

NLWJC- Kagan

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NFRC v. Glickman II [3]

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

10 NORTHWEST FOREST RESOURCE)
11 COUNCIL, an Oregon) No. 95-6244-HO (Lead)
12 corporation,) No. 95-6267-HO (Consolidated)
13) No. 95-6384-HO (Consolidated)
14 Plaintiff,)
15 v.) SCOTT TIMBER CO.'S REPLY IN
16) SUPPORT OF MOTION TO COMPEL
17) REPLACEMENT VOLUME
18 DANIEL R. GLICKMAN, in his)
19 capacity as Secretary of)
20 Agriculture, BRUCE BABBITT, in)
21 his capacity as Secretary of)
22 Interior,)
23 Defendants.)

18 I. INTRODUCTION.

19 In their Memorandum in Opposition to Scott Timber Co.'s
20 Motion to Compel Identification and Release of Replacement Volume
21 (Govt. Opp.), federal defendants contend that the replacement
22 timber volume mandated by Section 2001(k)(3) of the Emergency
23 Salvage Timber Sale Program is subject to administrative appeal
24 and the National Environmental Policy Act (NEPA) process. Govt.
25 Opp. at 12. This assertion is without merit. Release of the
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1 timber sales are ultimately authorized by Section 2001(k)(1),
2 which preempts the administrative procedures of NEPA. Section
3 2001(k)(3) simply directs the Secretaries to identify replacement
4 timber if for any reason Section 2001(k)(1) sales are not
5 released. The Justice Department's assertion that administrative
6 appeals and all environmental laws apply to identification of
7 replacement volume is inconsistent with the Emergency Salvage
8 Timber Sale Program, the regulations promulgated by the
9 Secretaries, and the Secretaries' prior implementation of the
10 replacement volume provision.

11 This issue is not before the Ninth Circuit Court of
12 Appeals because the Bureau of Land Management and Forest Service
13 is currently identifying replacement volume and federal
14 appellants did not raise the issue of the scope of their
15 replacement volume obligations in their appeal. This Court has
16 jurisdiction to grant Scott Timber relief.

17 **II. ARGUMENT.**

18 Section 2001(k)(1) directs the Secretaries to release
19 existing timber sales "notwithstanding any other provision of
20 law." Section 2001(k)(3) supplements (k)(1) by directing the
21 Secretaries to provide replacement timber, "if for any reason"
22 the Section 2001(k)(1) sales are not released. Federal
23 defendants do not question that Section 2001(k)(1) ultimately
24 governs release of green sales, or that such sales are not
25 subject to administrative appeal and NEPA. Rather, federal
26

1 defendants claim that administrative appeal and NEPA apply to
2 identification and release of Section 2001(k) (3) replacement
3 timber.

4 Federal defendants' position assumes that
5 Section 2001(k) (3) controls the release of timber independently
6 of (k) (1). This assumption is untenable: release of timber must
7 be mandated, and therefore controlled, by Section 2001(k) (1)
8 before (k) (3) even applies. Section 2001(k) (3) directs that
9 replacement timber shall consist of an "equal volume of timber,
10 of like kind and value ... subject to the terms of the original
11 contract." Thus, except for changing the source of the timber,
12 Section 2001(k) (3) does not alter the terms of sales, as set by
13 (k) (1).

14 Subjecting release of replacement timber to lengthy
15 administrative appeal and NEPA review also defeats Congress's
16 intent in enacting Section 2001(k). The provisions releasing
17 existing sales, like the rest of the Rescissions Act, were
18 intended to speed up the flow of timber to mills and local
19 communities. H. Conf. Rep. 104-124, pp. 136-37. Congress passed
20 the bill on the assumption that timber would be made available
21 free from further administrative delay. H. Comm. Rep. 104-71,
22 pg. 22. Given Congress's intent to expedite timber sales, there
23 is no reason to assume Congress wished to delay identification
24 and release of replacement timber.

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1 The litigation position adopted by the Department of
2 Justice has not been adopted and applied by the Secretaries. An
3 agency's interpretation of its own regulations are normally
4 entitled to deference, Trustees of Cal. State Univ. v. Riley, 74
5 F.3d 960, 966 (9th Cir. 1996), but "no deference is owed when an
6 agency has not formulated an official interpretation . . . but is
7 merely advancing a litigating position." United States v.
8 Trident Seafoods Corp., 60 F.3d 566, 559 (9th Cir. 1995); see
9 also 3550 Stevens Creek Associates v. Barclay's Bank of Cal., 915
10 F.2d 1355, 1364 n.19 (9th Cir. 1990), cert. denied 500 U.S. 917
11 (1991).

12 The Secretaries' official regulatory and implementing
13 actions, contrary to the Justice Department's litigation
14 position, have not applied administrative appeals and NEPA to
15 identifying and releasing replacement volume. In response to the
16 Emergency Salvage Timber Sale Program, Secretary Glickman on
17 April 3, 1996, promulgated 36 C.F.R. § 223.85(b), which governs
18 identification of substitute timber for Section 2001(k) sales.
19 65 Fed. Reg. 14618 (April 3, 1996). The Secretary explained that
20 the rule was promulgated on an expedited basis precisely because
21 of the duty to immediately release Section 2001(k) sales. Id. at
22 14620. Neither the preamble to the rule nor the rule itself
23 mentions an exception from this duty to promptly release timber
24 under Section 2001(k) (3), but rather recognize that (k) (1) sets

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1 the "general release requirements" for existing sales. Id. at
2 14619.

3 While the Secretaries have not formulated any official
4 interpretation of the Emergency Salvage Timber Sale Program
5 supporting the Justice Department's litigation position, they
6 have promulgated regulations on point which indicate replacement
7 timber volume should not be subject to administrative appeal.
8 Specifically, the Forest Service "shall dismiss any notice of
9 appeal on subsequent implementing actions that result from
10 initial decision subject to review." 36 C.F.R. § 217.4(b). The
11 regulation gives an example that "an initial decision to offer a
12 timber sale is appealable under this part; subsequent actions to
13 advertise or award that sale are not appealable." Id. The
14 Forest Service simply has not allowed administrative appeal of
15 timber sale contract modifications in general and of 2001(k)
16 modifications in particular. See Exhibit B, p. 1, attached to
17 NFRC Memorandum in Support of Motion to Compel (releasing
18 replacement volume for harvest without appeal or NEPA review
19 pursuant to Section 2001(k) and 65 Fed. Reg. 14618). Given the
20 inconsistency of the Secretaries prior regulatory interpretations
21 and their current litigation position, "[d]eference to what
22 appears to be nothing more than an agency's convenient litigating
23 position would be entirely inappropriate." Bowen v. Georgetown
24 Univ. Hospital, 488 U.S. 204, 212 (1988).

1 Finally, the Secretaries' actual implementation of
2 Section 2001(k) (3) to identify and release replacement volume has
3 not applied NEPA or administrative appeal rules. Numerous sales
4 have been modified to identify replacement volume without NEPA
5 review or administrative appeal, including Scott Timber Co.'s
6 Boulder Krab (murrelets), First, Last, and China Creek (owls)
7 Timber Sales. The replacement volume was identified and reviewed
8 by the purchaser and harvest has begun or is already completed
9 for the replacement units. For example, the First and Last
10 Timber Sales involved over ten million board feet of replacement
11 volume. Replacement volume was identified for the First Timber
12 Sale starting on approximately April 6, 1996 and harvest of
13 replacement volume on this sale is complete. Replacement volume
14 has been identified for other Section 2001(k) sales without
15 applying NEPA or allowing administrative appeal, including the
16 Anchovy and Red 90 Timber Sales.

17 **III. THIS COURT HAS JURISDICTION TO GRANT SCOTT TIMBER RELIEF.**

18 Scott Timber's requested relief is entirely consistent
19 with its complaint. In its complaint, Scott Timber requested
20 that the defendants release and permit to be completed all of the
21 timber sale units purchased by Scott Timber. As additional
22 relief, Scott Timber requested "other relief as the court finds
23 reasonable and necessary." Consistent with this request for
24 other relief as the court finds reasonable and necessary, the
25 Court has retained jurisdiction requiring defendants to provide
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1 biweekly reports on the compliance with 2001(k). These reports
2 have also described sales for which replacement volume was
3 identified.

4 For the particular units subject to the current motion,
5 we believe it is within the Court's jurisdiction to provide Scott
6 Timber complete relief and to enter an order requiring the
7 identification and release of replacement volume for those units
8 that the defendants have determined they will not release
9 pursuant to the Court's January 19, 1996 Order on Scott Timber's
10 complaint. This is particularly true for the units that are
11 subject to this motion because defendants have never argued that
12 these units should be released nor did Scott Timber appeal this
13 Court's January 19, 1996 interpretation regarding the release of
14 these units. Consequently, if the Ninth Circuit rules in favor
15 of defendants, it will not effect these particular timber sale
16 units. None of the sale units for which Scott Timber seeks
17 replacement volume were included among those that Scott Timber
18 sought permission to log as part of the stay pending appeal
19 motions.

20 If the Court believes that Scott Timber's complaint
21 must be amended, Scott Timber respectfully requests that it be
22 given leave to amend and will do so immediately if ordered by the
23 Court.

24 : : :

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1 IV. CONCLUSION.

2 Federal defendants' assertion that replacement timber
3 sales are subject to additional administrative review and NEPA is
4 contrary to the Emergency Salvage Timber Sale Program. Moreover,
5 federal defendants' current position regarding replacement timber
6 sales is inconsistent with their own previously adopted
7 regulations and their actions implementing Section 2001(k). For
8 these reasons, this court should conclude that replacement timber
9 sales must be released "notwithstanding any other provision of
10 law."

11 Dated this 23rd day of May, 1996.

12 HAGLUND & KIRTLEY

13
14 By 

15 Scott W. Horngren
16 Attorneys for Plaintiff
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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
APPELLATE SECTION
WASHINGTON, D.C. 20530
FAX NUMBER (202) 514-4240

DATE: May 30, 1996

FROM: Albert Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 4 pages

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MESSAGE:

The Ninth Circuit has denied our Petition for Rehearing and has issued a modified opinion. Attached is a copy of the order denying the petition together with the modifications to the original opinion. I will circulate a full copy of the modified opinion tomorrow.

No news yet on the (k)(2) appeal.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

v.

DANIEL GLICKMAN, in his capacity
as Secretary of Agriculture; BRUCE
BABBITT, in his capacity as
Secretary of the Interior,
Defendants,
and

OREGON NATURAL RESOURCES
COUNCIL; SIERRA CLUB, INC.;
PILCHUCK AUDUBON SOCIETY;
WESTERN ANCIENT FOREST
CAMPAIGN; PORTLAND AUDUBON
SOCIETY; BLACK HILLS AUDUBON
SOCIETY; and HEADWATERS,
Intervenors-Appellants.

No. 95-36038

D.C. No.
CV-95-06244-MRH
ORDER AND
AMENDED
OPINION

6444

①

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

v.

DANIEL GLICKMAN, in his capacity
as Secretary of Agriculture; BRUCE
BABBITT, in his capacity as
Secretary of the Interior,
Defendants-Appellants,

No. 95-36042

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

and

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

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, Chief District Judge, Presiding

Argued and Submitted
January 8, 1996--Portland, Oregon

Filed April 24, 1996
Amended May 30, 1996

Before: John T. Noonan, Jr., Edward Leavy and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

2

Mark C. Rutzick and Alison Kean Campbell, Portland, Oregon, for the plaintiff-appellee.

ORDER

The Opinion filed April 24, 1996, slip op. 4941-4971, is amended as follows:

Page 4956, lines 3-8: delete beginning "By the terms of Section 318," through "S 318(a)(2)." and substitute:

By its terms, Section 318 encompasses "the national forests of Oregon and Washington," S 318(a)(1), including "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,]" S 318(a)(1), as well as the Bureau of Land Management's "administrative districts in western Oregon." S 318(a)(2).

Page 4957, lines 6-10: delete beginning "Section 318 authorized" through "S 318(a)(2)." and substitute:

Section 318 mandated that certain sales quotas be met through timber sales in (1) "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,]" S 318(a)(1), and (2) the Bureau of Land Management's "administrative districts in western Oregon." S 318(a)(2).

Page 4958, second full paragraph, lines 9-17: delete beginning "The statute defined" through "'subject to [S]ection 318.'" and substitute:

The statute covers "the national forests of Oregon and Washington," S 318(a)(1), including "the thirteen national forests in Oregon and Washington

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known to contain northern spotted owls[,] "
S 318(a)(1), as well as the Bureau of Land Manage-
ment's "administrative districts in western Oregon."
S 318(a)(2). Although the statute imposed special
substantive and procedural requirements on timber
sales in "the thirteen national forests in Oregon and
Washington known to contain northern spotted
owls[,] " S 318(a)(1), the other geographical units
encompassed by the statute may nonetheless be said
to be "subject to [S]ection 318."

Having amended the Opinion, the panel votes to DENY the
Petition for Rehearing filed by Oregon Natural Resources
Council, to DENY defendants-appellants' Petition for Rehear-
ing or, in the Alternative, Motion for Clarification and Stay,
and to GRANT Northwest Forest Resource Council's Motion
to Transfer Consideration of Attorney Fees to District Court.

OPINION

HAWKINS, Circuit Judge:

We consider what would appear to be a relatively straight-
forward question of statutory interpretation with fairly pro-
found consequences. This appeal requires us to determine the
relationship between two separate statutory provisions gov-
erning timber sales, Section 2001(k)(1) of the Fiscal Year
1995 Emergency Supplemental Appropriations for Disaster
Relief and Rescissions Act, and Section 318 of the Depart-
ment of the Interior and Related Agencies Appropriations
Act. In particular, we must determine the meaning of the
phrase "subject to [S]ection 318" as it appears in Section
2001(k)(1) of the 1995 Rescissions Act. It is not our role to
determine the wisdom of Section 2001(k)(1), only its mean-
ing.

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U.S. DEPARTMENT OF JUSTICE
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PLEASE DELIVER TO:

To: Dinah Bear 456-0753
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NUMBER OF PAGES:

DATE: May 16, 1996

FROM: Michelle Gilbert

MESSAGE: Attached is a short request we filed with Judge Hogan yesterday. After talking with the Assistant U.S. Attorney, who thought Hogan could rule on some of the very important issues raised in NFRC's reply brief on alternative timber, we decided to file the attached to ensure that we had the opportunity to brief the issues before any such ruling was made. The brief, to be filed on Tuesday (which is basically when it would be due under the local rules) will have to address the issues of nonapplicability of "notwithstanding" protections to k(3) timber and whether k(3) sales should be considered Option 9 sales entitling them to the protections provided by that subsection of the Act. As to this later point, it is my understanding that a decision has been made that these sales would not be deemed Option 9 sales, but I was not certain whether this was a formal decision agreed to by the agencies. I think there may be some confusion on this point. If there is any open question on this issue, I would appreciate it if you would call me to discuss it, so that the draft brief reflects the right position. Thanks.

st. j

2 Ask Dinah

Michelle

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

| | | |
|----|--------------------------------------|------------------------|
| 12 | NORTHWEST FOREST RESOURCE COUNCIL,) | |
| 13 | Plaintiff,) | |
| 14 | v.) | Civil No. 95-6244-HO |
| 15 |) | (lead case) |
| 16 | GLICKMAN and BABBITT,) | Civil No. 95-6267-HO |
| 17 | Defendants,) | (consolidated case) |
| 18 | OREGON NAT. RES. COUNCIL, et al.) | FEDERAL DEFENDANTS' |
| 19 | Defendants-Intervenors) | REQUEST TO FILE |
| |) | OPPOSITION TO NFRC'S |
| |) | MOTION TO COMPEL |
| |) | TIMBER AND REPLY BRIEF |

20 Following plaintiff Scott Timber Company's motion to compel
 21 the release of alternative timber by the United States Forest
 22 Service, on May 9, 1996, plaintiff Northwest Forest Resource
 23 Council (NFRC) filed a similar motion seeking release of timber
 24 under section 2001(k) (3) for specific timber sale units. Without
 25 awaiting a response from the federal defendants to its motion, on
 26 May 13, NFRC filed a reply raising several new arguments on

1 significant issues that have not been fully briefed by the
2 government, as they were not part of either of the plaintiff's
3 complaints in this consolidated action. NFRC's motion also
4 raises issues relating to the provision of alternative timber for
5 timber sale units offered by the Bureau of Land Management. At
6 the hearing on Scott Timber's motion on May 14, federal
7 defendants requested that if the Court were to consider the new
8 arguments, the government be provided the opportunity to brief
9 these important and complex issues. Accordingly, federal
10 defendants hereby request that the Court not rule on the issues
11 raised in NFRC's reply brief until the government has had the
12 opportunity to file the necessary brief, which it proposes to
13 file by no later than May 21, 1996.

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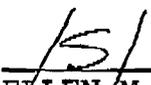
1 Dated this 16th day of May, 1996.

2 Respectfully submitted,

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6 Assistant United States Attorney

7 LOIS J. SCHIFFER
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95- 36042

DRAFT

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

REPLY TO APPELLEE'S OPPOSITION TO REQUEST
FOR CLARIFICATION AND STAY

On May 3, 1996, the Secretaries of the Interior and Agriculture filed a petition for rehearing on this Court's April 24, 1996 opinion. The Petition sought to harmonize the Court's judgment with the text of the opinion. Specifically, we noted (Petition for Rehearing at 2) that the opinion, which describes the geographical scope of Section 2001(k)(1) as the thirteen national forests in Oregon and Washington known to contain the northern spotted owl and the BLM administrative districts in western Oregon, is at odds with the scope of the injunction affirmed by this Court. The injunction covers more than the thirteen "owl forests" -- it also covers six national forests in eastern Oregon and Washington.

