws when offering alternative
17 timber sale units under (k)(3).⁷ As an initial matter, lacking
18 ambiguity, the plain meaning of the statute controls and
19 consultation of legislative history is unnecessary. Pacificorp
20 v. Bonneville Power Administration, 856 F.2d 94, 97 (9th Cir.
21 1988); Church of Sociology v. United States Department of
22 Justice, 612 F.2d 417, 421 (9th Cir. 1979). "Where the statute's
23 language 'can be construed in a consistent and workable fashion,'

24 ⁷ NFRC has failed to point to any contemporaneous
25 legislative history -- statements made during debate or in the
26 House, Senate or conference reports -- that addresses the issue
of whether the "notwithstanding" phrase applies to (k)(3) timber.

1 [this Court] must put aside contrary legislative history." Hearn
2 v. Western Conf. of Teamsters Pension Trust Fund, 68 F.3d 301,
3 304 (9th Cir. 1995). As explained above, the statute is easily
4 and most logically construed as not carrying through the
5 "notwithstanding" phrase to the separate obligation to provide
6 alternative timber. Certainly, the post-enactment statements
7 relied upon by NFRC which merit little, if any weight, cannot
8 overcome the plain language of the statute to require the
9 Secretaries to disregard applicable laws in developing new timber
10 sale units.⁸

11
12 III. The Duty To Provide Alternative Timber Under Subsection
13 2001(k)(3) Does Not Preclude Application Of NEPA

14 NFRC argues that laws such as NEPA do not apply to sales
15 whose release is mandated by subsection 2001(k)(3). NFRC Reply
16 at 4-5. NFRC's argument mischaracterizes the nature of the task
17 directed by subsection (k)(3) and relies on inapposite cases.
18 While the statute directs that alternative timber be provided,
19 the actual identification of suitable sale areas and development
20 of the parameters of each sale necessarily involves the exercise
21 of discretion by the Secretaries. NFRC has not cited any case

22
23 ⁸ See Cose v. Getty Oil Co., 4 F.3d 700, 708 (9th Cir.
24 1993); see also Consumer Product Safety Comm'n v. GTE Sylvania,
25 Inc., 447 U.S. 102, 118 (1980). "Arguments based on subsequent
26 legislative history . . . should not be taken seriously, not even
in a footnote." Multnomah Legal Serv. Wkrs. U. v. Legal
Services, 936 F.2d 1547, 155 (9th cir. 1991) (quoting Sullivan v.
Finkelstein, 110 S.Ct. 2658, 2667 (1990)).

1 that suggests that the duty to provide timber sale units, as
2 contemplated by subsection 2001(k)(3), involves nondiscretionary
3 action. Moreover, none of the cases suggests that compliance
4 with NEPA is not required here. In concluding that preparation
5 of an environmental impact statement (EIS) was not required in
6 National Wildlife Federation v. Espy, 45 F.3d 1337 (9th Cir.
7 1995), the court relied on the finding that the relevant agency
8 action, the Farmers Home Administration's transfer of title of
9 wetlands used for grazing, did not alter the status quo. Id. at
10 1343. The court did not rely on a finding of a mandatory duty.
11 Here of course, identifying and offering timber sale units for
12 harvesting will necessarily result in a change of the status quo.

13 Westlands Water District v. Natural Resources Defense
14 Council, 43 F.3d 457 (9th Cir. 1994) is similarly inapposite.
15 There the court found that sections of the Central Valley Project
16 Improvement Act (CVPIA) requiring implementation of certain
17 actions "upon enactment" irreconcilably conflicted with NEPA.
18 Noting that courts are to give NEPA the broadest possible
19 interpretation, the court held that only "if there is an
20 'irreconcilable' conflict between the statute and NEPA will the
21 requirements of NEPA not apply." The court explained that if
22 "the statute 'does not require [implementation] within any
23 particular period,' NEPA will be applicable." Id. at 459. Here,
24 even as NFRC admits, section (k)(3) "does not specify a precise
25
26