- 2 -

In its "opposition" to the Secretaries' Petition for Rehearing, NFRC concedes that the Court's "discussion of Section 318 * * * is in a few respects not completely comprehensive * * * ." (Opposition at 6). NFRC concludes, however, that the "minor discrepancies are inconsequential to the Court's reasoning and to its conclusion." Id. NFRC's attempt to assure this Court as to the "inconsequential" nature of the subject of the Secretaries' Petition for Rehearing is at best disingenuous. Indeed, NFRC's entire opposition is based on an incorrect assumption that the timber sales in the western BLM districts released by Section 318(a)(2) were not "afforded the protections of Subsections 318(b)-(k)." (Opposition at 5). A review of those subsections, however, demonstrates that the BLM sales authorized by Section 318(a)(2) fell within the special environmental provisions of those sections. For example Section 318(b)(5) expressly prohibits timber sales in the western BLM districts which "occur within the 110 areas identified in the December 22, 1987 agreement * * * ." That same subsection also requires the BLM to identify, in conjunction with the Fish and Wildlife Service, "an additional twelve spotted owl habitat areas[]" in which no sales could occur. See also Sections 318(b)(6), 318(c), 318(g), and 318(h) which expressly include the BLM sales within the special environmental protections afforded by Section 318. Indeed, but for the existence of Section 318, and in particular, Section 318(b)(6), these sales in the western BLM districts could not be

- 3 -

released. See e.g. Seattle Audubon v. Robertson, 914 F.2d 1311, 1313 (9th Cir. 1990), rev'd, Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992). Thus NFRC is simply wrong in stating that the BLM sales allowed under Section 318(a)(2) did not fall within the protections of Sections 318(b)-(k).

Similarly, NFRC is incorrect in stating (Opposition at 6) that Section 318(a) "authorized" the timber sales in issue in the "non-owl" forests of eastern Washington and Oregon. Section 318(a)(1) simply established a target harvest level for the national forests in Washington and Oregon. To the extent that Section 318 "authorized" sales, such authorization was limited to the sales in the thirteen owl forests and western BLM districts - areas in which the courts had previously enjoined timber harvesting based on violations of environmental laws. See, e.g., Portland Audubon Society v. Lujan, 884 F.2d 1233, 1237 (9th Cir. 1989); Seattle Audubon Society v. Robertson, W. D. Wash., No. 89-160WD (March 24, 1989). In contrast, the timber sales in the eastern "non-owl" forests proceeded under the National Forest Management Act, 16 U.S.C. 472, and other authorizing statutes. Indeed, the only court to consider the issue held that nothing in Section 318(a)(1) created a "mandatory action requiring the Forest Service to sell exactly 7.7 b[illion] b[oard] f[et] of timber. * * * Thus, the Forest Service was required only to sell as much of the 7.7 bbf it deemed possible given section

- 4 -

318's environmental requirements." Gifford Pinchot Alliance v. Butruille, 752 F. Supp. 967, 971-972 (D. Or. 1990).

CONCLUSION

For the foregoing reasons and the reasons contained in our Petition for Rehearing, this Court should amend its judgment to include only the thirteen national forests known to contain northern spotted owls and the western BLM districts in Oregon and Washington.

Respectfully Submitted,

DRAFT

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May 16, 1996

No. 95-36042

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants,

APPELLEE'S OPPOSITION TO APPELLANTS' MOTION
FOR CLARIFICATION AND STAY

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Of Attorneys for Plaintiff-
Appellee Northwest Forest
Resource Council

INTRODUCTION

Plaintiff-Appellee Northwest Forest Resource Council ("NFRC") opposes appellants' motion for clarification of the court's April 24, 1996 Opinion and for a stay of 11 timber sales. The Court's affirmance of the district court's orders is entirely consistent with the reasoning of the Court's Opinion, and is correct under section 2001(k) and section 318. There is no ambiguity in the Court's decision, and no basis for a stay of the sales that Congress released in section 2001(k). Appellants' motion should be denied.

ARGUMENT

APPELLANTS ARE NOT ENTITLED TO A STAY OF TIMBER SALES BECAUSE THE COURT'S OPINION IS FULLY CONSISTENT WITH THE COURT'S AFFIRMANCE OF THE DISTRICT COURT'S INJUNCTION.

This appeal presented two related issues concerning the interpretation of section 2001(k) of Public Law 104-19. One issue was whether the law applies to timber sales offered in fiscal years 1991-95, and the other was whether the national forest units "subject to section 318" include six national forests in eastern Oregon and Washington that were subject to a mandatory timber sale direction in section 318(a), but did not have to follow the special environmental provisions in section 318(b).

Section 318(a)(1) mandated 7.7 billion board feet of Forest Service timber sales for 1989-90. It directed that 5.8 billion board feet of these sales come from "the thirteen national forests in Oregon and Washington known to contain northern

spotted owls." These sales were required to follow the special environmental provisions in section 318(b) protecting ecologically significant old growth and spotted owl habitat. Section 318(b)(1)-(4).

The other 1.9 billion board feet of Forest Service sales came from the six "eastside" national forests that do not contain northern spotted owls. In addition, Section 318(a)(2) mandated a further 1.9 billion board feet of Bureau of Land Management (BLM) timber sales. Neither the eastside Forest Service sales nor the BLM sales were required to contain the old growth and spotted owl protective measures required for the westside Forest Service sales.

In this case the appellants argued both interpretation issues from a common premise: that section 2001(k) was only intended to release timber sales that were subject to the special environmental provisions in section 318(b). From that premise, they contended that the phrase "subject to section 318" limits the statute to timber sales offered under section 318 in 1989-90, and also limits the statute to timber sales from the 13 national forests known to contain spotted owls and the six BLM districts in western Oregon.

The district court rejected both these arguments and granted injunctive relief to release "all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995 in any national forest in Oregon and Washington or [Bureau of Land Management] district in western Oregon." Slip Op. at 4947.

Both issues were fully briefed by the parties on appeal, and both issues were discussed at length during the oral argument January 8, 1996. This court affirmed the district court's decision on both issues. *Id.* at 4947, 4970.

Appellants now contend that the Court somehow missed the issue of the six eastside national forests in its April 24 Opinion, or actually decided it contrary to the district court, even though the Court unconditionally affirmed the district court's orders. This argument is refuted by the text of the Opinion.

The Opinion unequivocally rejects the common premise of appellants' argument: that "subject to section 318" limits section 2001(k) to releasing timber sales that were subject to the special environmental provisions in section 318(b). The Court very clearly held that 1991-95 timber sales are released even though none of these sales were prepared under section 318.

In rejecting the common premise of appellants' argument, the Opinion necessarily also rejected appellants' contention that section 2001(k) is limited to national forests known to contain spotted owls because the eastside national forests did not have to comply with section 318(b).

In applying the doctrine of last antecedent to find that section 318 "defines only the geographic scope of timber sales required by Section 2001(k)(1), and not other characteristics of the sales," the Court explained:

The Secretaries contend that the doctrine of last antecedent should not apply in this case because they argue it would pro-

duce an absurd result: It would require the release of timber sales offered in forests that were never subject to Section 318's environmental and procedural protections.

Such a result is not absurd. On the contrary, it mirrors the original provisions of Section 318. By its very terms, Section 318 accords such protections to only a subset of the sales it authorized. . . .

Slip Op. at 4956-57. The Court noted that BLM sales offered under Section 318(a)(2) were "never afforded the protections of Subsections 318(b)-(k)." *Id.* at 4957. The Court found that all of the BLM's western Oregon districts are "subject to section 318," and therefore to section 2001(k), even though none of the BLM's sales were subject to the special old growth and spotted owl protective measures in section 318(b).

The Court's point was that an area would be "subject to section 318" if it was subject to section 318(a) even if it was not subject to the special protective measures in section 318(b). This reasoning necessarily rejects appellants' argument that the six eastside forests are not "subject to section 318" because — like the BLM — their 1.9 billion board feet of section 318 timber sales were not required to meet the special environmental provisions of section 318(b). The Court's reasoning agreed with the district court's conclusion that the six eastside national forests were "subject to section 318," and therefore to section 2001(k), because they were subject to section 318(a).

Without acknowledging the Court's reasoning, appellants base their argument solely on three brief passages regarding the

scope of section 318. Appellants' contentions are without merit.

The Court's discussion of section 318 in these three passages is in a few respects not completely comprehensive, but the minor discrepancies are inconsequential to the Court's reasoning and to its conclusion:

While section 318(a)(1) does refer to "the thirteen national forests in Oregon and Washington known to contain northern spotted owls," as the Opinion states at page 4956, the law refers more broadly to "the national forests of Oregon and Washington" in directing its 7.7 billion board foot national forest timber sale program. Section 318(a)(1). Thus, while section 318(a) does identify two distinct geographical areas, as the Opinion states at page 4958, it also identifies the broader geographical area of "the national forests of Oregon and Washington."

It is plainly true, as the Opinion states at page 4957, that section 318 authorized one category of timber sales for the 13 national forests known to contain spotted owls and another category for BLM districts. It is also true that section 318 authorized a third category of timber sales: for the six national forests that do not contain northern spotted owls.

None of these minor points contradicts the Court's central holding: the plain meaning of section 2001(k) releases timber sales that were not subject to the special protective measures in section 318(b). This holding affirms the district court's conclusion that the statute applies to timber sales in the

eastside forests, just as it affirms the district court's conclusion that the statute applies to 1991-95 timber sales. The Opinion is fully consistent with the Court's affirmance of the district court's orders.

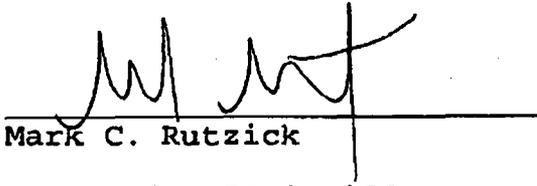
Appellants have demonstrated no likelihood of obtaining rehearing or modification of the court's Opinion. Appellants are therefore not entitled to a stay of the 11 eastside timber sales that remain to be operated this year. The "harm" they fear - logging the sales this summer - is precisely what Congress intended.

CONCLUSION

The motion for clarification of the Court's April 24 Opinion and for a stay of 11 timber sales should be denied.

Dated this 10th day of May, 1996.

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By: 

Mark C. Rutzick

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6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

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

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

Page

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

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1 defendants in their opposition to Scott Timber Co's motion to
2 compel replacement timber.¹

3 The government asserts that it will take at least 12 months,
4 and perhaps far longer, to provide the replacement timber
5 mandated by section 2001(k)(3).² It asserts that this delay is
6 compelled by its responsibility to comply with other environmen-
7 tal laws such as the National Environmental Policy Act (NEPA) and
8 the National Forest Management Act (NFMA) and applicable regula-
9 tions before supplying replacement timber. For the following
10 reasons, its position is entirely lacking in merit:

11 1. The environmental laws such as NEPA and NFMA do not
12 apply to the provision of replacement timber under section
13 (k)(3). The "notwithstanding any other provision of law" clause
14 in section (k)(1) applies to the entire contract that is released
15 under that subsection, even if replacement timber is provided
16 under section (k)(3). Section (k)(3) expressly states that the
17 replacement timber "shall be subject to the terms of the original
18 contract." This clause means that changing the location of the
19 timber to be cut does not abolish the original contract, and does

20
21 ¹ In the event the defendant Secretaries present different
22 arguments in opposition to NFRC's companion motion, NFRC reserves
23 the right to reply further. In addition, NFRC hereby adds one
24 unit to its motion seeking replacement timber: Roman Dunn Unit
25 2.

26 ² The motion to compel compliance with section 2001(k)(3)
relates to the existing third and fourth claims for relief, and
is not in any way pending before the Ninth Circuit. This court
has jurisdiction to grant the motion. NFRC can file an amended
complaint if the court deems that necessary.

1 not eliminate the application of the "notwithstanding any other
2 provision of law" clause to the contract.

3 Thus, section (k)(1) allows the purchaser to operate the
4 sale notwithstanding any other provision of law, at least through
5 September 30, 1996, under the terms of the original contract -
6 even if different timber is provided under section (k)(3). As
7 the Ninth Circuit recently affirmed, "Section 2001(k)(1) does not
8 defy or violate existing environmental laws; rather, it explicit-
9 ly preempts them with its phrase 'notwithstanding any other
10 provision of law.'" *Northwest Forest Resource Council v.*
11 *Glickman*, Nos. 95-36038, 36042, slip op. at 4967 (April 24,
12 1996).

13 2. The Forest Service recently recognized that it can
14 provide replacement timber under section 2001(k) without going
15 through NEPA or other environmental procedures. On April 3, 1996
16 the Forest Service issued an emergency regulation allowing it to
17 modify contracts released under section 2001(k), without adver-
18 tisement or competitive bidding, "by substituting timber from
19 outside the sale area specified in the contract for timber"
20 61 Fed. Reg. 14618, 14621. (Attachment A.) Relying on this
21 regulation, the Forest Service immediately provided Scott Timber
22 Co. with replacement timber for the First and Last timber sales,
23 which were awarded by order of this court, without complying with
24 NEPA or other environmental statutes. (Attachment B.)

25 3. The authors of the July 27, 1995 letter to the Secre-
26 taries addressed this very issue:

Page

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

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1 In the event that subsection (k) (2) bars the
2 release of a timber sale unit, subsection
3 (k) (3) requires provision of an equal volume
4 of timber, of like kind and value. The
5 provision of alternative timber under subsec-
6 tion (k) (3), when required, is clearly a
7 component of compliance with subsection
8 (k) (1), and therefore does not require com-
9 pliance with environmental laws or other
10 federal statutes in light of the "notwith-
11 standing any other provision of law" language
12 in subsection (k) (1). If your agencies were
13 confused on this point, they should have
14 raised it in our deliberations. Alternative
15 volume under subsection (k) (3) must be pro-
16 vided promptly so that all sales requiring
17 alternative volume can, like all the other
18 released sales, be operated to completion in
19 fiscal years 1995 and 1996.

11 Letter to Secretary Dan Glickman and Secretary Bruce Babbitt from
12 Senators Frank Murkowski, Larry Craig and Slade Gorton and
13 Representatives Don Young, Charles Taylor and Pat Roberts (July
14 27, 1995) (NFRC Exhibit 4) (emphasis added).

15 4. In any event, NEPA does not apply to the mandatory duty
16 to provide replacement volume. "An EIS is normally not required
17 where agency action is mandatory." *National Wildlife Federation*
18 *v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). When a mandatory
19 duty begins to run on a date certain (45 days after enactment of
20 section 2001 in this case), compliance with NEPA is not required
21 before the agency complies with the duty. *Westlands Water Dist.*
22 *v. Natural Resources Defense Council*, 43 F.3d 457, 460 (9th Cir.
23 1994).

24 Where Congress intervenes to end a disruption in timber
25 sales with short-term emergency legislation, the courts will not
26 permit NEPA to defeat the intent of Congress. *Texas Committee On*

1 *Natural Resources v. Bergland*, 573 F.2d 201, 209 (5th Cir.
2 1978) (NEPA compliance not required for two-year congressional
3 direction to continue timber sales). Nor would the Endangered
4 Species Act apply to this mandatory duty. *Sierra Club v.*
5 *Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (ESA does not apply to non-
6 discretionary agency acts).

7 Section 2001(k) was emergency legislation to release timber
8 sales and have them operated promptly. Congress never intended
9 that lengthy NEPA procedures and other administrative reviews
10 under environmental laws would delay replacement timber until
11 1997 or later, as defendants now threaten. Thus, those laws do
12 not apply to these mandated sales in any case.

13 5. Section 2001(d) of the Rescissions Act also exempts
14 replacement volume from the environmental laws. This section
15 allows the Forest Service and BLM to prepare, offer and award
16 timber sale contracts in the Option 9 region until December 31,
17 1996 "notwithstanding any other law," a provision which expressly
18 preempts environmental laws. In *Oregon Natural Resource Council*
19 *v. Thomas*, No. 95-6272-HO (D. Or.), the same defendants argued,
20 and this court agreed, that section 2001(d) exempts timber sale
21 contracts in the Option 9 region from environmental laws.

22 All of the sales withheld under section (k)(2) are in the
23 Option 9 region. Thus, between now and December 31, 1996, the
24 defendants may proceed under section (k)(3) to identify and
25 provide replacement volume for those contracts without complying
26 with NEPA. In addition, section 2001(e) provides that there are

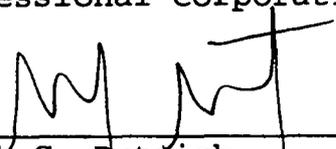
1 no administrative appeals for sales under section 2001(d).

2 **Conclusion**

3 NFRC's motion to compel provision of replacement timber for
4 the sale units identified above should be granted. Defendants
5 should be ordered to provide replacement timber for these units
6 in compliance with section 2001(k) (3) as soon as possible and in
7 no event later than June 1, 1996.

8 Dated this 13th day of May, 1996.

9 MARK C. RUTZICK LAW FIRM
10 A Professional Corporation

11 By: 
12 Mark C. Rutzick
13 Attorney for Plaintiff

discretionary authority can be found at 36 CFR 1.5 (Closures and public use limits) and at 36 CFR 1.7(b) (Park compendium) to safely regulate access to the Caves.

On March 14, 1995, the NPS published the proposed regulation that would delete this special regulation (60 FR 13662). Public comment was invited. The comment period closed on May 15, 1995. No comments were received during the comment period.

Drafting Information

The primary authors of this final rule are Craig W. Ackerman, Area Manager of Oregon Caves National Monument and Dennis Burnett, Washington Office of Ranger Activities, National Park Service.

Paperwork Reduction Act

This final rule does not contain collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

Compliance with Other Laws

This rule was not subject to Office of Management and Budget review under Executive Order 12866. The Department of the Interior determined that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq). The economic effects of this rulemaking are local in nature and negligible in scope.

The NPS has determined that this final rule will not have a significant effect on the quality of the human environment, health and safety because it is not expected to:

(a) Increase public use to the extent of compromising the nature and character of the area or causing physical damage to it;

(b) Introduce non-compatible uses which might compromise the nature and characteristics of the area, or cause physical damage to it;

(c) Conflict with adjacent ownerships or land uses; or

(d) Cause a nuisance to adjacent owners or occupants. Based upon this determination, this regulation is categorically excluded from the procedural requirements of the National Environmental Policy Act (NEPA) by Departmental regulations in 516 DM 6, (49 FR 21438). As such, neither an Environmental Assessment (EA) nor an Environmental Impact Statement (EIS) has been prepared.

List of Subjects in 36 CFR Part 7

National parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, 36 CFR Chapter I is amended as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for part 7 continues to read as follows:

Authority: 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

§7.49 [Removed]

2. Section 7.49 is removed.

Dated: March 14, 1996.

George T. Frampton, Jr.,
Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 96-7878 Filed 4-2-96; 8:45 am]
BILLING CODE 4310-70-P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

RIN 0596-AB58

Disposal of National Forest System Timber; Modification of Timber Sale Contracts in Extraordinary Conditions

AGENCY: Forest Service, USDA.

ACTION: Interim final rule; request for public comment.

SUMMARY: This interim rule revises the existing regulations regarding noncompetitive sale of timber based on the Secretary of Agriculture's determination that extraordinary conditions exist. The intended effect is to allow forest officers, without advertisement, to make modifications to timber sales awarded or released pursuant to section 2001(k) of the 1995 Reversions Act, which result in the substitution of timber from outside the sale area specified in the contract for timber within the timber sale contract area. Good cause exists to adopt this interim final rule without prior notice and comment; however, public comment is invited and will be considered before adoption of a final rule.

DATES: This rule is effective April 3, 1996. Comments must be received by May 20, 1996.

ADDRESSES: Send written comments to: Chief (2400), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.

The public may inspect comments received on this rule in the Office of the Director, Timber Management Staff, Forest Service, USDA, 201 14th Street,

SW., Washington, DC 20250. Parties wishing to view comments are requested to call ahead ((202) 205-0893) to facilitate entry into the building. FOR FURTHER INFORMATION CONTACT: Bob Lynn, Timber Management Staff (202) 205-1787; Jay McWhirter, Natural Resources Division, Office of the General Counsel (202) 690-0329.

SUPPLEMENTARY INFORMATION:

Applicable Contract Law

The rules at 36 CFR Part 223 govern the sale of National Forest System timber. Sections 223.80 and 223.100 address the requirements for advertisement and for award of timber sale contracts respectively. Title 16 U.S.C. 472a(d) requires the Secretary of Agriculture to advertise all sales of forest products unless the value of the sale is less than \$10,000, or the Secretary determines that extraordinary conditions exist, as defined by regulation. Current regulations at 36 CFR 223.80 require advertisement of a sale for 30 days when its value is greater than \$10,000. The Secretary has not previously promulgated rules to implement section 472a(d)'s authority to dispose of timber without advertisement when extraordinary conditions exist.

The advertising requirement of 16 U.S.C. 472a(d) also limits modifications to contracts involving the addition or substitution of timber outside a contract's sale area. Since only the timber within the contract's sale area was subject to competitive bidding, any timber located outside the contract's sale area would theoretically be available for sale to other interested purchasers; thus the current rules do not permit contract modifications that add or substitute timber outside a contract's sale area for timber under contract within the sale area. Moreover, the General Accounting Office has held that substitution of timber outside a contract's sale area for timber within the contract area violated the agency's authority to sell timber. B-177602 (1973). The Agriculture Board of Contract Appeals has decided similarly in several cases. See *Appeal of Summit Contractors*, AGBCA No. 81-252-1, AGBCA No. 83-312-1 (Jan. 8, 1986), and *Appeal of Jay Rucker*, AGBCA No. 79-211A CDA (June 11, 1980). In addition, in a recent case involving the Bureau of Land Management, the Court of Federal Claims stated that modifications to existing timber sales must conform with agency status and regulations regarding disposal of timber. *Croman Corporation v. United States*, 31 Fed. Cl. 741, 746-47 (August 16, 1994).

The 1995 Rescissions Act

On July 27, 1995, President Clinton signed into law the 1995 Rescissions Act (Pub. L. 104-19, 109 Stat. 246). Section 2001(k) of the 1995 Rescissions Act directed the release of timber sales subject to section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act (Pub. L. 101-121, 103 Stat. 745). Section 318 has been the subject of extensive litigation, including a Supreme Court decision ultimately affirming the constitutionality of the law in *Robertson v. Seattle Audubon Society*, 503 U.S.C. 429 (1992). Some section 318 timber sales were affected by litigation over compliance with various terms of section 318, such as the requirement to minimize fragmentation of ecologically-significant old growth. See *Seattle Audubon Society v. Robertson*, Civ. No. 89-160 (W.D. Wash.).

Many section 318 sales did not go forward as a result of concerns about significant impacts to species listed under the Endangered Species Act (ESA). In June 1990, after enactment of section 318, the United States Fish and Wildlife Service (FWS) listed the northern spotted owl as a threatened species under the ESA (55 FR 26189; June 26, 1990). Because of the listing of the northern spotted owl as a threatened species, a number of Forest Service section 318 sales were "modified, eliminated or held in abeyance." See *Gifford Pinchot Alliance v. Buttrille*, 742 F. Supp. 1077, 1080.

On September 28, 1992, the FWS listed the marbled murrelet as a threatened species (57 FR 45328; Oct. 1, 1992). As a result of the listing, the Forest Service reinstated consultation with the FWS under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1538(a)(2), regarding the effects of murrelets of continuing to harvest section 318 sales that had already been awarded. In June 1995, the FWS concluded that further logging of a number of the Forest Service section 318 sales would likely jeopardize the continued existence of the marbled murrelet. As a result, these section 318 sales were suspended pending further field survey work.

Some section 318 sales were also affected when the National Marine Fisheries Service proposed listing several anadromous fish species in the region as threatened or endangered. These species include the Umpqua River cutthroat trout (59 FR 35089; July 8, 1994), and the coho salmon (60 FR 38011; July 25, 1995). As stated in these listings, the decline of these species is

due in part to past timber harvest practices.

The 1995 Rescissions Act contained a provision directed at these section 318 sales that were still suspended. Section 2001(k) of the Act states:

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 sale contracts offered or awarded before that date 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 (103 Stat. 745). The return of the bid bond of the higher bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph.

Currently the Department is in litigation involving the implementation of section 2001 of the 1995 Rescissions Act. On September 13, 1995, the district court in *NFRC v. Glickman* No. 95-6244-HO (D. Or.), held that section 2001(k) applies to timber sales previously offered or awarded in all national forests in Washington and Oregon and BLM districts in western Oregon up to July 27, 1995. On October 17, 1995, the district court entered an order which "compelled and directed" the Secretary of Agriculture and the Secretary of the Interior, "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 sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or BLM district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting." The government has appealed the district court's ruling (*NFRC v. Glickman*, 9th Cir. No. 95-36042), and is awaiting a decision.

After the district court's September 13, 1995, ruling, and its October 17, 1995, injunction, the Forest Service proceeded to release timber sales to previously identified high bidders. In one category of sales, however, the high bidders were either unwilling, unable, or unqualified to take advantage of the renewed offer of the timber sale. In another category of sales, courts had previously issued injunctions preventing the award of the sales, or the Forest Service had rejected bids, suspended, or terminated sales as a result of earlier litigation. For both categories, the Forest Service decided not to pursue the award or release of

timber sales, and was challenged in district court in the *NFRC v. Glickman* case. In a decision dated January 10, 1996 (amended to address typographical errors on January 17, 1996), the district court enjoined the Secretary of Agriculture to award, release and permit to be completed immediately, all timber sales that were subject to section 2001(k). The January 10, 1996, injunction included sales where the Forest Service had rejected bids, suspended, or terminated sales as a result of earlier litigation, and those sales where the high bidders were unwilling, unable, or unqualified to be awarded sales.

In section 2001(k)(2) of the 1995 Rescissions Act, Congress created a limited exception from the general release requirements imposed by section 2001(k)(1). Under section 2001(k)(2), "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." Section 2001(k)(3) requires the Secretary of Agriculture and the Secretary of the Interior to provide an equal volume of alternative timber "of like kind and value" for timber sales withheld under 2001(k)(2)'s "known to be nesting" provision. On August 23, 1995, the Department of Agriculture and the Department of the Interior issued a joint letter of direction implementing section 2001(k)(2). The agencies concluded that, based on the scientific analysis used in a protocol developed by the Pacific Seabird Group, the protocol's criteria should be utilized in evaluating whether marbled murrelets are "known to be nesting" in timber sales that are subject to section 2001(k).

On September 1, 1995, a lawsuit was filed challenging the government's implementation of section 2001(k)(2). *Scott Timber Co. v. Glickman*, Civ. No. 95-6267-HO (D. Or.). The district court consolidated the *Scott Timber* case with *NFRC v. Glickman*, Civ. No. 95-6244-HO. On January 19, 1996, the district court issued a decision rejecting the government's interpretation of section 2001(k)(2) and use of the Pacific Seabird Group Protocol criteria to determine whether marbled murrelets are "known to be nesting." The court stated:

The language and legislative history of section 2001(k)(2) suggest that Congress intended to allow the agencies some leeway to determine what types of physical evidence observed within sale unit boundaries are sufficient to establish a "known" nesting site within the sale unit. Thus an agency may rely on the visual or auditory observation of a murrelet located sub-canopy within sale unit boundaries engaging in behavior that the

agency determines is sufficiently indicative of nesting to establish a "known" nesting site within that sale unit.

The District court then enjoined the Secretary of Agriculture to release sales that had previously been suspended if the sales did not satisfy the criteria set forth in the court's January 19, 1996, order. At a hearing held on January 25, 1996, the district court granted a 60-day stay of the injunction. The stay expires on March 25, 1996, and timber purchasers have opposed continuation of the stay order on the bases that they should be entitled to begin harvesting and any continuation may preclude them from completing timber sales due to the expiration of section 2001(k)(1) on September 30, 1996. The government has appealed both the January 10 and January 19, 1996, rulings of the district court; oral argument on the appeal is scheduled for the week of May 6, 1996.

Extraordinary Conditions

The Secretary of Agriculture is under October 17, 1995, January 10, 1996, and January 19, 1996, injunctions by the district court in *NFRC v. Glickman* to release sales that the Forest Service had previously suspended, withdrawn, or canceled. While the United States has taken appeals from the district court rulings underlying these injunctions, some sales have already been released, and others may be released in the future to comply with the district court injunctions.

Timber sales that have been released, or that may be released were planned and prepared under standards that predated the Record of Decision for amendments to Forest Service and Bureau of Land Management planning documents within the range of the northern spotted owl, dated April 13, 1994 (hereinafter referred to as Northwest Forest Plan). The release and harvest of some of these sales may cause real harm to natural resources, including fish and wildlife resources. However, the opportunity exists to negotiate mutual modifications to these sales that will minimize environmental harm and bring them more in compliance with the Northwest Forest Plan's standards and guidelines. However, the mutual modifications likely to be needed for these sales would require the Forest Service to substitute timber from outside of the existing sale areas. Faced with these extraordinary conditions, unless the agency can immediately implement the authority provided in 16 U.S.C. 472a(d) to dispose of timber without advertisement, the opportunity to carry out section 2001(k) with a minimum of environmental harm

through modifications to timber sale contracts will be lost.

Good Cause Exemption

Based on the foregoing extraordinary conditions, the Department finds that there exists good cause to promulgate this rule on an expedited basis. Because of district court injunctions in *NFRC v. Glickman* which require the Forest Service to take immediate action to award and release these timber sales, the Forest Service has a compelling need to make modifications to contracts which have been or will be awarded or released pursuant to section 2001(k) of the 1995 Rescissions Act. Without modification, sales will be awarded or released which contain provisions that pre-date the implementation of the timber sale standards and guidelines of the Northwest Forest Plan. Given the duty to comply with the district court's injunction, and the urgent need to modify timber sales to avoid environmental harm that would occur if these timber sales are completed without modification, the Department finds that notice and comment are impracticable prior to the issuance of this rule, and thus, that good cause exists to adopt this interim final rule.

Moreover, the Department finds that it would be contrary to the public interest, under these circumstances, to fail to act immediately to address the need for modification of these timber contracts. First, this rule will have a limited application. It will apply only to those sales that have been or will be released pursuant to section 2001(k) of the 1995 Rescissions Act. To date, the Forest Service has identified approximately 100 timber sales subject to section 2001(k). Second, without authority to make contract modifications that include timber outside the sale area, the Forest Service cannot provide a reasonable alternative to imminent harvest of environmentally harmful timber sales. It is the opinion of the Department, based on communications with timber contract holders, that failure to expeditiously provide alternatives to the timber sales released by section 2001(k) will lead to the immediate harvest of released sales. Such environmental harm, which may restrict options for future timber harvests, may occur within the time otherwise required for notice and public participation by E.O. 12866. Finally, section 2001(h) of the 1995 Rescissions Act does not require the Secretary of Agriculture to adhere to the requirements of 5 U.S.C. 553 in implementing the 1995 Rescissions Act. To the extent that this rule is in furtherance of the duties imposed by the

Rescissions Act, normal rulemaking procedures would not apply.

Intended Effects

This interim final rule redesignates the existing text in 36 CFR 223.85 as paragraph (a) and adds a new paragraph (b) to define "extraordinary conditions" to allow forest officers, without advertisement, to make modifications to timber sales awarded or released pursuant to section 2001(k) of Public Law 104-19 (109 Stat. 246), which result in the substitution of timber from outside the sale area specified in the contract for timber within the sale area. It should be noted, however, that this rule change does not compel a timber purchaser to accept a timber sale modification offered under the interim final rule. The rule authorizes the Forest Service to propose modifications and to enter into discussions with purchasers on such modifications, but, as with all mutual transactions, purchasers are not obligated to accept any proposed modifications.

Regulatory Impact

This rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. While it has been determined that this is not an economically significant rule, this rule has been determined to be significant because this rule implements a statutory authority for noncompetitive modification of timber sale contracts. Heretofore, there have been no rules on this subject. Given the wide interest in the timber sales and the statutory direction that gives rise to the extraordinary conditions which are the subject of this rulemaking, this rule has been reviewed by the Office of Management and Budget prior to publication.

Moreover, this rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by that act.

Environmental Impact

This rulemaking action falls within a category of actions excluded from documentation in an Environmental Impact Statement or an Environmental Assessment. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental assessment or impact statement "rules, regulations, or policies to establish Service-wide administrative

procedures, program processes, or instructions." The agency's assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement for this rule.

Controlling Paperwork Burdens on the Public

This rule does not require any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR 1320 not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) and implementing regulations at 5 CFR 1320 do not apply.

List of Subjects in 36 CFR Part 223

Exports, Government contracts, National forest, Reporting and recordkeeping requirements, Timber sales.

Therefore, for the reasons set forth in the preamble, it is proposed to amend part 223 of title 36 of the Code of Federal Regulations as follows:

PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER

1. The authority citation for part 223 continues to read as follows:

Authority: 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213, 16 U.S.C. 618, unless otherwise noted.

Subpart B—Timber Sale Contracts

2. Section 223.85 is revised to read as follows:

§ 223.85 Noncompetitive sale of timber.

(a) Forest officers may sell, within their authorization, without further advertisement, at not less than appraised value, any timber previously advertised for competitive bids but not sold because of lack of bids and any timber on uncut areas included in a contract which has been terminated by abandonment, cancellation, contract period expiration, or otherwise if such timber would have been cut under the contract. This authority shall not be utilized if there is evidence of competitive interest in the product.

(b) Extraordinary conditions, as provided for in 16 U.S.C. 472(d), are defined to include the potential harm to natural resources, including fish and wildlife, and related circumstances arising as a result of the award or release of timber sale contracts pursuant to

section 2001(k) of Public Law 104-19 (109 Stat. 246). Notwithstanding the provisions of paragraph (a) or any other regulation in this part, for timber sale contracts that have been or will be awarded or released pursuant to section 2001(k) of Public Law 104-19 (109 Stat. 246), the Secretary of Agriculture may allow forest officers to, without advertisement, modify those timber sale contracts by substituting timber from outside the sale area specified in the contract for timber within the timber sale contract area.

Dated: March 28, 1996.
 Dan Glickman,
 Secretary of Agriculture.
 [FR Doc. 96-8095 Filed 4-2-96; 8:45 am]
 BILLING CODE 3410-11-M

36 CFR Part 292

RIN 0596-AB39

Smith River National Recreation Area

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements Section 8(d) of the Smith River National Recreation Area Act of 1990 and sets forth the procedures by which the Forest Service will regulate mineral operations on National Forest System lands within the Smith River National Recreation Area. This rule supplements existing Forest Service regulations and is intended to ensure that mineral operations are conducted in a manner consistent with the purposes for which the Smith River National Recreational Area was established.

EFFECTIVE DATE: This rule is effective April 3, 1996.

FOR FURTHER INFORMATION CONTACT: Sam Hotchkiss, Minerals and Geology Management Staff, (202) 205-1535.

SUPPLEMENTARY INFORMATION:

Background

The Smith River National Recreation Area (SRNRA) was established by the Smith River National Recreation Area Act of 1990 (the Act) (16 U.S.C. 460bbb et seq.). The purpose of the Act is to ensure, "... the preservation, protection, enhancement, and interpretation for present and future generations of the Smith River watershed's outstanding wild and scenic rivers, ecological diversity, and recreation opportunities while providing for the wise use and sustained productivity of its natural resources.

In order to meet the purposes of the Act, Congress directed the Secretary to

manage the SRNRA to provide for a broad range of recreational uses and to improve fisheries and water quality. The Act prohibits mining, subject to valid existing rights and limits extraction of mineral materials to situations where the material extracted is used for construction and maintenance of roads and other facilities within the SRNRA and in certain areas specifically excluded from the SRNRA by the Act.

The SRNRA consists of approximately 300,000 acres of National Forest System lands in the Six Rivers National Forest in northern California. The Act divides the SRNRA into eight distinct management areas and specifies a management emphasis for each. One of these eight areas is the Siskiyou Wilderness, most of which was designated by Congress in 1984. The Casquet-Orleans Corridor was added to the Siskiyou Wilderness by the Act in 1990. The Act specifies that the Siskiyou Wilderness is to continue to be managed pursuant to the provisions of the Wilderness Act.

The Act also designates the Smith River, the Middle Fork of the Smith River, the North Fork of the Smith River, the Siskiyou Fork of the Smith River, and the South Fork of the Smith River as components of the National Wild and Scenic Rivers System and stipulates that they be managed in accordance with the Act and the Wild and Scenic Rivers Act. In the event of a conflict between the provisions of these two statutes, the Act specifies that provisions of the most restrictive statute apply. Finally, the Act expressly excludes four areas that lie within the boundary of the SRNRA from compliance with provisions of the Act.