1 date by which replacement timber is to be provided."⁹ As the
2 Westlands court made clear, NFRC cannot rely on any alleged
3 "implication" that timber be provided "promptly" (NFRC Memo. at
4 5) to circumvent the requirements of NEPA. There simply is no
5 irreconcilable conflict -- replacement timber can be provided, as
6 contemplated by subsection 2001(k)(3), in accordance with NEPA
7 procedures.¹⁰

8 IV. Subsection 2001(d) Does Not Apply To Alternative Sale Units
9 Provided Under Subsection 2001(k)(3) And Accordingly
10 Provides No Protections From Applicable Laws For Such Sales

11 In an attempt to find another source of protection for
12 (k)(3) sales units and to extend the period of protection,¹¹ NFRC

13 ⁹ NFRC Memo. at 5.

14 ¹⁰ The other two cases relied upon by NFRC are easily
15 distinguished and provide no support to plaintiff. In Texas
16 committee on Natural Resources v. Bergland, 573 F.2d 201 (5th
17 Cir. 1978), the Fifth Circuit found that an EIS was not required
18 for a congressionally determined interim course of action -- that
19 the Forest Service continue to permit clearcutting under interim
20 guidelines pending development of management plans under NFMA.
Id. at 209-208. In Sierra Club v. Babbitt, 65 F.3d 1502, 1508
(9th Cir. 1995), the court found that the Endangered Species Act
could not apply as the relevant agency no longer retained the
ability to influence private conduct, as related to the
threatened spotted owl, in connection with the affected right-of-
way.

21 ¹¹ If NFRC were to prevail on its argument that (k)(1)'s
22 "notwithstanding" protections apply to (k)(3) alternative timber
23 sales, those protections would only extend through the end of
24 fiscal year 1996, or September 30, 1996. No party has contested
25 this fact. See NFRC's Reply at 3; Appellee's Opposition to
26 Motion for Stay Pending Appeal at 8 (dated October 23, 1995);
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. In an attempt to obtain
even broader and more extended protections, NFRC argues that
(continued...)

1 further argues that (k)(3) sale units should also be deemed
2 Option 9 sales subject to the protections of subsection 2001(d).
3 NFRC Reply at 5. Such an argument runs contrary to the most
4 basic rules of statutory construction. Subsection 2001(d) is an
5 entirely separate provision for the expeditious preparation,
6 offer and award of timber sale contracts on Federal lands
7 described in the Record of Decision for the President's Forest
8 Plan. Subsection 2001(d) requires the Secretaries,
9 notwithstanding any other law, to "expeditiously prepare, offer
10 and award timber sale contracts on Federal lands described in"
11 the President's Forest Plan. The use of the terms "prepare" and
12 "offer" demonstrates that subsection 2001(d) applies only to new
13 contracts that will be competitively bid, not replacement
14 contracts provided to existing contract holders.¹²

15
16
17 ¹¹(...continued)

18 (k)(3) sales also are entitled to the protections of 2001(d).
19 Under that subsection, sales proceeding thereunder would then be
20 subject to subsection 2001(j), stating that the terms and
21 conditions of subsection (d), including its limited judicial
22 review provisions, apply through completion of the contracts. As
23 explained above, there is simply no support for NFRC's attempt to
24 convert subsection (k)(3) sales into subsection (d) sales.

25 ¹² Advertisement of timber is not equivalent to an offer of
26 the timber, but is an integral part of the process leading to
award of a sale. The Forest Service in its advertisement informs
interested parties that the government is seeking to sell timber,
but specifically reserves its right to enter into a contract that
will confer the greatest advantage to the government. See,
Cutler-Hammer v. United States, 194 Ct. Cl. 758, 441 F.2d 1179
(1971). Thus, the stage at which a timber sale is "offered" is
the point at which the Forest Service opens the bids of parties
responding to the advertisement.