Mining and prospecting for minerals have been an important part of the history of the Smith River area since the 1850's. Historically, mining operations within the Smith River area have been small-scale placer gold exploration and recovery operations within the bed and banks of the Smith River and its main tributaries. Panning, sluicing, and dredging operations occur predominantly during the summer months. In recent years, large, low-grade, nickel-cobalt resources in the uplands of the Smith River watershed have attracted the attention of prospectors. In 1990, there were approximately 5,000 mining claims covering about 30,000 acres of National Forest System lands within the SRNRA. By 1995, however, there were only approximately 320 mining claims covering about 8,000 acres of National Forest System lands in the SRNRA that met current Bureau of Land Management filing requirements. In

United States
Department of
Agriculture

Forest
Service

Umpqua National Forest
PO Box 1008
Roseburg, OR 97470
(541) 672-6601
FAX (541) 957-3495

REPLY TO: 2450

April 6, 1996

SUBJECT: First Timber Sale, Contract No. 083979 and
Last Timber Sale, Contract No. 083847

TO: Scott Timber Company
P.O. Box 1088
Roseburg, OR 97470

LETTER OF AGREEMENT

Pursuant to the interim final rule for 36 CFR Part 223 (Disposal of National Forest System Timber; Modification of Timber Sale Contracts in Extraordinary Conditions) published in the Federal Register on April 3, 1996 and Public Law 104-19 Subsection 2001 (k), the Secretary of Agriculture authorized the Forest Service to modify the First and Last Timber Sales by substituting timber from outside the sale area specified in the contract for timber within the timber sale contract area.

In accordance with direction from the Regional Forester, the Forest Service proposes to substitute timber of equal volume and of like kind and value for the uncut volume on First and Last Timber Sales according to the following procedures for implementing the contract modifications to the First Timber Sale Contract No. 083979 and the Last Timber Sale Contract No. 083847 to consummate this action:

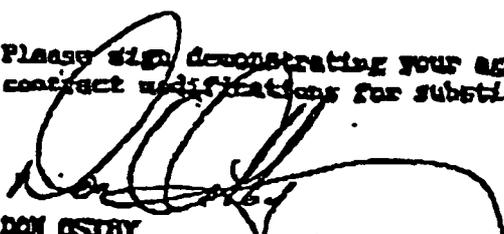
1. Both parties agree to substitute the entire sale volumes, minus the volume that has already been felled. The volume of the timber already felled will be determined by scaling the logs when they are delivered to an agreed upon scaling location. The volume of the sale will be the volume determined by the Forest Service's original sale cruise; however, because the original sale cruise was completed about ten years ago, there may have been some growth and mortality of the timber within the current sale units. If the Purchaser believes that the net growth was significant, the Purchaser may place sufficient funds on deposit with the Forest Service to pay for an independent cruiser to re-cruise the original sale units. The Forest Service will then contract with an independent cruiser to re-cruise to the cruising and quality standards that were used at the time of the original cruise. The results of the re-cruise will be mutually binding and will be used to determine the amount of the volume to be substituted.
2. The substitute volume will be the overstory trees in existing shelterwood harvest units on the Tillamook Ranger District that are identified by the Forest Service with concurrence of the Level One Team, then presented to the Purchaser for review and acceptance.

EXHIBIT 3
PAGE 1

Reserve trees will be marked in the identified riparian and cultural resource areas by the Forest Service. The substitute timber will be identified in a timely manner to permit uninterrupted operations by the Purchaser.

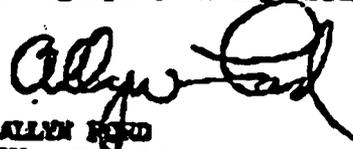
3. The Forest Service will cruise the volume in the units accepted for substitution to determine the volume counted toward the required substitute timber. The Purchaser will have an opportunity to review the cruise reports. The Forest Service and Purchaser will come to a mutual agreement on the cruise volume.
4. The Forest Service will complete an appraisal using the current Transaction Evidence Appraisal program and costs for the current timber sale contract and for the modified timber sale contract. The appraisal of the modified contract will be based on the substitute volume and will reflect the changed conditions between the original units and the substitution units including, but not limited to, the revised haul routes, volume per acre, move-in/move-out costs, average log size and logging systems. The difference in appraised value between the two appraisals will be used to adjust the Current Contract Rates. The Purchaser will have an opportunity to review the appraisal. The Forest Service and Purchaser will come to a mutual agreement on the appraised values.
5. The Current Contract Rates will be charged for any substituted volume that is removed prior to the completion of the appraisals. When the appraisals are completed, a retroactive adjustment will be made to the charges for timber removed so that all substituted volume is charged at the adjusted rates.
6. An Amended Agreement to Modify Contract, 2400-9, will be prepared and offered to Scott Timber Company to delete the existing units and add the substitute units. This Letter of Agreement is sufficient to allow both parties to proceed with the substitution of volume.
7. If, for any reason, the substitute timber in paragraph 2 is not provided or cannot be harvested, the Purchaser can resume harvest of the First and Last Timber Sales. Both parties shall make all reasonable effort to avoid the necessity to resume harvesting of First and Last Timber Sales.
8. Upon the signing of this Letter of Agreement, cutting operations will cease in the existing units and may begin in the initial substitute units. However, both parties recognize that there may be additional felling required in Units 9 and 10 of Last Timber Sale in order to be able to remove the currently felled volume. Both parties intend to agree on the extent of this additional felling no later than Monday, April 8, 1996. The mutual intent is to keep any additional felling after the date of this agreement to the absolute minimum necessary for girdling feasibility and safety.

Please sign demonstrating your agreement with these procedures to implement the contract modifications for substitute volume.



DON OSTBY
Contracting Officer
Umpqua National Forest

I agree with the above procedures to implement the contract modifications for substituting volume for First and Last Timber Sale Contracts and to cease cutting existing units upon the signing of this Letter of Agreement except for paragraph 7 or any trees agreed to be cut under paragraph 6.



ALLEN FORD
Vice President
Scott Timber Company

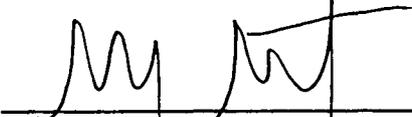
cc: Tiller RD, Regional Forester

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on May 13, 1996, by mailing to said attorneys true copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorneys at said attorneys' last known addresses, and deposited in the post office at Portland, Oregon, on said day.

Dated this 13th day of May, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: 
Mark C. Rutzick
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PROVISION OF REPLACEMENT TIMBER FOR CERTAIN SALE UNITS on:

Michelle Gilbert/Wells Burgess
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
601 Pennsylvania Avenue N.W.
8th Floor
Washington, D.C. 20044
(202) 305-0429 (fax)

Patti A. Goldman
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104
(206) 343-1526 (fax)

on May 13, 1996, by facsimile and 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

James L. Sutherland
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Marianne Dugan
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401

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 | |
| | Ted Boling | 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: 21

DATE: May 13, 1996

FROM: Paula Clinedinst

MESSAGE: NFRC v. Glickman

Attached is Federal Defendants' Motion to Strike, or, in the Alternative, Opposition to Scott Timber Co's Motion to Compel Timber.

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 U.S. Department of Justice
 Environment and Natural Resources Division
 8 P.O. Box 663
 Washington, D.C. 20044-0663
 9 Telephone: (202) 305-0460

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

| | | |
|----|--------------------------------------|-----------------------|
| 12 | NORTHWEST FOREST RESOURCE COUNCIL,) | |
| 13 | Plaintiff,) | |
| 14 | v.) | Civil No. 95-6244-HO |
| 15 |) | (lead case) |
| 16 | GLICKMAN and BABBITT,) | Civil No. 95-6267-HO |
| 17 | Defendants,) | (consolidated case) |
| 18 | OREGON NAT. RES. COUNCIL, et al.) | FEDERAL DEFENDANTS' |
| 19 | Defendants-Intervenors) | MOTION TO STRIKE, OR, |
| |) | IN THE ALTERNATIVE, |
| |) | OPPOSITION TO SCOTT |
| |) | TIMBER CO.'S MOTION |
| |) | TO COMPEL TIMBER |

20 Introduction

21 Plaintiff Scott Timber Company seeks an Order
 22 compelling the Forest Service to identify and release replacement
 23 timber pursuant to Section 2001(k)(3). First and foremost, this
 24 request is not properly before the Court at this time, because
 25 section (k)(3) is outside the scope of this lawsuit and Scott
 26 Timber would have to seek the Court's permission to amend its
 complaint at this late stage of the litigation to raise an
 DEFENDANTS' MOTION TO STRIKE -1

1 entirely new legal issue that is not appropriate for adjudication
2 at this time. Alternatively, to the extent that Scott Timber
3 maintains that this new claim arises from the (k)(2) question,
4 this Court cannot address this issue, because sole jurisdiction
5 on the (k)(2) interpretation rests with the Court of Appeals for
6 the Ninth Circuit.

7 Moreover, even if Scott Timber's motion for
8 identification and release of timber were properly before the
9 court, it should be denied. Defendants must properly await the
10 decision of the Ninth Circuit on the (k)(2) issue before
11 proceeding to identify and release replacement timber. Without
12 the full knowledge of the volume of replacement timber, the
13 federal Defendants could not analyze and choose suitable
14 replacement timber, but would be forced to engage in piecemeal
15 decisionmaking. Also, requiring such premature identification
16 and release would also treat timber companies unequally and move
17 one company, Scott Timber, to the front of the replacement timber
18 line.

19 Finally, as has already been raised in the context of
20 the stay proceedings, within 60 days of a final order on the
21 (k)(2) issue, the Forest Service would identify locations of
22 alternative timber, discuss alternative timber with the
23 purchasers and compare the original sale with that of the
24 replacement timber. See Declaration of Gray F. Reynolds
25 (3/28/96) at 4 (attached as Ex. B). As previously outlined, the
26 identification process is simply the first step, followed by
important environmental and administrative appeal reviews before
DEFENDANTS' MOTION TO STRIKE -2

1 such releases can go forward. These steps can and should only
2 move forward following the disposition of the overall issue. If,
3 however, the Court orders that this identification and release
4 move forward prior to the Ninth Circuit's decision, the Forest
5 Service attaches another declaration setting forth the time
6 required to comply with the post-identification processes.

7 For all the reasons set forth below, the identification
8 and release of replacement timber sought by Scott Timber Co. is
9 unwarranted. Federal Defendants' motion to strike should be
10 granted, or, in the alternative Scott Timber's motion should be
11 denied.

12 Procedural History

13 On August 29, 1995, Scott Timber Company filed a
14 lawsuit in the U.S. District Court for the District of Oregon
15 challenging the Forest Service's interpretation and application
16 of Section 2001(k)(2) to 15 sales where Scott Timber was
17 identified as the high bidder. See Scott Timber v. Glickman, No.
18 95-6267 (Complaint, 8/28/95). By request of Scott Timber, this
19 action was consolidated with the related Rescissions Act case,
20 Northwest Forest Resource Council v. Glickman, Civil No. 95-6244.
21 See Record of Proceedings (9/8/95). In its complaint, and
22 subsequent motion for summary judgment, Scott Timber exclusively
23 requested relief from the agencies' interpretation of 2001(k)(2).
24 Complaint, Prayer For Relief at ¶1 (seeking declaratory judgment
25 that 2001(k)(2) does not prohibit release of sales awarded to
26 Scott Timber); Motion for Summary Judgment, passim (8/30/95).

1 A number of environmental groups filed a third and
2 separate complaint, along with a motion for a temporary
3 restraining order, seeking an interpretation of (k)(1) that would
4 halt the release of timber sales that were enjoined or cancelled
5 prior to July 27, 1995. See Pilchuck Audubon Society v.
6 Glickman, No. 95-6384; Motion for TRO (12/4/95). This action was
7 consolidated with the lead case of NFRC v. Glickman. See Record
8 of Order (12/4/95). In response to these new claims, Scott
9 Timber requested, and was granted, status as a defendant-
10 intervenor in the Pilchuck action. See Record of Order
11 (12/8/96).¹ On January 10, 1996, this Court issued a second
12 order deciding these new issues relating to the scope of
13 2001(k)(1).²

14 On January 19, 1996, this Court issued an order
15 addressing all claims relating to the "known to be nesting"
16 determination. In issuing its order, the court specifically
17 addressed Scott Timber's Motion for Summary Judgment. Order at
18 21. (1/19/96). Federal defendants appealed and requested a stay
19 of all provisions. Upon expiration of the 60-day stay issued by
20 this Court, the Ninth Circuit, by Order dated April 5, 1996,

21 ¹ Western Timber Company, represented by the same counsel
22 as Scott Timber, also sought and was granted intervenor status as
23 to the application of 2001(k)(1) to timber sales offered or
24 awarded prior to the effective date of Section 318. See Record
25 of Order (11/30/95). This claim was dismissed by the Court.
26 Order at 25 (1/10/96).

² To the limited extent that Scott Timber's Motion for
Summary Judgment was interpreted as addressing claims outside the
scope of 2001(k)(2), it was resolved by this Order. See Order at
25. (1/10/96) ("[M]otion for summary judgment is granted in part,
and denied in part as indicated in this order.").

1 granted the Secretaries' motion for a stay pending appeal of the
2 January 19, 1996 Order. The Ninth Circuit stay remains in effect
3 until further Order of that Court. See Stay Order. The case is
4 fully briefed before the Ninth Circuit, and oral argument took
5 place on May 7, 1996.

6 ARGUMENTS

7 I.

8 As A Preliminary Matter, Scott Timber's Motion
9 Should Be Dismissed As Not Properly Before The Court.

10 Scott Timber Co. moves this Court for an order
11 compelling agency action on a matter never raised or pled in
12 these consolidated actions. Its claim, therefore, is not
13 properly before the Court. Plaintiffs may not raise such a
14 separate and distinct issue without first seeking leave to file
15 an amended complaint pursuant to Federal Rule of Civil Procedure
16 15(a).

17 Scott Timber's original complaint, on its face, did not
18 plead allegations relating to replacement timber volume under
19 Section 2001(k)(3). Nor does Scott Timber's limited involvement
20 as defendant-intervenor in the context of pre-Section 318 sales,
21 confer on it the right to raise issues under Section 2001(k)(3).

22 Section 2001(k)(3) of the Rescissions Act, which
23 requires the Secretaries to offer replacement timber for sale
24 units withheld from release under Section 2001(k)(2), represents
25 a totally new and distinct claim from any of the issued litigated
26 to date. This Court has never before considered how the
requirement of replacement timber should be satisfied. While the

1 clear that the Court lacks jurisdiction to entertain such a
2 motion. The Secretaries have appealed the January 19 Order, and
3 the Ninth Circuit has issued a stay pending appeal of that Order.
4 As we demonstrate below, under these circumstances this Court
5 does not retain any broad discretionary powers and inherent
6 ability to control its docket.

7 As a prudent and practical measure, district courts
8 have recognized that when an issue is squarely before a Court of
9 Appeals, sole jurisdiction lies with the appellate court to
10 decide matters intimately related to the issue on appeal. See
11 Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979) (filing of a
12 notice of appeal divests the district court of jurisdiction);
13 Griggs v. President Consumer Discount Co., 459 U.S. 56, 58
14 (1982) (generally accepted that notice of appeal divests the
15 district court of jurisdiction and bestows it upon court of
16 appeals); see also Morris v. Morgan Stanley & Co., 942 F.2d 648,
17 654 (9th Cir. 1991) (motion to clarify pursuant to Rule 60(a) can
18 only be heard by the district court if the suggested
19 clarification simply corrects a typographical or other clerical
20 error). The general policy behind this rule "is to avoid the
21 confusion and inefficiency of two courts considering the same
22 issue simultaneously." Doyle v. United States, 712 F.2d 1195,
23 1997 (9th Cir. 1983) (internal cites omitted).

24 If a party seeks to have a district court consider an
25 issue properly before a Circuit Court of Appeals, a motion
26 pursuant to Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869
(9th Cir. 1976) is required. Under this somewhat detailed

1 procedure, the party seeking relief under a district court's
2 order, at the same time the order is on appeal, must first
3 present its request for a decision as to whether the district
4 court would entertain or grant a motion seeking to alter or
5 modify order. Then, if the district court indicates that it
6 would entertain or grant a motion, the moving party can move
7 forward and request limited remand from the appellate court.
8 Plaintiffs here have not done so.

9 Thus, with the entire (k)(2) issue before the Ninth
10 Circuit and an order staying the January 19, 1996 Order, no
11 jurisdiction exists to hear Scott Timber Co.'s Motion to
12 Compel.⁴ Jurisdiction can only be granted through a complex
13 procedure, which Scott Timber Co. has not followed. Moreover,
14 based on the Ninth Circuit's stay, an opening or modification of
15 the Ninth Circuit's Order may be required prior to any action by
16 this Court. Therefore, Scott Timber Co.'s motion should be
17 struck.

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21
22 ⁴ The Federal Defendants raise this important
23 jurisdictional issue based specifically on the facts presented
24 here, including that (1) the underlying (k)(2) issue is currently
25 before the Ninth Circuit; and (2) the Order of January 19, 1996
26 has been stayed. Clearly, under other circumstances, such as
where compliance with a Court order was ongoing and no Court of
Appeals action on the underlying issue remained, a district court
retains full jurisdiction to enforce or interpret the scope of an
injunction issued by the Court. See generally Meinhold v. U.S.
D.O.D., 34 F.3d 1469, 1480 n.14 (9th Cir. 1994); New York State
NOW v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989).

1 III.

2 No Injunction Should Issue Regarding
3 Replacement Timber Until the Ninth Circuit
4 Has Decided the (K)(2) Issue.

5 Scott Timber Co.'s Motion to Compel Identification and
6 Release of Replacement Timber seeks to force the Forest Service
7 to identify and then release timber for seven sale units
8 prematurely to giving an unfair advantage to Scott Timber Co.
9 over all other timber companies which may require replacement
10 timber under the final (k)(2) decision. This inequitable
11 treatment is sought based on incorrect information and erroneous
12 assumptions.

13 Ninth Circuit's De Novo Review. -- First, Scott
14 Timber Co. maintains that the units for which it seeks
15 replacement timber "are not subject to the current appeals
16 pending before the Ninth Circuit of this Court's January 19, 1996
17 [O]rder."⁵ Scott Memo. at 3. In fact, that is not the case.
18 The issue before the Ninth Circuit is whether the district court
19 erred in failing to defer to the Secretaries definition of the
20 "known to be nesting" provision of Section 2001(k)(2). Because
21 the issue raises a question of statutory interpretation, the
22 court of appeals exercises de novo review. Thus, the court of
23 appeals remains free to adopt its own interpretation of the
24 statutory language. Accordingly, awaiting a final ruling from

25 ⁵ Attachment A to the Quast Declaration lists the units
26 Scott Timber alleges are the subject of this motion. The Forest
Service identifies these units as seven separate units, not six
as set forth by plaintiffs. Wilcox Declaration ¶2.

1 the Ninth Circuit is not only sensible, but to act prior to the
2 ruling would be irresponsible.

3 (K) (3) Timber Will Be Provided Even After September
4 1996. -- Second, Scott Timber Co. dramatically asserts, "Time
5 is running out for the federal defendants to comply with the
6 mandate of . . . 2001(k)." Scott Memo. at 1 (opening sentence).
7 Similarly, Peter C. Quast, the Woods Manager of Scott Timber Co.,
8 states in his Declaration, "We would like to harvest this
9 replacement volume before September 30, 1996 when the protections
10 of the Rescissions Act are due to expire." Quast Dec. at par. 4.
11 These statements appear to reflect a misunderstanding about
12 (k) (3) replacement timber.

13 In a filing with this Court on March 21, 1996, the
14 Secretaries clearly stated that "the plaintiffs will not be
15 harmed by a continuation of the stay, since upon disposition by
16 the Court of Appeals they will either be offered alternative
17 timber or be able to proceed in accordance with their contracts."
18 Defs.' Reply in Support of Stay at 2. In fact, the federal
19 Defendants explained further that the release of timber pursuant
20 to (k) (3) would not and could not comply with the expedited time
21 frame of (k) (1). Id. at 7. Instead, these replacement sales
22 would require full compliance with all environmental laws, and
23 judicial review of such sales would not be limited by the
24 Rescissions Act. Id.

25 Thus, based on the plain language of the statute and
26 the representations already made to this Court, the
identification and release of replacement timber are not based
DEFENDANTS' MOTION TO STRIKE -10

1 upon any expedited schedule. Nor are they based upon any magical
2 cut-off date. Instead, as set out in the attached Declaration of
3 Acting Deputy Chief Sterling Wilcox, attached as Ex. A, they will
4 involve the standard identification, National Environmental
5 Policy Act documentation, and administrative appeals' review
6 necessary for all timber sales that are not otherwise exempted
7 from the requirements of all environmental and land planning
8 statutes. Wilcox Dec. ¶¶ 4-7.

9 This process can commence either before or after
10 September 30, 1996, without consequence. As previously set
11 forth, "the Secretaries' authority to award alternative timber
12 under Section 2001(k)(3) for rights which accrue during the
13 statutory period will continue beyond September 30, 1996."
14 Defs.' Reply in Support of Stay, at 5. If it commences now
15 pursuant to Scott Timber Co.'s Motion, however, it would provide
16 preferential treatment to one litigant. Wilcox Dec. ¶8. It
17 would require a focusing of Forest Service resources on
18 replacement for seven units, in lieu of an orderly and more equal
19 process. See Wilcox Dec. ¶9.

20 Replacement Timber Should Await a Final Decision. --
21 Until the Court of Appeals rules, no award of replacement timber
22 should be ordered. The amount of volume to be required can only
23 be known after the (k)(2) issue is finally decided. With a set
24 amount of volume enunciated, the Forest Service and the Bureau of
25 Land Management could then proceed to identify and release sales
26 in a coherent manner, accounting for cumulative effects of these
sales. Without a set volume, however, the federal Defendants
DEFENDANTS' MOTION TO STRIKE -11

1 would be required to proceed in a piecemeal fashion giving
2 preference to some timber companies, but not others. Such a
3 result would anger many and satisfy very few.

4 IV.

5 The Forest Service's Time Estimate

6 Finally, if the Court determines to hear and grant
7 Scott Timber Co.'s Motion, the Forest Service has set forth the
8 basic time frames for compliance with Scott Timber's request.⁶
9 First, within 60 days from such time as the Court orders an
10 identification and release of alternative timber, the Forest
11 Service would (1) identify and map general locations of
12 alternative timber; (2) request the assistance of purchasers in
13 identifying alternative timber; and (3) compare availability and
14 kind and value. Wilcox Dec. ¶3, citing Reynolds Dec., attached
15 as Ex. B, ¶3.

16 The next stage, from identification to release, would
17 take longer. NEPA compliance could take a minimum of six months.
18 Wilcox Dec. ¶4. A comment period and preparation of a final
19 decision document is then required. Wilcox Dec. ¶5. The
20 administrative appeal process, tree marking, appraisal and sale
21 preparation would then follow. Wilcox Dec. ¶6. The contract can
22 then be executed. The timing of the final execution, and harvest
23

24 ⁶ The Forest Service is the only land management agency
25 providing such a schedule, because Scott Timber Co. has requested
26 the identification and release of only Forest Service Sales. The
Bureau of Land Management, however, also a defendant in this
action, would have a different time frame than that of the Forest
Service. This difference arises, because the BLM has far fewer
sales in the various categories than does the Forest Service.

1 activities, may of course be affected by litigation. Wilcox Dec.
2 ¶7.

3 Without doubt, this is a resource and labor intensive
4 process -- one that should not begin until the universe of
5 replacement timber has been clearly identified. Only then can
6 the Forest Service move forward with these sales in full
7 compliance with all environmental statutes and without preference
8 to any single timber company.

9 Conclusion

10 For all the reasons set forth above, Scott Timber Co.'s
11 Motion should not be heard and, if heard, should be denied. The
12 motion is based on an incorrect reading of the Rescissions Act
13 and the scope of the Ninth Circuit's jurisdiction.

14 Dated this 10th day of May, 1996.

15 Respectfully submitted,

16 KRISTINE OLSON
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17 JAMES L. SUTHERLAND
18 Assistant United States Attorney

19 LOIS J. SCHIFFER
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff.

v.

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

Defendants.

Civil No. 95-6244-HO

DECLARATION OF
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

Exhibit A-1

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

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

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

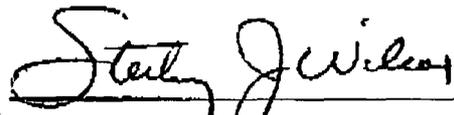
6. After the environmental and decision documents are prepared, the decision document would be subject to administrative appeal under 36 C.F.R. 215, a process that can require 105 days to complete. An automatic stay of implementation applies from the publication of a notice of decision for appeal until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

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

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

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 Wilson

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | |
|------------------------------------|---|----------------------|
| NORTHWEST FOREST RESOURCE COUNCIL, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Civil No. 95-6244-HO |
| v. |) | |
| |) | DECLARATION OF |
| DAE GLICKMAN, in his capacity as |) | GRAY F. REYNOLDS |
| Secretary of Agriculture, |) | |
| BRUCE HABBITT, in his capacity as |) | |
| Secretary of the Interior |) | |
| |) | |
| Defendants. |) | |

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

1. My name is Gray F. Reynolds. My position is Deputy Chief of the National Forest System in the Washington office of the Forest Service. I have previously filed a declaration in this matter.

2. I understand that plaintiffs in this matter have requested that the Court order the Forest Service to identify replacement volume within thirty days for sale units that remain stayed due to a determination of nesting. Although this issue remains in litigation, the Forest Service

Exhibit B-1

SENT BY:

3-28-96 ; 4:12PM ;

USDA, OGC, NRD-

WILDLIFE SECTION: 3/ 3

would "identify" alternative volume for sales currently withheld pursuant to the Court's January 19, 1996, order for the 40 units (approximately 51 million board feet) as set forth in the following paragraphs.

3. Within 60 days from such time as the Court may grant plaintiffs' request, 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.

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

Executed at Washington, District of Columbia on March 28, 1996.



Gray F. Reynolds

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 10, 1996 she caused one copy of the foregoing FEDERAL DEFENDANTS' MOTION TO STRIKE, OR IN THE ALTERNATIVE, IN OPPOSITION TO SCOTT TIMBER CO'S MOTION TO COMPEL TIMBER, to be served by telefacsimile machine and first-class United States mail upon the counsel of record hereinafter named:

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NUMBER OF PAGES: 10

DATE: May 10, 1996

FROM: Paula Clinedinst

MESSAGE: NFRC v. Glickman

Attached is NFRC's Motion to Compel Provision of Replacement Timber for Certain Sale Units, requesting Oral Argument, filed yesterday in Oregon.

N01-9506\1RP91148.1KP

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 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 MOTION TO COMPEL |
| 19 | LUMBER INC., and WESTERN TIMBER |) | PROVISION OF REPLACEMENT |
| 20 | CO., |) | TIMBER FOR CERTAIN SALE |
| 21 | |) | UNITS |
| 22 | Plaintiff-intervenors, |) | |
| 23 | |) | Oral Argument Requested |
| 24 | vs. |) | |
| 25 | |) | Expedited Consideration |
| 26 | DAN GLICKMAN, in his capacity |) | Requested (Hearing |
| 27 | as Secretary of Agriculture; |) | Requested for May 14, 1996 |
| 28 | BRUCE BABBITT, in his capacity |) | at 11:00 a.m.) |
| 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") moves
 40 for an order compelling defendants to comply with section

Page

1 - NFRC'S MOTION TO COMPEL PROVISION OF
 REPLACEMENT TIMBER FOR CERTAIN SALE UNITS

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N01-9506\1RP91148.LKP

1 2001(k) (3) of Public Law 104-19 by providing replacement timber
2 as soon as possible, and in any event no later than June 1, 1996,
3 for the following timber sale units that have been withheld from
4 release under section 2001(k) (2) :

- 5 Gordy Bluff: Unit 3
- 6 Foland Ridge: Unit 3
- 7 North Ball: Unit D
- 8 Bear Air: Unit 2
- 9 Median: Units 3 and 5
- 10 Fish Story: Unit 2
- 11 West Boundary: Unit 4
- 12 Wynochee Resale: Unit A-240
- 13 Lower Bailey: Unit 4
- 14 Scraps: Units 1, 4 and 9
- 15 Stalwart: Unit 3
- 16 Green Apple: Unit 3
- 17 Upperten 002: Unit 1
- 18 Benner Bunch: Unit D3

19 In support of this motion the court is respectfully referred
20 to NFERC's Memorandum In Support of Motion To Compel Provision of
21
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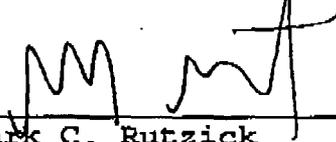
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Replacement Timber For Certain Sale Units filed herewith.

Dated this 9th day of May, 1996.

MARK C. RUTZICK LAW FIRM
A Professional Corporation

By: 
 Mark C. Rutzick
 Attorney for Plaintiff

Page

3 - NFRC'S MOTION TO COMPEL PROVISION OF
REPLACEMENT TIMBER FOR CERTAIN SALE UNITS

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N01-9506\1R091149.1KQ

1 an order compelling defendants to comply with section 2001(k)(3)
 2 of Public Law 104-19 by providing replacement timber as soon as
 3 possible, and in no event later than June 1, 1996, for certain
 4 timber sale units that have been withheld from release under
 5 section 2001(k)(2).¹

6 Defendants have determined that all these units must be
 7 withheld under the court's interpretation of the "known to be
 8 nesting" exemption in section (k)(2). NFRFC does not contest
 9 those determinations. Defendants also contend that these units
 10 could be withheld under their interpretation of section (k)(2).
 11 Thus, the parties agree that these units are properly withheld
 12 under section (k)(2).

13 Therefore, for these units defendants have a mandatory duty
 14 under section (k)(3) to provide "an equal volume of timber, of
 15 like kind and value, which shall be subject to the terms of the
 16 original contract . . ." Defendants have not provided replace-
 17 ment volume for any of these units (indeed, not for any units at
 18 all). The units in question are:

19 Gordy Bluff: Unit 3

20 Foland Ridge: Unit 3

21 North Ball: Unit D

22 Bear Air: Unit 2

23
 24
 25 ¹ NFRFC presently seeks replacement timber for 17 sale units.
 26 However, NFRFC is in the process of contacting individual compa-
 nies to determine their interest in immediate replacement timber,
 and NFRFC may add additional units hereafter.

Page

2 - MEMORANDUM IN SUPPORT OF NFRFC'S MOTION TO
 COMPEL PROVISION OF REPLACEMENT TIMBER FOR
 CERTAIN SALE UNITS

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N01-9606\1RP91149.1KQ

1 Median: Units 3 and 5
 2 Fish Story: Unit 2
 3 West Boundary: Unit 4
 4 Wynochee Resale: Unit A-240
 5 Lower Bailey: Unit 4
 6 Scraps: Units 1, 4 and 9
 7 Stalwart: Unit 3
 8 Green Apple: Unit 3
 9 Upperten 002: Unit 1
 10 Benner Bunch: Unit D3

11 **Argument**

12 **NFRC IS ENTITLED TO AN ORDER COMPELLING DEFENDANTS TO**
 13 **COMPLY PROMPTLY WITH THEIR MANDATORY DUTIES UNDER**
 14 **SECTION 2001(k) (3)**

15 Mandamus relief is available when "(1) the plaintiff's claim
 16 is clear and certain, (2) the duty is ministerial, and so plainly
 17 prescribed as to be free from doubt, and (3) no other adequate
 18 remedy is available." *Oregon Natural Resources Council v.*
 19 *Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995), quoting *Fallini v.*
 20 *Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). A mandatory injunc-
 21 tion is governed by the same standard. *Id.*

22 Even if the defendant official has some discretion in the
 23 manner in which the duty is performed, mandamus is available if
 24 the official has "failed entirely to carry out statutory purpos-
 25 es" or if there is "a complete failure of federal officials to
 26 comply with mandatory statutory and regulatory directives."
Barron v. Reich, 13 F.3d 1370, 1376 (9th Cir. 1994) (citations

Page

3 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION TO
 COMPEL PROVISION OF REPLACEMENT TIMBER FOR
 CERTAIN SALE UNITS

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N01-9506\1RP91149.1KQ

1 omitted). "Mandamus may lie if 'statutory or regulatory stan-
2 dards delimiting the scope or manner in which such discretion can
3 be exercised . . . have been ignored" *Han v. U.S.*
4 *Department of Justice*, 45 F.3d 333, 337 (9th Cir. 1995), quoting
5 *Silveyra v. Moschjorak*, 989 F.2d 10112, 1014-15 (9th Cir. 1993).

6 A mandatory injunction is proper in this case. NFRF's claim
7 to replacement timber is clear and certain. The duty to provide
8 replacement timber under section (k)(3) is ministerial and free
9 from doubt. Defendants have completely ignored this statutory
10 duty. No other remedy is available.

11 The fact that defendants must use discretion to select the
12 particular replacement timber does not lessen the mandatory
13 nature of their duty under section (k)(3). Defendants cannot
14 simply ignore their duty under this section, as they have done to
15 date.

16 The duty to provide replacement timber on these units arose
17 on September 10, 1995 since section (k)(3) requires replacement
18 timber for any sale that "cannot be released and completed under
19 the terms of this subsection within 45 days after the date of
20 enactment of this Act." For eight full months defendants have
21 maintained that 148 sale units must be withheld under (k)(2), and
22 must be replaced with alternative timber under (k)(3). Yet
23 defendants have done nothing to comply with this duty. Replace-
24 ment timber has not been provided for a single unit that has been
25 withheld under section (k)(2).

26 The purpose of section 2001(k), as the court has previously

Page

4 - MEMORANDUM IN SUPPORT OF NFRF'S MOTION TO
COMPEL PROVISION OF REPLACEMENT TIMBER FOR
CERTAIN SALE UNITS

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N01-9506\IRP91149.1KQ

1 determined, was to release timber sales immediately to provide
 2 local mills with timber in 1995 and 1996. While section (k) (3)
 3 does not specify a precise date by which replacement timber is to
 4 be provided, the emergency nature of the statute clearly implies
 5 a duty for the defendants to provide replacement volume promptly
 6 so that mills that are unable to operate their sales because of
 7 the "known to be nesting" exemption in section (k) (2) will have
 8 replacement volume available instead to operate in 1996.

9 The only way for NFRC's members to obtain their rights under
 10 section (k) (3) is for this court to order the defendants to
 11 comply with section (k) (3) for the units in question by a date
 12 certain. NFRC is at this time only asking for relief on a small
 13 number of sale units where there is no controversy about the need
 14 for replacement timber. NFRC respectfully asks the court to
 15 order defendants to provide "an equal volume of timber, of like
 16 kind and value, which shall be subject to the terms of the
 17 original contract" for these units as soon as possible,
 18 and in no event later than June 1, 1996.

19 No further relief should be necessary. There should be no
 20 reason for the court to become involved in the details of
 21 replacement timber for any particular sale unit. NFRC believes
 22 individual purchasers will be able to successfully negotiate with
 23 the defendants on the terms of replacement timber for each unit
 24 if the defendants are simply ordered to comply with the statute
 25 by a date certain.

26

Page

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

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Conclusion

NFRC's motion to compel provision of replacement timber for the sale units identified above should be granted. Defendants should be ordered to provide replacement timber for these units in compliance with section 2001(k)(3) as soon as possible and in no event later than June 1, 1996.

Dated this 9th day of May, 1996.

MARK C. RUTZICK LAW FIRM
A Professional Corporation

By: 
Mark C. Rutzick
Attorney for Plaintiff

Page

6 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION TO COMPEL PROVISION OF REPLACEMENT TIMBER FOR CERTAIN SALE UNITS

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

DATE: May 8, 1996
FROM: Albert Ferlo
RE: NFRC v. Glickman and Babbitt
OFFICE PHONE: (202) 514-2757
NUMBER OF PAGES: Message and 4 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
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Karen Mouritsen 219-1792
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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 Petition for Rehearing on the Geographic scope issue filed by SCLDF. Under the court rules, no responses can be filed unless the court requests a response. We will keep you informed of further developments.

*I have not faxed the attachments.
Please call if you want them.*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 95-36038 & 95-36042
Consolidated

NORTHWEST FOREST RESOURCE COUNCIL,
Plaintiff-Appellee,

v.

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

Defendants-Appellants,

and

OREGON NATURAL RESOURCES COUNCIL, et al.,

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

ONRC'S PETITION FOR REHEARING

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
Oregon Natural Resources Council

PURPOSE

Oregon Natural Resources Council et al. (collectively "ONRC") respectfully petitions for rehearing pursuant to Fed. R. App. P. 40 of a limited portion of Northwest Forest Resource Council v. Glickman, Nos. 95-36038, 95-36042 (9th Cir. April 24, 1996).^{1/} In counsel's judgment, rehearing is warranted to correct a material fact overlooked in the decision. As the decision now stands, there is a schism between the analysis of the Court and the relief granted. While the Court notes at least three times that Section 318 of the Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, 103 Stat. 745 (1989) refers to the geographic scope of the thirteen national forests in Oregon and Washington that contain northern spotted owls, the relief granted affirms the district court's summary judgment and injunctive orders which require the release of timber sales on all national forests in Oregon and Washington. There are more than thirteen national forests in Oregon and Washington, and the district court's orders are causing the release of timber sales on national forests not covered by this Court's detailed analysis.