1 Moreover, the judicial review provisions of subsection
2 2001(f) which apply to all timber sales offered under subsection
3 2001(d) requires any challenge to be filed within 15 days of the
4 "advertisement" of such timber sales. Alternative timber sale
5 units to be provided under subsection 2001(k)(3) are not going to
6 be advertised, as they are to be provided to the purchaser of a
7 (k)(1) sales unit withheld under (k)(2). Thus, there would be no
8 way to give effect to the review provisions expressly
9 contemplated for subsection (d) sales in the context of
10 subsection (k)(3) alternative timber sale units.

11 NFRC's position also is inconsistent with the legislative
12 history of subsection 2001(d). In debate, Senator Gorton, the
13 author of these provisions, argued that subsection 2001(d)'s
14 waiver of environmental laws is necessary to achieve the harvest
15 level for Option 9 lands because "almost no single action taken
16 pursuant to this option will escape an appeal within the Forest
17 Service and a lawsuit being stretched out forever and ever." 141
18 Cong. Rec. S 4875 (daily ed. March 30, 1995). Similarly, Senator
19 Hatfield emphasized that subsection 2001(d) was designed to "give
20 the administration all possible tools to meet its promises to get
21 wood to the mills of the Pacific Northwest in the next 18
22 months." Id. at 4882. Thus, the protections accorded sales
23 offered under subsection (d) were intended to assist the agencies
24 in meeting certain timber goals; they were not intended to allow

1 alternative sale units provided under (k)(3) to proceed outside
2 the parameters of applicable environmental laws.

3 V. BLM Is In The Process Of Providing Alternative Timber For
4 The Two BLM Sale Units Identified For Release By NFRC

5 Generally accusing defendants of having "done nothing to
6 comply with [the (k)(3)] duty," NFRC also seeks a mandamus
7 directing the Bureau of Land Management (BLM) to provide
8 replacement timber for two BLM sale units -- Bear Air Unit 2 and
9 Roman Dunn Unit 2. See NFRC Memo. at 4; NFRC Reply at 2 note 1;
10 NFRC Motion to Compel at 2. The BLM has been actively working
11 with the contract holders to provide alternative timber for these
12 units. The relevant BLM districts have identified potential
13 replacement timber, developed in accordance with applicable
14 environmental laws and standards and guidelines. See Nineteenth
15 Declaration of William Bradley at ¶¶ 3-7 (attached hereto as Ex.
16 B). The purchasers rejected the proposed replacement volume. Id.
17 As a result, the BLM has made a second proposal to each of the
18 purchasers. Id. As to the Bear Air unit, the BLM is awaiting
19 the reply of the purchaser. Id. at ¶ 5. For the Roman Dunn unit,
20 the BLM was informed in a letter dated May 10 from the purchaser
21 that the second proposal was accepted pending agreement on the
22 value determination. Id. at ¶ 6. Accordingly, NFRC's claims of
23 inaction are simply not accurate and in light of the agency's
24 ongoing efforts to provide the alternative timber, NFRC's request
25 for intervention by the Court is inappropriate.
26

1 CONCLUSION

2 For the foregoing reasons and as further explained in
3 federal defendants' May 14 opposition to Scott Timber Company's
4 motion to compel, NFRC's motion to compel the provision of
5 replacement timber should be denied.

6 Dated this 21st day of May, 1996.

7 Respectfully submitted,

8 KRISTINE OLSON
United States Attorney

9 JAMES L. SUTHERLAND
10 Assistant United States Attorney

11 LOIS J. SCHIFFER
Assistant Attorney General

12
13 

14 ELLEN M. ATHAS
15 MICHELLE L. GILBERT
16 TED BOLING
United States Department of Justice
17 Environment and Natural
Resources Division
General Litigation Section
18 P.O. Box 663
Washington, D.C. 20044-0663
19 (202) 305-0460

20 Attorneys for Defendants
21
22
23
24
25
26

1 Of Counsel:

2 TIMOTHY OBST
3 JAY MCWHIRTER
4 Office of the General Counsel
5 United States Department of Agriculture
6 Washington, D.C.