^{1/} Circuit Judges Noonan, Leavy, and Hawkins heard these appeals.

REHEARING IS NECESSARY TO CORRECT A FACTUAL
ERROR WHICH CAUSES A SCHISM BETWEEN THE
COURT'S ANALYSIS AND THE RELIEF GRANTED.

Because Section 2001(k) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 240 (1995) explicitly defines its mandates by reference to Section 318 of the Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, 103 Stat. 745 (1989), the Court began its analysis by reviewing the scope of timber sales covered by Section 318. As noted by the Court, subsection 318(a)(1) "provided that the bulk of timber sales must derive from 'the thirteen national forests in Oregon and Washington known to contain northern spotted owls.'" Northwest Forest Resource Council v. Glickman, slip op. at 4948. In discussing the structure of Section 2001(k)(1), the Court stated that:

In the context of Section 318, units "subject to section 318" are identical to units "described by section 318." By the terms of Section 318, this category includes: (1) "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,]" § 318 (a)(1), and (2) the Bureau of Land Management's "administrative districts in western Oregon." § 318(a)(2).

Id., slip op. at 4956. See also slip op. at 4957.

Turning to the canon of ordinary meaning, the Court held that the ordinary meaning of the statute identified geographic units that were affected by Section 318. "The statute defined two distinct geographic areas: Subsection 318(a)(i) covered the

thirteen national forests and Bureau of Land Management districts 'known to contain northern spotted owls[,] while subsection 318(a)(2) authorized a smaller set of timber sales located in BLM lands in western Oregon." *Id.*, slip op. at 4958. In addition to the thirteen spotted owl national forests, Oregon and Washington host the Fremont, Ochoco, Malheur, Umatilla, Wallowa-Whitman, and Colville National Forests.

Based on its parsing of statutory language and legislative history, this Court affirmed the summary judgment and injunctive orders of the district court. The district court's orders, however, require the release of timber sales in all national forests in Oregon and Washington. *Id.*, slip op. at 4950-51. Under this Court's analysis, these orders are too broad, and yet the Court affirmed the district court without modification.

In order for the relief to follow from the Court's analysis, the district court's orders should be modified to require the release of timber sales only from the public forest lands that were indeed subject to section 318 -- that is, the thirteen spotted owl national forests in Oregon and Washington and the Bureau of Land Management districts in western Oregon. Unless the relief is modified, there is a fundamental factual error and analytical schism between the Court's discussions and its conclusion.

This is not merely a semantic debate. Under the district court's orders, the Forest Service is releasing timber sales

ONRC'S PETITION FOR REHEARING

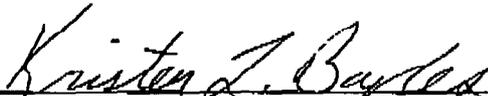
which would not be released under the logic of this Court's opinion. See generally Fed. ER at 20, Declaration of Jerry Hofer ¶ 6 (August 31, 1995) (approximately 104 million board feet located on the eastside of Oregon and Washington); see also Federal Defendants' March 28, 1996 Compliance Report (copy attached showing sales released on the Fremont, Ochoco, Malheur, Umatilla, Wallowa-Whitman, and Colville National Forests). This Court should modify the relief granted to reflect its detailed analysis.

CONCLUSION

For the reasons stated above, ONRC respectfully requests that the Court grant rehearing on the limited issue of harmonizing the analysis with the relief granted.

DATED this 3rd day of May, 1995.

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
Oregon Natural Resources Council

506REHEA.PET

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

DATE: May 8, 1996

FROM: Al Ferlo

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and pages

PLEASE DELIVER TO:

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| Chris Nolin | 395-4941 |
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| Tom Tuchmann (503) | 326-6254 |
| Sue Zike (503) | 326-7742 |

MESSAGE:

Attached is the government's Petition for Rehearing on the Geographic scope issue arising out of the 9th Circuit's April 24, 1996 opinion in NFRC v. Glickman. Under the court rules, no responses can be filed unless the court requests a response. We will keep you informed of further developments.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95- 36042

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

PETITION FOR REHEARING OR, IN THE ALTERNATIVE,
MOTION FOR CLARIFICATION AND STAY

On April 24, 1996, this Court issued an opinion in the above-captioned case and rendered a decision affirming the district court's summary judgment order of September 13, 1995 and its permanent injunction of October 17, 1995. The Court's opinion correctly characterizes the major dispute between the parties as whether the phrase "subject to [S]ection 318" imposed a temporal limitation on the scope of Section 2001(k) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19. This Court concluded, contrary to the submission of the Forest Service appellants, that the disputed phrase imposed only a geographical limitation on the scope of Section 2001(k). This petition for rehearing or clarification does not seek to disturb that

- 2 -

conclusion.^{2/} Instead, we seek to bring to the Court's attention an issue concerning the definition of the geographical limitation encompassed by the term "subject to [S]ection 318" which was raised but not directly decided in the appeal. As a result of this omission, there is an inconsistency between the written opinion and the ultimate decision.

Specifically, three times in the course of the April 24, 1996, opinion this Court describes the geographical scope of section 318 as encompassing the thirteen national forests in Oregon and Washington known to contain the northern spotted owl and the BLM administrative districts in western Oregon:

In the context of Section 318, units "subject to section 318" are identical to units "described by section 318": By the terms of Section 318, this category includes: (1) "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,] [Sec.] 318(a)(1) and (2) the Bureau of Land Management's "administrative districts in western Oregon." [Sec.] 318(a)(2).

National Forest Resource Council v. Glickman, No. 95-36038 slip op. at 4956 (April 24, 1996). See also id. slip op. at 4957, 4958. See generally id. slip op. at 4448. The summary judgment of the district court, and its permanent injunction, however, define the geographical scope of the disputed term as encompassing all national forests in Oregon and Washington, not just those known to contain the northern spotted owl. Despite

^{2/} No decision has been reached as to whether the federal appellants would seek a rehearing en banc to challenge the outcome of this appeal. It is our understanding the present petition does not foreclose a separate petition for rehearing en banc and that the 45 day period in which such a petition may be filed is not tolled by the present filing.

- 3 -

this inconsistency, the decision of this Court was simply to affirm the district court thus continuing an injunction that is greater in scope than the Court's interpretation of the disputed term warrants.

It may be that this Court did not fully realize that the issue concerning the exact geographic scope of the disputed term, "subject to Section 318", was pressed upon the government's appeal or that the definition of the geographical scope made a substantial difference to the impact of the district courts' judgment. As detailed on page 21 of the government's brief on appeal, however, there are several national forests in the states of Oregon and Washington which are not known to contain the northern spotted owl.^{2/} The district court's injunction nevertheless ordered the release of sales in several of these non spotted owl forests: the Umatilla, Wallowa-Whitman, Fremont, Malheur, Ochoco and Colville National Forests. The question presented on this appeal included a challenge to this broader definition of the geographical scope to include all national forests in Oregon and Washington, see Govt. Br. at 2, and the principal brief addressed this issue in the argument. Id. at 20-21. In short, the exact geographical scope of the term "subject to Section 318" is a live issue between the parties on this appeal.

^{2/} These are known as the "eastside" forests because they are located to the east of the Cascade mountain range in Oregon and Washington. The natural range of the northern spotted owl does not extend to these eastside forests.

- 4 -

As stated above, this Court's opinion reflects the decision that the disputed term "subject to Section 318" extends geographically to encompass "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,] "^{3/}slip op. at 4956-4958. This Court's judgment, however, affirmed the summary judgment and injunctive order of the district court without the modification necessary to align it to this Court's opinion. Since the issuance of the opinion, the federal appellants have reconfirmed that the difference in the definition of the geographical scope of Section 2001(k) continues to be of importance: eleven timber sales, comprising over 42 million board feet of timber, in forests outside the range of the northern spotted owl have been released pursuant to the district court's order of October 1995 and remain subject to harvest. Modification of this Court's judgment to reflect the decision that the geographical scope of the term "subject to Section 318" extends only to "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,] "^(slip op. 4957) would therefore allow the termination of eleven sales which do not meet current standards of environmental protection.

Accordingly, the federal appellants request that this Court grant rehearing to the extent of clarifying its opinion and order by modifying the judgment to conform to the text of the opinion.

^{3/} The parties do not dispute the geographical scope of the BLM lands involved.

- 5 -

We suggest that this could be accomplished by altering the judgment of this Court by adding "insofar as they apply to timber sales in the thirteen national forests in Oregon and Washington known to contain northern spotted owls and the Bureau of Land Management's administrative districts in western Oregon" at the end of page 4970 of the slip opinion. Such a modification of the judgment should not require further proceedings between the parties.

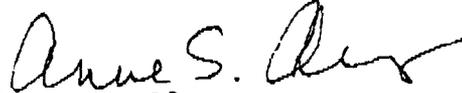
Should this Court wish to defer consideration of this request to await the response of other parties, the federal appellants respectfully request that this Court preserve the status quo in the forests involved by granting a stay to restrain the operation of the eleven identified sales while this request for rehearing or clarification is pending. To this end, we append a list of the eleven timber sales located in forests outside the range of the northern spotted owl in a declaration of counsel so that operation of those sales may be restrained until this motion is resolved by this Court. Because May is the traditional commencement of logging operations in much of the Pacific Northwest, such temporary relief would be necessary to preserve the status quo in the forests should this Court need addition time to resolve this motion.

- 6 -

CONCLUSION

For these reasons the petition for rehearing and or clarification should be granted and the judgment modified to reflect the opinion of this Court. A stay pending resolution of this motion is also requested.

Respectfully submitted,



Anne S. Almy
Albert M. Ferlo, Jr.
Attorneys, Appellate Section
Environment & Natural Resources
Division
Department of Justice
P.O. Box 23795 (L'Enfant Station)
Washington, D.C. 20026
(202) 514-2749

DECLARATION OF ANNE S. ALMY

I, Anne S. Almy, counsel for appellants in the above-captioned case, state as follows:

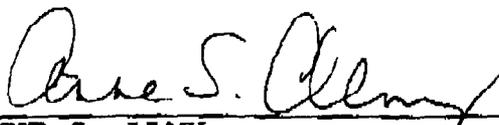
2. To the best of my knowledge and based upon recent information provided by the United States Forest Service, there are eleven remaining sales for which harvesting has either not commenced or not been completed that fall under the scope of section 2001(k) as interpreted by the United States District Court for the District of Oregon in Northwest Forest Resource Council v. Glickman, Civil No. 9506244-HO, but which are not within the thirteen national forests in Oregon and Washington known to contain northern spotted owls. These sales are:

| <u>Sale</u> | <u>Forest</u> |
|---------------|-----------------|
| Allen | Wallowa-Whitman |
| Banty Salvage | Wallowa-Whitman |
| Blue Ford | Fremont |
| Eagle Ridge | Umatilla |
| Houselog | |
| Gatorson | Colville |
| Horn Salvage | Wallowa-Whitman |
| Locust | Malheur |
| Off Broadway | Ochoco |
| RD Salvage | Wallowa-Whitman |
| Tanhorse | Wallowa-Whitman |
| Tanya | Wallowa-Whitman |

3. The total volume of timber of these eleven sales is approximately 42 million board feet.

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

Dated this 3d day of May 1996.


 ANNE S. ALMY

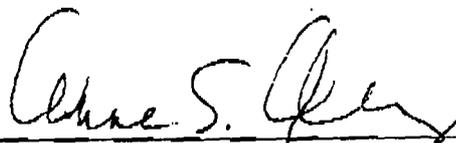
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Rehearing Or, In The Alernative, Motion For Clarification And Stay was served on this 3rd day of May 1996, by overnight express delivery service addressed to the following counsel of record:

Mark C. Rutzick
Alison Kean Campbell
500 Pioneer Tower
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Scott W. Horngren
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 ENVIRONMENT AND NATURAL RESOURCES DIVISION
 GENERAL LITIGATION SECTION
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 WASHINGTON, D.C. 20004
 FAX NUMBER (202) 305-0429, -0506
 CONFIRMATION NUMBER (202) 305-0503

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| | Lois Schiffer | |
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| | Sue Zike (503) | 326-7742 - |

NUMBER OF PAGES: 18

DATE: May 2, 1996

FROM: Michelle Gilbert

MESSAGE: NFRC v. Glickman

Attached is Plaintiff's May 1, 1996 filing. See attached cover letter.

HAGLUND & KIRKLEY

ATTORNEYS AT LAW

ONE MAIN PLACE
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PORTLAND, OR 97204

TELEPHONE (503) 225-0777
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May 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
Case No. 95-6244-HO (Lead)
Case No. 95-6267-HO (Consolidated)

Dear Clerk:

Enclosed for filing are the originals and one copy the following documents:

1. Scott Timber Co.'s Motion to Compel Identification and Release of Replacement Volume;
2. Scott Timber Co.'s Memorandum in Support of Motion to Compel Identification and Release of Replacement Volume; and
3. Declaration of Scott W. Horngren Re: Faxed Declaration of Peter C. Quast.

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

Sincerely,



Scott W. Horngren

Enclosures
cc w/enclosures: Counsel

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.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | | | |
|----|--------------------------------|---|-------------------------------|
| 10 | NORTHWEST FOREST RESOURCE |) | No. 95-6244-HO (Lead) |
| 11 | COUNCIL, an Oregon |) | No. 95-6267-HO (Consolidated) |
| 12 | corporation, |) | No. 95-6384-HO (Consolidated) |
| 13 | |) | |
| 14 | Plaintiff, |) | SCOTT TIMBER CO.'S MOTION TO |
| 15 | |) | COMPEL IDENTIFICATION AND |
| 16 | v. |) | RELEASE OF REPLACEMENT |
| 17 | |) | VOLUME |
| 18 | DANIEL R. GLICKMAN, in his |) | |
| 19 | capacity as Secretary of |) | ORAL ARGUMENT AND EXPEDITED |
| 20 | Agriculture, BRUCE BABBITT, in |) | CONSIDERATION REQUESTED |
| 21 | his capacity as Secretary of |) | |
| 22 | Interior, |) | |
| 23 | |) | |
| 24 | Defendants. |) | |

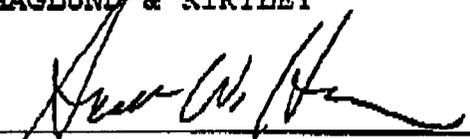
18 Plaintiff Scott Timber Co. respectfully moves for an
19 order from this Court requiring the defendants to comply with
20 Pub. L. No. 104-19 § 2001(k) (3), 109 Stat. 194, 246 (1995), the
21 Emergency Salvage Timber Sale Program and identify and release
22 replacement volume for harvest by June 1, 1996 for those units of
23 Scott Timber's sales that the defendants contend contain nesting
24 marbled murrelets under both, Section 2001(k) (2) and the
25 January 19, 1996 Order of this Court. The pending appeal of the
26

HAGLUND & KIRTLEY
ATTORNEYS AT LAW
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PORTLAND, OREGON 97204
TELEPHONE (503) 225-0777

1 January 19, 1996 Order only relates to those units that the Court
2 ordered released and the outcome of that appeal will not effect
3 those units that already do not qualify for release under the
4 January 19, 1996 Order. Consequently, there is no reason for
5 further delay in identifying and releasing replacement volume for
6 these units. This motion is supported by the Declaration of
7 Peter C. Quast and the Memorandum in Support.

8 Dated this 15 day of May, 1996.

9 HAGLUND & KIRTLEY

10
11 By 
12 Scott W. Horngren
13 Attorneys for Plaintiff
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HAGLUND & KIRTLEY
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1 CERTIFICATE OF SERVICE
2 I hereby certify that I served the foregoing SCOTT
3 TIMBER CO.'S MOTION TO COMPEL IDENTIFICATION AND RELEASE OF
4 REPLACEMENT VOLUME on the following parties:

5 Ms. Patti A. Goldman VIA REGULAR MAIL
6 Mr. Adam J. Berger
7 Ms. Kristen J. Boyles
8 Sierra Club Legal Defense Fund
9 705 Second Avenue, Suite 203
10 Seattle, WA 98104

11 Ms. Marianne Dugan VIA REGULAR MAIL
12 Ms. Deborah N. Mailander
13 Western Environmental Law Center
14 1216 Lincoln Street
15 Eugene, Oregon 97401

Attorneys for Plaintiffs

16 Mr. Mark Rutzick VIA REGULAR MAIL
17 500 Pioneer Tower
18 888 S.W. Fifth Avenue
19 Portland, Oregon 97204

Attorney for NFRC

20 Ms. Kristine Olson VIA REGULAR MAIL
21 U.S. Attorney
22 888 S.W. Fifth Avenue, Suite 1000
23 Portland, Oregon 97204

24 Ms. Michelle Gilbert VIA FAX AND REGULAR MAIL
25 Mr. Wells D. Burgess
26 U.S. Department of Justice
27 Env. & Nat. Res. Div.
28 601 Pennsylvania Avenue, N.W., Suite 854
29 Washington, D.C. 20004

30 Ms. Jean E. Williams VIA FAX AND REGULAR MAIL
31 Ms. Ellen Kohler
32 Mr. James C. Kimbourne
33 U.S. Department of Justice
34 Env. & Nat. Res. Div.
35 601 Pennsylvania Avenue, N.W., Suite 5000
36 Washington, D.C. 20004

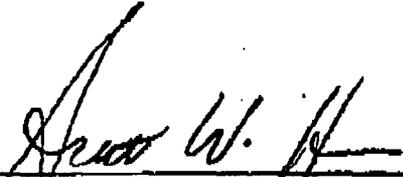
Attorneys for Defendants

HAGLUND & KIRTLEY
ATTORNEYS AT LAW
ONE MAIN PLACE
101 SW. MAIN, SUITE 1800
PORTLAND, OREGON 97204
TELEPHONE (503) 325-0777

1 Ms. Patricia M. Dost VIA REGULAR MAIL
2 Schwabe, Williamson & Wyatt
3 1211 S.W. Fifth Avenue, Ste.1600
4 Portland, Oregon 97204

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

7 DATED May 1st, 1996.

8 
9 _____
10 Scott W. Horngran
11 Attorneys for Scott Timber Co.
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13
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1 Michael E. Haglund, OSB 77203
2 Scott W. Horngren, OSB 88060
3 Shay S. Scott, OSB 93421
4 HAGLUND & KIRTLEY
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9 (503) 225-0777

Attorneys for Scott Timber Co.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

| | | | |
|----|--------------------------------|---|-------------------------------|
| 10 | NORTHWEST FOREST RESOURCE |) | |
| 11 | COUNCIL, an Oregon |) | No. 95-6244-HO (Lead) |
| 12 | corporation, |) | No. 95-6267-HO (Consolidated) |
| 13 | |) | No. 95-6384-HO (Consolidated) |
| 14 | Plaintiff, |) | |
| 15 | |) | SCOTT TIMBER CO.'S |
| 16 | v. |) | MEMORANDUM IN SUPPORT OF |
| 17 | |) | MOTION TO COMPEL |
| 18 | DANIEL R. GLICKMAN, in his |) | IDENTIFICATION AND RELEASE |
| 19 | capacity as Secretary of |) | OF REPLACEMENT VOLUME |
| 20 | Agriculture, BRUCE BABBITT, in |) | |
| 21 | his capacity as Secretary of |) | |
| 22 | Interior, |) | |
| 23 | |) | |
| 24 | Defendants. |) | |

Time is running out for the federal defendants to comply with the mandate of Pub. L. No. 104-19 § 2001(k), the Emergency Salvage Timber Sale Program. Defendants have disputed the clear direction of the statute at almost every turn. This Court's orders have also been vigorously challenged by federal defendants. Most recently, defendants have appealed this Court's January 19, 1996 Order regarding when marbled murrelets are "known to be nesting" in a sale unit. However, one area where

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..

1 the federal defendants have not disputed the statute or this
2 Court's orders, is that marbled murrelet behavior subcanopy
3 within a sale unit boundary means a marbled murrelet is "known to
4 be nesting" within the unit. Scott Timber has six of these
5 units. Declaration of Peter C. Quast (Quast Dec.) at ¶ 2.

6 Section 2001(k)(3) of the Act states:

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

17 Scott Timber Co. seeks an order from this Court compelling
18 federal defendants to identify replacement volume for these units
19 by June 1, 1996 to comply with the requirements of
20 Section 2001(k)(3). The Forest Service has not identified
21 replacement volume for these units. For example, defendants
22 contend that one of Scott Timber's units, Fivemile Flume 1A/B
23 contains an ancient marbled murrelet nest. In December, 1995,
24 the Forest Service had promised that replacement volume for this
25 unit would be identified and released for harvest. Quast Dec.
26 ¶ 3. However, federal defendants have yet to identify the
replacement volume.

? where
we say
in. in. 's

The units subject to this motion are listed in
Exhibit A to the Declaration of Peter C. Quast. All of these

1 units were classified occupied based on subcanopy behavior
2 observed within the unit boundary. Consequently, they are not
3 subject to the current appeals pending before the Ninth Circuit
4 of this Court's January 19, 1996 order. Northwest Forest
5 Resource Council v. Glickman, Nos. 96-35107 and 96-35132

6 There is absolutely no reason to further delay the
7 identification and release of replacement volume for these units.
8 Scott Timber Co. respectfully requests that this Court order
9 federal defendants to identify and release for harvest
10 replacement volume for these units by June 1, 1996.

11 Dated this 1st day of May, 1996.

12 HAGLUND & KIRTLEY

13
14 By Scott W. Horngren
15 Scott W. Horngren
16 Attorneys for Plaintiff
17
18
19
20
21
22
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25
26

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing SCOTT
TIMBER CO.'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
IDENTIFICATION AND RELEASE OF REPLACEMENT VOLUME on the following
parties:

Ms. Patti A. Goldman VIA REGULAR MAIL
Mr. Adam J. Berger
Ms. Kristen J. Boyles
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Mr. James C. Kimbourne
U.S. Department of Justice
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Washington, D.C. 20004

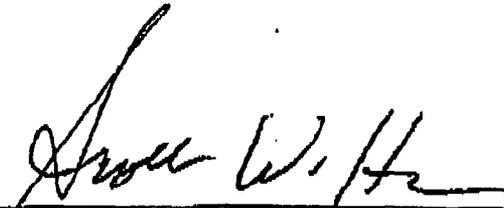
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Ms. Patricia M. Dost VIA REGULAR MAIL
Schwabe, Williamson & Wyatt
1211 S.W. Fifth Avenue, Ste.1600
Portland, Oregon 97204

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

DATED May 1st, 1996.



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Attorneys for Scott Timber Co.

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SWH\awhk7630

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2 Scott W. Horngren, OSB 88060
3 Shay S. Scott, OSB 93421
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6 Attorneys for Scott Timber Co.

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

| | | | |
|----|--------------------------------|---|-------------------------------|
| 10 | NORTHWEST FOREST RESOURCE |) | |
| 11 | COUNCIL, an Oregon |) | No. 95-6244-HO (Lead) |
| 12 | corporation, |) | No. 95-6267-HO (Consolidated) |
| 13 | |) | No. 95-6384-HO (Consolidated) |
| 14 | Plaintiff, |) | |
| 15 | |) | DECLARATION OF |
| 16 | v. |) | SCOTT W. HORNGREN |
| 17 | |) | RE: FAXED DECLARATION OF |
| 18 | DANIEL R. GLICKMAN, in his |) | PETER C. QUAST |
| 19 | capacity as Secretary of |) | |
| 20 | Agriculture, BRUCE BABBITT, in |) | |
| 21 | his capacity as Secretary of |) | |
| 22 | Interior, |) | |
| 23 | |) | |
| 24 | Defendants. |) | |

18 I, SCOTT W. HORNGREN, declare and state:

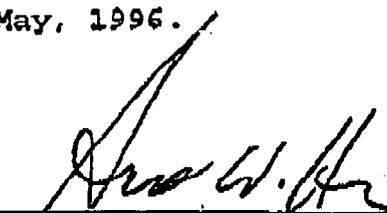
19 1. I am one of the attorneys for Scott Timber Co. I
20 make this declaration based on my personal knowledge.

21 2. Attached as Exhibit A to my declaration is a
22 signed faxed copy of the Declaration of Peter C. Quast who lives
23 in Roseburg, Oregon. Because of the logistics involved, I have
24 not yet received the signed original of Mr. Quast's Declaration.
25 I will file the original Declaration as soon as it is received
26 from Mr. Quast.

HAGLUND & KIRTLEY
ATTORNEYS AT LAW
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TELEPHONE (503) 225-0777

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

3 Dated this 5th day of May, 1996.

4
5
6 
7 Scott W. Horngren

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1 Michael E. Haglund, OSB 77203
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9 (503) 225-0777

Attorneys for Scott Timber Co.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE
COUNCIL, an Oregon
corporation,

Plaintiff,

v.

DANIEL R. GLICKMAN, in his
capacity as Secretary of
Agriculture, BRUCE RABBITT, in
his capacity as Secretary of
Interior,

Defendants.

No. 95-6244-HO (Lead)
No. 95-6267-HO (Consolidated)
No. 95-6384-HO (Consolidated)

DECLARATION OF PETER C.
QUAST

I, PETER C. QUAST, declare and state:

1. Scott Timber is the contract holder of 13 timber sales containing approximately 33 units totaling approximately 63 million board feet (MMBF) that the government has classified as occupied by the marbled murrelet under the Pacific Seabird Group protocol. I am the Woods Manager for Scott Timber Co. and make this declaration based on my personal knowledge.

2. Attached as Exhibit A to my declaration is a list of sale units which the Forest Service classified as occupied

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EXHIBIT A

1 from marbled murrelet surveys. These particular units had
2 subcanopy behavior observed within the unit boundary. The Forest
3 Service maintains that the marbled murrelets are "known to be
4 nesting" in these units under Section 2001(k) and under the
5 Court's January 19, 1996 order.

6 3. Despite the Forest Service insistence that the
7 units are occupied, they have not identified replacement volume
8 for these units. For example, the Father Oak Unit 1A/1B,
9 according to the Forest Service, contains a marbled murrelet
10 active nest. Since at least December, 1995 we have had
11 discussions with the Forest Service about identifying replacement
12 volume and replacement volume still has not been identified.

13 4. We would like to harvest this replacement volume
14 before September 30, 1996 when the protections of the Rescissions
15 Act are due to expire.

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

18 Dated this 1st day of May, 1996.

21 
22 Peter C. Quast

HAGLUND & KIRTLEY
ATTORNEYS AT LAW
ONE MAIN PLACE
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PORTLAND, OREGON 97204
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68210027620

LIST OF SCOTT TIMBER'S UNITS THAT MEET THE CRITERIA OF
"KNOWN TO BE NESTING" WITHIN THE UNIT BOUNDARY
UNDER THE COURT'S JANUARY 19, 1996 ORDER

| | |
|----------------|-------------|
| Father Oak | Unit 1A/1B |
| Fivemile Flume | Unit 4 |
| Formader 103 | Unit 1 |
| Indian Hook | Units 4 & 5 |
| Skywalker | Unit 6 |
| Sulphur | Unit 4 |

EXHIBIT A

SNH\swk7635

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
DECLARATION OF SCOTT W. HORNGREN RE: FAXED DECLARATION OF PETE
QUAST on the following parties:

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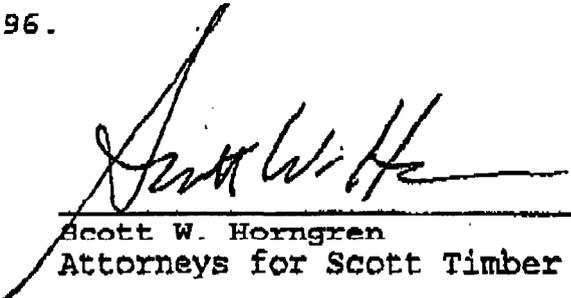
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by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

DATED May 15, 1996.



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

DATE: May 3, 1996
FROM: Albert M. Ferlo, Jr. and Anne Almy
RE: NFERC v. Glickman and Babbitt
OFFICE PHONE: (202) 514-2757 or 514-2749
NUMBER OF PAGES: Message and 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
Nancy Hayes 208-5242
Gerry Jackson 208-6916
Elena Kagan 456-1647
Karen Mouritsen 219-1792
Kris Clark
Chris Nolin 395-4941
Jason Patlis (301) 713-0658

MESSAGE:

Attached is a draft Petition for Rehearing and request for a stay pending Rehearing on the Geographic scope issue. We would like to file this by close of business today. Please telephone your comments to Anne Almy (514-2749) by 3:00 pm today.

Al Ferlo

OK

1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95- 36042

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

PETITION FOR REHEARING OR, IN THE ALTERNATIVE,
MOTION FOR CLARIFICATION AND STAY

On April 24, 1996, this Court issued an opinion in the above-captioned case and rendered a decision affirming the district court's summary judgment order of September 13, 1995 and its permanent injunction of October 17, 1995. The Court's opinion correctly characterizes the major dispute between the parties as whether the phrase "subject to [S]ection 318" imposed a temporal limitation on the scope of Section 2001(k) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19. This Court concluded, contrary to the submission of the Forest Service appellants, that the disputed phrase imposed only a geographical limitation on the scope of Section 2001(k). This petition for rehearing or clarification does not seek to disturb that

- 2 -

conclusion.^{1/} Instead, we seek to bring to the Court's attention an issue concerning the definition of the geographical limitation encompassed by the term "subject to [S]ection 318" which was raised but not directly decided in the appeal. As a result of this omission, there is an inconsistency between the written opinion and the ultimate decision.

Specifically, three times in the course of the April 24, 1996, opinion this Court describes the geographical scope of section 318 as encompassing the thirteen national forests in Oregon and Washington known to contain the northern spotted owl and the BLM administrative districts in western Oregon:

In the context of Section 318, units "subject to section 318" are identical to units "described by section 318": By the terms of Section 318, this category includes: (1) "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,] " [Sec.] 318(a)(1) and (2) the Bureau of Land Management's "administrative districts in western Oregon." [Sec.] 318(a)(2).

National Forest Resource Council v. Glickman, No. 95-36038 slip op. at 4956 (April 24, 1996). See also id. slip op. at 4957, 4958. See generally id. slip op. at 4448. The summary judgment of the district court, and its permanent injunction, however, define the geographical scope of the disputed term as encompassing all national forests in Oregon and Washington, not just those known to contain the northern spotted owl. Despite

^{1/} No decision has been reached as to whether the federal appellants would seek a rehearing en banc to challenge the outcome of this appeal. It is our understanding the present petition does not foreclose a separate petition for rehearing en banc and that the 45 day period in which such a petition may be filed is not tolled by the present filing.

- 3 -

this inconsistency, the decision of this Court was simply to affirm the district court thus continuing an injunction that is greater in scope than the Court's interpretation of the disputed term warrants.

It may be that this Court did not fully realize that the issue concerning the exact geographic scope of the disputed term, "subject to Section 318", was pressed upon the government's appeal or that the definition of the geographical scope made a substantial difference to the impact of the district courts' judgment. As detailed on page 21 of the government's brief on appeal, however, there are several national forests in the states of Oregon and Washington which are not known to contain the northern spotted owl.^{2/} The district court's injunction nevertheless ordered the release of thirty-two sales in three of these non spotted owl forests: the Wallowa-Whitman, Fremont and Malheur National Forests. The question presented on this appeal included a challenge to this broader definition of the geographical scope to include all national forests in Oregon and Washington, see Govt. Br. at 2, and the principal brief addressed this issue in the argument. Id. at 20-21. In short, the exact geographical scope of the term "subject to Section 318" is a live issue between the parties on this appeal.

^{2/} These are known as the "eastside" forests because they are located to the east of the Cascade mountain range in Oregon and Washington. The natural range of the northern spotted owl does not extend to these eastside forests.

- 4 -

As stated above, this Court's opinion reflects the decision that the disputed term "subject to Section 318" extends geographically to encompass "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,]"^{2/} slip op. at 4956-4958. This Court's judgment, however, affirmed the summary judgment and injunctive order of the district court without the modification necessary to align it to this Court's opinion. Since the issuance of the opinion, the federal appellants have reconfirmed that the difference in the definition of the geographical scope of Section 2001(k) continues to be of importance: seventeen timber sales in forests outside the range of the northern spotted owl have been released pursuant to the district court's order of October 1995 and remain subject to harvest. Modification of this Court's judgment to reflect the decision that the geographical scope of the term "subject to Section 318" extends only to "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[,]" (slip op. 4957) would therefore allow the termination of seventeen sales which do not meet current standards of environmental protection.

Accordingly, the federal appellants request that this Court grant rehearing to the extent of clarifying its opinion and order by modifying the judgment to conform to the text of the opinion. We suggest that this could be accomplished by altering the

^{2/} The parties do not dispute the geographical scope of the BLM lands involved.

- 5 -

judgment of this Court by adding "insofar as they apply to timber sales in the thirteen national forests in Oregon and Washington known to contain northern spotted owls and the Bureau of Land Management's administrative districts in western Oregon" at the end of page 4970 of the slip opinion. Such a modification of the judgment should not require further proceedings between the parties. Should this Court wish to defer consideration of this request to await the response of other parties, the federal appellants respectfully request that this Court preserve the status quo in the forests involved by granting a stay to restrain the operation of the seventeen identified sales while this request for rehearing or clarification is pending. To this end, we append a list of the seventeen timber sales located in forests outside the range of the northern spotted owl and a draft order restraining operation of those sales until this motion is resolved by this Court. Because May is the traditional commencement of logging operations in much of the Pacific Northwest, such temporary relief would be necessary to preserve the status quo in the forests should this Court need additional time to resolve this motion.

CONCLUSION

For these reasons the petition for rehearing and or clarification should be granted and the judgment modified to reflect the opinion of this Court. A stay pending resolution of this motion is also requested.

- 6 -

Respectfully submitted,

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

**DANIEL GLICKMAN, in his capacity
as Secretary of Agriculture; BRUCE
BABBITT, in his capacity as
Secretary of the Interior,**
Defendants,

and

**OREGON NATURAL RESOURCES
COUNCIL; SIERRA CLUB, INC.;
PILCHUCK AUDUBON SOCIETY;
WESTERN ANCIENT FOREST
CAMPAIGN; PORTLAND AUDUBON
SOCIETY; BLACK HILLS AUDUBON
SOCIETY; and HEADWATERS,**
Intervenors-Appellants.

No. 95-36038
D.C. No.
CV-95-06244-MRH
OPINION

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
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NORTHWEST FOREST RESOURCE
COUNCIL, an Oregon corporation,
Plaintiff-Appellee,

v.

DANIEL GLICKMAN, in his capacity
as Secretary of Agriculture; BRUCE
BABBITT, in his capacity as
Secretary of the Interior,

Defendants-Appellants,

and

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

No. 95-36042

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

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, Chief District Judge, Presiding

Argued and Submitted
January 8, 1996—Portland, Oregon

Filed April 24, 1996

Before: John T. Noonan, Jr., Edward Leavy and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins

SUMMARY

Natural Resources and Energy/Public Lands/ Wildlife and Habitat

The court of appeals affirmed district court orders. The court held that a statute requiring the release of certain timber sale contracts in areas "subject to section 318" of the Department of the Interior and Related Agencies Appropriations Act was not limited to the fiscal years covered by § 318.

The Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act (1995 Rescissions Act) contained a provision, § 2001(k)(1), releasing previously authorized timber sales. Section 2001(k)(1) required that within 45 days of the 1995 Rescissions Act's enactment, the Secretaries of Agriculture and Interior had to release "all timber sale contracts offered or awarded before" the 1995 Rescissions Act's enactment "in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318" of the Department of the Interior and Related Agencies Appropriations Act.

Section 318 mandated an "aggregate timber sale level" for timber harvests cut from national Forest Service and Bureau of Land Management lands in Oregon and Washington during fiscal years 1989 and 1990. Section 318 provided for sales it had authorized, but which were not finalized until after it expired.

Appellee the Northwest Forest Resource Council (NFRC), a timber industry trade association, brought a declaratory action against the Secretaries of Agriculture and the Interior, seeking release under § 2001(k)(1) of "all timber sales offered prior to the date of enactment" of the 1995 Rescissions Act "in all national forests in Oregon and Washington and in Bureau of Land Management districts in western Oregon." NFRC argued that § 2001(k)(1)'s term "subject to Section

318" described only § 318's geographical boundaries, and did not incorporate § 318's chronological limits (fiscal years 1989 and 1990).

Appellants the Oregon Natural Resources Council (ONRC) and several other environmental organizations (collectively, ONRC) moved to intervene in the action. The district court denied the motion.