7 KAREN MOURITSEN
8 Office of the Solicitor
9 United States Department of the Interior
10 Washington, D.C.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

In the event of contract modification under this Subsection, Purchaser shall be reimbursed for any additional protection required, provided that any work or extra protection required shall be subject to prior approval by Forest Service. Amount of reimbursement shall be determined by Forest Service and shall be in the form of a reduction in stumpage rates unless agreed otherwise in writing. However, in no event may stumpage rates be reduced below Base Rates. Purchaser shall protect Barklow Mountain Trail Shelter. Directional felling of timber away from Barklow Mountain Trail Shelter required. Road construction activities and yarding shall not disturb shelter and all known and identified historic or prehistoric sites, buildings, objects and properties related to American history, architecture, archaeology and culture against destruction, obliteration, removal or damage during Purchaser's Operations. In accordance with 36 CFR 296.14(c), Purchaser shall bear costs of restoration, provided that such payment shall not relieve Purchaser from civil or criminal remedies otherwise provided by law.

Wheeled or track-laying equipment shall not be operated within such areas except on roads, landings, tractor roads or skid trails approved under B5.1 and B6.422. Unless agreed otherwise, trees will not be felled into such areas. Purchaser may be required to backblade skidtrails and other ground disturbed by Purchaser's Operations within such areas in lieu of cross ditching required under B6.6.

C6.25# - PROTECTION OF HABITAT OF ENDANGERED, THREATENED, AND SENSITIVE SPECIES. (9/89) Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973, as amended, or as sensitive by the Regional Forester under authority of FSM 2670, are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract or are as follows:

If protection measures prove inadequate, if other such areas are discovered, or if new species are listed as Federally threatened or endangered or as sensitive by the Regional Forester, Forest Service may either cancel under C8.2 or unilaterally modify this contract to provide additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.

In the event of contract modification under this Subsection, Purchaser shall be reimbursed for any additional protection required by the modification, provided that any work or extra protection required shall be subject to prior approval by Forest Service. Amount of reimbursement shall be determined by Forest Service using standard Forest Service rate redetermination methods in effect at time of agreed change and shall be in the form of a reduction in Current Contract Rates unless agreed otherwise in writing. However, in no event may Current Contract Rates be reduced below Base Rates.

087

Ex. A, p. 1

PART C8.0 - OTHER CONDITIONS

C8.2 - TERMINATION. (12/89) The Chief, Forest Service, by written notice, may terminate this contract, in whole or in part, (1) to comply with a court order, regardless of whether this sale is named in such an order, upon determination that the order would be applicable to the conditions existing on this sale; or (2) upon a determination that the continuation of all or part of this contract would:

- (a) Cause serious environmental degradation or resource damage.
- (b) Be significantly inconsistent with land management plans adopted or revised in accordance with Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended.
- (c) Cause serious damage to cultural resources pursuant to C6.24#.
- (d) Jeopardize the continued existence of Federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester.

Compensation for termination under this provision shall be calculated pursuant to C9.5, except; compensation for termination under (1) shall be calculated pursuant to C9.51 when included in this contract and compensation for termination under (2)(d) shall be calculated pursuant to C9.52 when included in this contract.

C8.21 - DELAY IN RECONSTRUCTION OF PROCESSING FACILITIES. (6/78)
Notwithstanding the 12-month limitation in B8.21, if Purchaser demonstrates a diligent effort has been made to replace primary timber processing facilities and that delays in doing so have been beyond Purchaser's control, Forest Service may authorize Contract Term Adjustment up to a total of 24 months.

C8.21 (OPTION 2) - CONTRACT TERM ADJUSTMENT. (7/87) Partial shutdowns required under C7.22, Level II and III, which prevents Purchaser from loading and hauling Included Timber, will entitle Purchaser to Contract Term Adjustment pursuant to B8.21, item (c) (ii); except that only those partial shutdowns occurring after August 1 of any year and prior to end of Normal Operating Season will be recognized. For such shutdowns Purchaser will be given one (1) day of additional time for each two (2) calendar days lost.

C8.23 - CONTRACT TERM EXTENSION. (11/85) "Contract Term Extension" means an extension of the term of this contract at the request of Purchaser other than Contract Term Adjustment under B8.21. This Subsection shall not obligate Forest Service to grant a Contract Term Extension.

(d) All contractual requirements have been met by Purchaser and accepted by Forest Service on area cutover at time of Purchaser's request except for areas where logging is in progress at time of Purchaser's request. Purchaser's burning of current slash, or seeding or planting for erosion control, may be temporarily waived if weather or other considerations make such work impractical.

(e) Any payment required under C4.26# has been made.

Contract Term Extension shall not become effective unless payments required by C8.23 have been paid and the initial Extension Deposit required by C4.254 shall have been made by the effective date of any extension.

C8.3 - CONTRACT MODIFICATION. (1/86) Upon written agreement, this contract may be modified to revise A9 and A10 to add roads not listed in A9 as necessary to facilitate reconstruction of existing Forest Service roads or accepted Specified Roads including appurtenances thereto. Roads or road segments to be added must meet the following conditions: a) the required work must be on an actual hauling route used by, or scheduled for use by, Purchaser, b) the required work must be the result of unforeseen cause, such as slides, slumps, washouts, subgrade conditions or similar causes, and c) the work must be necessary for economic, safe and practical use of the road by Purchaser. Additions will not be made when reconstruction is made necessary by Purchaser's negligence.

Revised A9 and adjustments to Purchaser Credit Limit in A10 shall be made by Forest Service in accordance with B5.2. Increase in Purchaser Credit Limit shall be limited to \$20,000 or less. Cost adjustments for increase in Purchaser Credit Limit for added roads shall be calculated in accordance with C5.221#, C5.251#, C5.253 and C5.254.

Forest Service may make modifications in Timber Specifications in B2.0, Transportation Facilities in B5.0, or Operations in B6.0, or in related Special Provisions, if and to the extent that such changes are reasonably necessary to make the contract consistent with guidelines and standards developed to implement Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended and with land management plans, developed or revised thereunder. Such modifications shall be limited to requirements with which Purchaser can reasonably comply. Resulting changes in the value of remaining Included Timber shall be reflected in a rate redetermination conducted in accordance with C3.312. Rates so redetermined shall apply to timber removed from Sale Area after the effective date of the modification.

C8.63 - NONDISCRIMINATION IN EMPLOYMENT. (6/78) Nothing in this contract shall be construed to require or permit discrimination based on sex.

KRISTINE OLSON, OSB #73254
 United States Attorney
 JAMES L. SUTHERLAND, OSB #68160
 Assistant U.S. Attorney
 701 High Street
 Eugene, OR 97401-2798
 Telephone: (541) 465-6771

LOIS J. SCHIFFER
 Assistant Attorney General
 MICHELLE L. GILBERT
 GEOFFREY GARVER
 U.S. Department of Justice
 Environment and Natural Resources Division
 General Litigation Section
 P.O. Box 663
 Washington, D.C. 20044-0663
 Telephone: (202) 305-0460

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,	)	FEDERAL DEFENDANT'S
BRUCE BABBITT, in his capacity as	)	OPPOSITION TO NFRC'S
Secretary of Interior	)	MOTION TO COMPEL
)	
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.

Ex.B, 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. This declaration is being filed to inform the court of the progress the BLM has made in offering replacement volume to Murphy Timber for unit No. 2 of the Bear Air sale and to Hull-Oakes for unit No. 2 of the Roman Dunn sale. Both of these units meet the court's definition of "known to be nesting".

4. On April 24, 1996, Murphy Timber was shown proposed replacement volume for Unit No. 2 of the Bear Air sale. Murphy Timber later rejected this offer stating that the timber was not of like kind and value.

5. On May 13, 1996, Murphy Timber was shown a second stand of proposed replacement volume. Murphy Timber is currently considering this proposal.

6. On April 15, 1996, a meeting was held with Hull-Oakes Lumber to discuss replacement volume for Roman Dunn No. 2. After examining the proposed timber, Hull-Oakes rejected the offer stating that the stem size was too small for their needs (not of like kind). A second proposal was made to Hull-Oakes. In a letter to the district dated May 10, 1996, Hull-Oakes stated that

they accept the offer pending an agreement on the value determination. A meeting has been scheduled for May 22, 1996, to discuss this.

7. As stated in Instruction Memorandum No. OR-96-63 dated April 8, 1996, replacement volume will comply with the Standards and Guidelines of the Northwest Forest Plan and the western Oregon Resource Management Plans and all existing environmental laws.

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

Executed at Portland, Oregon, on

May 20, 1996.

William L. Bradley

William L. Bradley

CERTIFICATE OF SERVICE

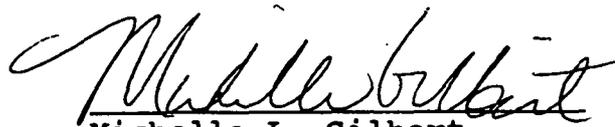
The undersigned hereby certifies that on May 21, 1996 she caused one copy of the foregoing **FEDERAL DEFENDANTS' OPPOSITION TO NFRC'S MOTION TO COMPEL TIMBER AND RESPONSE TO REPLY BRIEF** to be served by facsimile and first class mail upon the counsel of record hereinafter named:

MARK RUTZICK
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
Telephone: (503) 499-4572
Fax : (503) 295-0915

PATTI A. GOLDMAN
ADAM J. BERGER
KRISTEN L. BOYLES
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
Fax : (206) 343-1526

SCOTT HORNGREN
1800 One Main Place
101 S.W. Main St.
Portland, OR 97204
Telephone: (503) 225-0777
Fax: (503) 225-1257

MARIANNE DUGAN
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
Telephone: (503) 485-2471
Fax: (503) 485-2457


Michelle L. Gilbert

W01-9506\1R891169.11B

1 Mark C. Rutzick, OSB #84336
 2 MARK C. RUTZICK LAW FIRM
 3 A Professional Corporation
 4 500 Pioneer Tower
 5 888 S.W. Fifth Avenue
 6 Portland, Oregon 97204-2089
 7 (503) 499-4573

8 Attorney for Plaintiff

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

11	NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
12	COUNCIL, an Oregon corporation,	)	Lead Case
13)	
14	Plaintiff,	)	Civil No. 95-6267-HO
15		)	Civil No. 95-6384-HO
16	and	)	Consolidated Cases
17)	
18	SCOTT TIMBER CO., VAAGEN BROS.	)	NFRC'S SECOND REPLY
19	LUMBER INC., and WESTERN TIMBER	)	MEMORANDUM IN FURTHER
20	CO.,	)	SUPPORT OF MOTION TO COMPEL
21		)	PROVISION OF REPLACEMENT
22	Plaintiff-intervenors,	)	TIMBER FOR CERTAIN SALE
23		)	UNITS
24	vs.)	
25)	
26	DAN GLICKMAN, in his capacity)	
27	as Secretary of Agriculture;)	
28	BRUCE RABBITT, in his capacity)	
29	as Secretary of the Interior,)	
30)	
31	Defendants,)	
32)	
33	and)	
34)	
35	OREGON NATURAL RESOURCE)	
36	COUNCIL, et al.,)	
37)	
38	Defendant-intervenors.)	

39 Plaintiff Northwest Forest Resource Council ("NFRC") submits
 40 this reply to address the arguments presented by the federal

Page

1 - NFRC'S SECOND REPLY MEMORANDUM IN FURTHER
 SUPPORT OF MOTION TO COMPEL PROVISION OF
 REPLACEMENT TIMBER FOR CERTAIN SALE UNITS

MARK C. RUTZICK LAW FIRM
 A Professional Corporation
 Attorneys at Law
 500 Pioneer Tower
 888 S.W. Fifth Avenue
 Portland, OR 97204-2089
 (503) 499-4572 • Fax (503) 298-0915

NO1-9506\1R891169.118

1 defendants in their opposition to NFRC's motion to compel
2 replacement timber for 24 timber sale units, filed May 21, 1996.

3 The federal defendants do not deny the central points of
4 NFRC's motion: even though the government has a mandatory duty
5 under section 2001(k)(3) to provide replacement timber for units
6 withheld under (k)(2), the Forest Service has not even started to
7 provide replacement timber for any of the 140 units it has
8 withheld under (k)(2), including the 22 units at issue in NFRC's
9 motion.

10 The government's response merely argues that it must comply
11 with other environmental laws before providing replacement
12 timber, implying, though not directly arguing, that these other
13 laws will force the Forest Service to take years to comply with
14 (k)(3).

15 At the same time, government counsel also argues that no
16 injunctive relief is needed against the BLM because that agency
17 has already found replacement timber for the two BLM units in
18 question in NFRC's motion, and has agreed or will soon agree with
19 the purchasers to provide that timber under (k)(3).

20 The government never explains the contradiction in the two
21 agencies' positions: the BLM has already been able to complete
22 the process of finding replacement timber under (k)(3), in
23 compliance with all environmental laws, while the Forest Service
24 has not even started and will take well over a year to finish the
25 process.

26 The BLM's ability to find and provide replacement timber

N01-9506\18891169.1LB

1 promptly, in compliance with environmental laws, shows that the
 2 Forest Service could also act promptly if ordered to do so.
 3 Further, its duty to comply with other environmental laws is in
 4 fact excused by section (k)(1). Thus, this court can and should
 5 order the Forest Service to comply with section (k)(3) by
 6 providing replacement timber within 30 days.¹

Argument

8 **SECTION 2001(k)(1) ALLOWS THE COMPLETION OF A TIMBER**
 9 **SALE CONTRACT "NOTWITHSTANDING ANY OTHER PROVISION OF**
 10 **LAW" EVEN WHEN THE CONTRACT IS MODIFIED UNDER SECTION**
 11 **(k)(3).**

12 The government argues that a timber sale contract released
 13 under section 2001(k)(1) loses the protection of the "notwith-
 14 standing any other provision of law" clause if the contract is
 15 modified to include replacement timber under section (k)(3). The
 16 language of the statute plainly refutes this argument.

17 The three paragraphs of section 2001(k) work sequentially.
 18 Section (k)(1) defines the universe of timber sale contracts
 19 subject to the section. Section (k)(2) exempts some sale units
 20 within that universe from release and completion. Section (k)(3)
 21 requires replacement timber for the units exempt under (k)(2).
 22 Thus, section (k)(3) necessarily applies only to units of
 23 contracts that are already subject to (k)(1). For this reason,
 24 there was no reason for Congress to repeat in (k)(3) the "not-

25 ¹ NFRC originally requested replacement timber by June 1,
 26 1996. The passage of time has rendered that date impracticable.
 NFRC asks for replacement timber for the 24 units in question as
 soon as possible and in any event within 30 days.

NO1-9506\1R89\1169.HLB

1 withstanding any other provision of law" directive that already
2 applied to the entire universe of covered sales. Its absence,
3 contrary to the government's argument, proves nothing about
4 Congress' intent, which is clear from the language of (k)(1).

5 Since (k)(2) and (k)(3) operate on a unit by unit basis,
6 while (k)(1) applies to an entire contract, the government's
7 position would result in the original units of a (k)(1) contract
8 being protected by the "notwithstanding any other provision of
9 law" clause while other units, that are replaced under (k)(3),
10 would be subject to other laws, lawsuits and appeals. Congress
11 could not have intended that different units of the same timber
12 sale would be subject to such inconsistent standards. The plain
13 language of (k)(1) protects the entire contract, including units
14 replaced under (k)(3).

15 The government itself points out that providing replacement
16 timber under (k)(3) does not involve the offer or award of a new
17 contract. Federal Defendants' Opposition To NFRC's Motion To
18 Compel Timber at 13. Rather, as the government argues, (k)(3)
19 simply requires modification of the original contract to change
20 the designation of the included timber.

21 The replacement timber is expressly "subject to the terms of
22 the original contract." Section 2001(k)(3). After the contract
23 is modified to provide replacement timber, it remains subject to
24 section (k)(1), including its "notwithstanding any other pro-
25 vision of law" clause. The entire sale can be operated notwith-
26 standing other laws, even after it is modified.

Page

4 - NFRC'S SECOND REPLY MEMORANDUM IN FURTHER
SUPPORT OF MOTION TO COMPEL PROVISION OF
REPLACEMENT TIMBER FOR CERTAIN SALE UNITS

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 499-4573 • Fax (503) 295-0910

N01-9506\IR891169.1LB

1 This is exactly how the government interpreted section (k)
 2 in April 1996 when it provided replacement timber to Scott Timber
 3 Co. for the First and Last timber sales, pursuant to its newly-
 4 issued regulations, without complying with NEPA, the National
 5 Forest Management Act or the Endangered Species. Government
 6 counsel's attempt to distinguish this inconsistent conduct, see
 7 Federal Defendants' Opposition at 7 n.5, is unconvincing:

8 1. They argue that "notwithstanding any other provision of
 9 law" exempts replacement timber for the First and Last sales from
 10 environmental laws because those sales were subject to (k)(1).
 11 That argument supports NFRC's position on this motion: the
 12 government itself has previously conceded, on many occasions,
 13 that all the sales requiring replacement timber under (k)(3) are
 14 subject to (k)(1). See, e.g., Declaration of Jerry Hofer
 15 (September 29, 1995), Exhibit 1 (Directive from Forest Service
 16 Chief Jack Ward Thomas). Indeed, as shown above, a sale unit
 17 cannot be subject to the (k)(2) exemption unless it is part of a
 18 contract subject to (k)(1). Thus, all (k)(3) replacement volume
 19 is for sales subject to (k)(1), just like First and Last. The
 20 government's argument proves NFRC's position.

21 2. The government also argues that imminent logging on the
 22 First and Last sales precluded compliance with other environmen-
 23 tal laws. This remarkable argument is flatly wrong: if other
 24 environmental laws apply, they cannot be violated at the choosing
 25 of the government merely because the government believes the
 26 result is justified. The government cannot really contend that,

Page

5 - NFRC'S SECOND REPLY MEMORANDUM IN FURTHER
 SUPPORT OF MOTION TO COMPEL PROVISION OF
 REPLACEMENT TIMBER FOR CERTAIN SALE UNITS

MARK C. RUTZICK LAW FIRM
 A Professional Corporation
 Attorneys at Law
 500 Pioneer Tower
 888 S.W. Fifth Avenue
 Portland, OR 97204-2089
 (503) 488-6573 • Fax (503) 286-0915

N01-9506\1R891169.1LB

1 for example, it can violate the Endangered Species Act with
2 impunity because it wants to avoid logging old growth forest.

3 Thus, the government's prior conduct of providing replace-
4 ment timber on the First and Last sales, and other sales, without
5 complying with other environmental laws refutes its newly-
6 advanced contrary interpretation offered here by its attorneys.

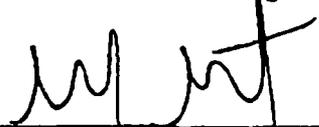
7 Section (k)(1) allows the completion of all the contracts
8 covered by that paragraph even after replacement timber is
9 provided under (k)(3). Section (k)(1) excuses further compliance
10 with environmental laws on these sales, including units replaced
11 under (k)(3).

12 **Conclusion**

13 NFRC's motion to compel provision of replacement timber for
14 24 sale units should be granted. Defendants should be ordered to
15 provide replacement timber for these units in compliance with
16 section 2001(k)(3) as soon as possible and in any event within 30
17 days.

18 Dated this 24th day of May, 1996.

19 MARK C. RUTZICK LAW FIRM
20 A Professional Corporation

21 By: 
22 Mark C. Rutzick
23 Attorney for Plaintiff