The district court granted summary judgment for NFRC, adopting its suggested interpretation of § 2001(k)(1). The court also granted NFRC's motion for a permanent injunction, directing the Secretaries "to award, release, and permit to be completed in fiscal years 1995 and 1996 . . . all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or [Bureau of Land Management] district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting."

The Secretaries appealed the summary judgment order and permanent injunction, contending that Congress used the phrase "subject to section 318" to require the release of only those timber sales originally offered or awarded pursuant to § 318 but were delayed due to legal challenges to the statute. They urged that the legislative history of § 2001(k)(1) provided persuasive evidence that Congress's intent in enacting the section of the 1995 Rescissions Act was to release only those timber sales that § 318 authorized for fiscal years 1989 and 1990. ONRC appealed the partial denial of its motion to intervene.

[1] Section 2001(k)(1) placed the phrase "subject to section 318" squarely in the portion of the sentence that modified the geographical areas covered by § 2001(k)(1). Given that structure, it was clear that the phrase modified only the geographical scope of § 2001(k)(1), but did not describe its temporal reach. Section 2001(k)(1) was not limited to the fiscal years

covered by § 318, but instead authorizes timber sales "offered or awarded" up until the date of enactment. [2] The doctrine of last antecedent also indicated that the phrase "subject to section 318" modified the phrase it immediately followed.

[3] The phrase "subject to section 318" could be interpreted as "governed or affected by section 318." In this case, the phrase identified those geographic units that were affected by § 318. [4] Based on § 2001(k)(1)'s structure, the plain and ordinary meaning of the words it contained, and several long-standing principles of statutory interpretation, § 2001(k)(1)'s language was clear — the phrase "subject to section 318" defined only the geographical reach of the statute, and clearly authorized the release of timber sales "offered or awarded" up until the date of enactment.

[5] The 1995 Rescissions Act's legislative history offered strong evidence that the phrase "subject to section 318" defined only the geographic scope of § 2001(k)(1).

[6] ONRC had not shown a sufficient interest to warrant intervention in the action. [7] In addition, because ONRC alleged only minor differences in opinion with the Secretaries, it failed to demonstrate inadequacy of representation. [8] ONRC also failed to satisfy a prong of the permissive intervention standard because it asserted no independent basis for jurisdiction.

COUNSEL

Albert M. Ferlo, Jr., United States Department of Justice, Washington, D.C., for the defendants-appellants.

Patti A. Goldman and Kristen L. Boyles, Sierra Club Legal Defense Fund, Seattle, Washington, for the intervenors-appellants.

Mark C. Rutzick and Alison Kean Campbell, Portland, Oregon, for the plaintiff-appellee.

OPINION

HAWKINS, Circuit Judge:

We consider what would appear to be a relatively straightforward question of statutory interpretation with fairly profound consequences. This appeal requires us to determine the relationship between two separate statutory provisions governing timber sales, Section 2001(k)(1) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, and Section 318 of the Department of the Interior and Related Agencies Appropriations Act. In particular, we must determine the meaning of the phrase "subject to [S]ection 318" as it appears in Section 2001(k)(1) of the 1995 Rescissions Act. It is not our role to determine the wisdom of Section 2001(k)(1), only its meaning.

This appeal consolidates two cases arising out of the same set of events but involving two distinct legal issues.¹ The first appeal requires us to define the categories of timber sales the Secretaries of Agriculture and Interior must release under Section 2001(k)(1) of the 1995 Rescissions Act. The Northwest Forest Resource Council ("NFRC"), a timber industry trade association, contends Section 2001(k)(1) mandates that the Secretaries release several years of timber sales in federal lands that are defined by a separate statute, Section 318 of Public Law No. 101-121 (estimated at 656 million board feet). The Secretaries urge that Section 2001(k)(1) requires them to release only sales for fiscal years 1989 and 1990 (an estimated 410 million board feet). They appeal the district

¹The two appeals were consolidated and expedited upon motion of several environmental organizations seeking to intervene in the litigation.

court's order adopting NFRC's interpretation of Section 2001(k)(1), and its permanent injunction directing the Secretaries to release timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995. We have jurisdiction over the Secretaries' appeal pursuant to 28 U.S.C. § 1292(a)(1).

In the second appeal, Oregon Natural Resources Council and several other environmental organizations (collectively "ONRC") challenge the district court's refusal to allow ONRC to intervene in NFRC's lawsuit against the Secretaries. The denial of a motion to intervene is appealable as of right. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990), cert. denied by *Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991).

For the reasons discussed below, we affirm the district court's order directing the Secretaries to release "all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or [Bureau of Land Management] district in western Oregon," and we affirm the district court's partial denial of ONRC's motion to intervene in NFRC's declaratory action against the Secretaries.

FACTUAL BACKGROUND

I. Northwest Forest Resource Council's Declaratory Action

A. The Enactment of the 1995 Rescissions Act

On July 27, 1995, the President signed into law the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. 104-19, 109 Stat. 240 (1995). Though principally an appropriations bill, the Act contained several provisions aimed at expediting the award of

timber harvesting contracts, including provisions authorizing the nationwide release of salvage timber sales (Section 2001(b)), expediting the award of timber sales covered in the President's Northwest Forest Plan (Section 2001(d)), and releasing previously authorized timber sales (Section 2001(k)(1)).

This appeal concerns the scope of Section 2001(k)(1) of the Act, which requires that within 45 days of the Act's enactment,² the Secretaries of Agriculture and Interior must release "all timber sale contracts offered or awarded before [the Act's enactment] 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." Because Section 2001(k)(1) defines its mandatory timber releases by reference to Section 318 of the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. 101-121, 103 Stat. 745 (1989), we must first examine the scope of timber sales under Section 318.

B. Timber Sales Authorized by Section 318

Enacted in October 1989, Section 318 mandated an "aggregate timber sale level" for timber harvests cut from National Forest Service and Bureau of Land Management lands in Oregon and Washington during fiscal years 1989 and 1990. § 318(a)(1).

Subsections 318(a)(1) and 318(a)(2) directed the Forest Service and the Bureau of Land Management to meet specified timber sales quotas from two geographical categories. Subsection 318(a)(1) provided that the bulk of timber sales must derive from "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[.]" § 318(a)(1). Other subsections of the statute imposed various

²Section 2001(k)(1) provided that timber sales were to be released starting September 10, 1995.

environmental and procedural requirements on these sales. See Subsections 318(b)-(j). Subsection 318(a)(2) authorized additional sales in the Bureau of Land Management's "administrative districts in western Oregon." The statute explicitly exempted Subsection 318(a)(2) sales from the procedural and substantive protections of Subsections 318(b)-(j). See § 318(i).

Implementation of Section 318 sales was delayed, however, by several lawsuits alleging Section 318 violated various federal environmental statutes.³ Although Section 318 expired by its own terms on September 30, 1990, it provided for sales it had authorized, but which were not finalized until after it expired. Subsection 318(k) required that sales remaining to be released after the expiration date were to remain "subject to the terms and conditions of [Section 318] for the duration of those sale contracts." § 318(k). As of the enactment of Section 2001(k)(1) of the 1995 Rescissions Act, an estimated 410 million board feet of timber remained to be released under Section 318.

C. Northwest Forest Resource Council's Declaratory Action

On August 8, 1995, after the 1995 Rescissions Act was enacted but before the September 10 release date, NFRC brought the declaratory action below (No. 95-36042). NFRC sought the release, under Section 2001(k)(1), of "all timber sales offered prior to the date of enactment [of the 1995 Rescissions Act] in all national forests in Oregon and Washington and in Bureau of Land Management districts in west-

³Litigation included a challenge to the constitutionality of Section 318, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); litigation over compliance with the terms of Section 318, *Seattle Audubon Soc'y v. Robertson*, Civ. Nos. 89-160, 89-99, 1991 WL 180099 (W.D. Wa. March 7, 1991); and challenges to Section 318 sales based on concerns about their impact on species listed under the Endangered Species Act (including the northern spotted owl and the marbled murrelet).

ern Oregon.”⁴ NFRC argued that Section 2001(k)(1)’s term “subject to Section 318” describes only Section 318’s geographical boundaries, but does not incorporate Section 318’s chronological limits (fiscal years 1989 and 1990). Under this interpretation, Section 2001(k)(1) requires the Secretaries to release sales occurring after fiscal years 1989 and 1990, but before enactment of the 1995 Rescissions Act. This interpretation would entail the release of 246 million board feet of timber over and above the 410 million board feet Section 318 authorized for release in fiscal years 1989 and 1990.

As part of its declaratory action, NFRC sought a permanent injunction compelling the Secretaries “to award, release, and permit to be completed in fiscal years 1995 and 1996 . . . all timber sales offered prior to July 27, 1995 in all national forests in Oregon and Washington and [Bureau of Land Management] districts in western Oregon, including the FY 1991-1995 sales.” (emphasis added). It also sought a temporary restraining order requiring the Secretaries to “take all administrative actions” necessary to release the sales by September 10.

D. The District Court’s Order and Permanent Injunction

The district court denied NFRC’s motion for a temporary restraining order but granted summary judgment for NFRC, adopting its suggested interpretation of Section 2001(k)(1). The district court also granted NFRC’s motion for a perma-

⁴NFRC subsequently added other claims to its lawsuit. First, it added a claim under Section 2001(k)(2), which exempts from Section 2001(k)(1) those forests in which threatened or endangered bird species are “known to be nesting.” This claim challenged the Secretaries’ proposed interpretation of Section 2001(k)(2), and sought the release of sales withheld under Section 2001(k)(2), absent physical evidence of nesting. Second, NFRC challenged the Forest Service’s refusal to release FY 1990 sales it conceded were within the scope of Section 2001(k)(1). These additional claims are not at issue in this appeal.

nent injunction, directing the Secretaries “to award, release, and permit to be completed in fiscal years 1995 and 1996 . . . all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or [Bureau of Land Management] district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting.” (emphasis added).

The Secretaries appealed the district court’s summary judgment order and permanent injunction. Their appeal was expedited and consolidated with ONRC’s appeal from the district court’s denial of its motion to intervene. The district court denied the Secretaries’ motion to stay the injunction pending this appeal, and a motions panel of this Court denied the Secretaries’ request for an emergency stay pending appeal.

II. Oregon Natural Resources Council’s Motion to Intervene in Northwest Forest Resource Council’s Declaratory Action

On August 14, 1995, six days after NFRC sued the Secretaries, ONRC moved to intervene in NFRC’s declaratory action, seeking, alternatively, intervention as of right or permissive intervention.⁵ The district court denied ONRC’s motion to intervene but did allow ONRC to participate as amicus curiae, both in the summary judgment hearing and in NFRC’s subsequent attempts to enforce the order against the Secretaries.⁶ ONRC appeals the district court’s partial denial of its motion to intervene.⁷

⁵NFRC opposed ONRC’s motion for three reasons: (1) ONRC’s interests in the enforcement of environmental laws were irrelevant because Section 2001(k)(1) nullified those laws; (2) ONRC’s interests would not be impaired by the lawsuit; and (3) the Secretaries, as defendants in the lawsuit, would adequately represent ONRC’s interests. The Secretaries took no position on ONRC’s motion.

⁶The district court also allowed ONRC to intervene with respect to NFRC’s subsequent § 2001(k)(2) claim, which is not at issue in this appeal.

⁷ONRC moved successfully to expedite its appeal and to consolidate it with the Secretaries’ appeal. We granted ONRC’s motion to file an amicus brief in the Secretaries’ appeal.

DISCUSSION

I. The Scope of Section 2001(k)(1) of the 1995 Rescissions Act

We review de novo the district court's interpretation of Section 2001(k)(1). *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1612 (1994).

The Secretaries' appeal requires us to determine what timber sales must be released under Section 2001(k)(1), which is purely a question of statutory interpretation. In interpreting a statute, we "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress. Then, if the language of the statute is unclear, we look to its legislative history." *Alarcon v. Keller Industries, Inc.*, 27 F.3d 386, 389 (9th Cir. 1994) (citations omitted).

A. The Language of Section 2001(k)(1)

We begin with the language of the statute. *United States v. Van Den Berg*, 5 F.3d 439, 442 (9th Cir. 1993) (citing *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 557 (1990)).

Section 2001(k)(1) provides in pertinent part:

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 sale contracts offered or awarded before that date 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[.]

(emphasis added)

At the heart of this appeal is the meaning and effect of the phrase "subject to section 318," which defines the scope of timber sales under Section 2001(k)(1). The Secretaries and NFRC offer divergent interpretations of this phrase and therefore disagree strenuously as to the relationship between Section 2001(k)(1) and Section 318.

The Secretaries contend Congress used the phrase "subject to section 318" to require the release of only those timber sales originally offered or awarded pursuant to Section 318, but that were delayed due to the various legal challenges to that statute. In the Secretaries' view, the phrase "subject to section 318" modifies "timber sale contracts[.]" According to this interpretation, the reference to Section 318 identifies both the regions and fiscal years of the sales, and thus imposes both geographical and temporal limits on the scope of Section 2001(k)(1).⁶

NFRC insists, however, that the phrase "subject to section 318" modifies "any unit of the National Forest System or district of the Bureau of Land Management" and thus defines only the geographic parameters of the sales. Within that geographic area, which it construes as "the national forests of Oregon and Washington and six [Bureau of Land Management] districts in western Oregon[.]" NFRC contends the statute requires the award and release of "all timber sales offered

⁶Shortly after NFRC filed its declaratory action, the Secretaries of Agriculture and Interior issued an Instruction Memorandum stating that Section 2001(k)(1) "applies only to the remaining section 318 timber sales[.]" and requires the release only of sales that were offered in fiscal years 1989 and 1990 and that met the environmental and procedural requirements of Section 318.

or awarded before the date of enactment of the [1995] Rescissions Act." Under NFRC's interpretation, the timber sales are not limited to fiscal years 1989 and 1990, the period covered by Section 318, but additionally encompass sales occurring since the enactment of Section 318. The district court agreed with NFRC's interpretation of Section 2001(k)(1), and accordingly tailored its permanent injunction to cover "all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or [Bureau of Land Management] district in western Oregon."

1. The Structure of Section 2001(k)(1)

The statute by its mandatory language ("shall act") requires the Secretaries to release the timber sales described therein. The timber sales that are the object of Section 2001(k)(1)'s mandate are:

all timber sale contracts offered or awarded before [the enactment of Section 2001(k)(1)] in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318[.]

The term "all" makes the mandate applicable to the entire category of "timber sale contracts" included by Section 2001(k)(1). Defining that category are two criteria: (1) the time frame, which is defined as "before [2001(k)(1)'s enactment], and (2) the geographical scope, which is defined as "in any unit [of national forests or BLM lands] subject to section 318." Both criteria bear equally on "timber sale contracts."

[1] Structured in this fashion, Section 2001(k)(1) places the phrase "subject to section 318" squarely in the portion of the sentence that modifies the geographical areas covered by Section 2001(k)(1). Given this structure, it is clear that the phrase modifies only the geographical scope of Section 2001(k)(1), but does not describe its temporal reach. The time frame of

Section 2001(k)(1) is defined instead by the explicit wording of the statute: "before [the] date [of enactment of the 1995 Rescissions Act]." Section 2001(k)(1) is therefore not limited to the fiscal years covered by Section 318, but instead authorizes timber sales "offered or awarded" up until the date of enactment.

This conclusion is bolstered by another feature of Section 2001(k)(1)'s structure. The statute does not set off the phrase "subject to section 318" from the preceding phrase "in any unit [of national forests or BLM lands][.]" These two phrases are unseparated by a comma or conjunction such as "and." The absence of such a division suggests that the phrase "subject to section 318" does not modify the entire preceding portion of the sentence. Instead, the link between the phrases "in any unit [of national forests or BLM lands]" and "subject to section 318" indicates that they operate as one entity and serve one function: defining the geographic scope of Section 2001(k)(1).

The Secretaries urge that the phrase "subject to section 318" modifies "timber sale contracts" generally. They argue, first, that had Congress intended to define only the geographical scope of Section 2001(k)(1), it could have identified the national forests and Bureau of Land Management lands in the text, and need not have invoked Section 318 as "shorthand" for these areas. Although Congress certainly could have adopted that approach, the language it chose instead is a valid means to achieve the same result.

The Secretaries' next argument against reading "subject to section 318" to modify "unit[s] [of national forests or BLM lands]" is that Sections 2001(b) and 2001(d) of the 1995 Rescissions Act employ the term "described by" to identify the location of timber sales covered in those sections. This difference is immaterial. Whether Congress had used "subject to" or "described by," it would produce the same result: Owing to its location in Section 2001(k)(1), the phrase would

invariably modify "unit[s] [of national forests or BLM lands]." In the context of Section 318, units "subject to section 318" are identical to units "described by section 318": By the terms of Section 318, this category includes: (1) "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[.]" § 318(a)(1), and (2) the Bureau of Land Management's "administrative districts in western Oregon." § 318(a)(2).

2. The Doctrine of Last Antecedent

Another guide in determining the role played by the phrase "subject to section 318" is the "doctrine of last antecedent," which teaches that where one phrase of a statute modifies another, the modifying phrase applies only to the phrase immediately preceding it. *Huffman v. Comm'r of Internal Revenue*, 978 F.2d 1139, 1145 (9th Cir. 1992) (citations omitted); *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989). We have long followed this interpretive principle. See *Wilshire Westwood Associates*, 881 F.2d at 804. See also Norman J. Singer, *Sutherland on Statutory Construction* § 47.33 (4th ed. 1985) ("[Q]ualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.")

[2] Applied here, the doctrine of last antecedent indicates that the phrase "subject to section 318" modifies the phrase it immediately follows: "unit[s] of the National Forest System [and] district[s] of the Bureau of Land Management." The doctrine of last antecedent thus lends further support to the conclusion that Section 318 defines only the geographic scope of timber sales required by Section 2001(k)(1), and not other characteristics of the sales.

The Secretaries contend that the doctrine of last antecedent should not apply in this case because they argue it would produce an absurd result: It would require the release of timber

sales offered in forests that were never subject to Section 318's environmental and procedural protections.

Such a result is not absurd. On the contrary, it mirrors the original provisions of Section 318. By its very terms, Section 318 accords such protections to only a subset of the sales it authorized. Section 318 authorized two categories of timber sales: (1) "the thirteen national forests in Oregon and Washington known to contain northern spotted owls[.]" § 318(a)(1), and (2) the Bureau of Land Management's "administrative districts in western Oregon." § 318(a)(2). The latter category was never afforded the protections of Subsections 318(b)-(k). Indeed, Subsection 318(i) explicitly exempted Subsection 318(a)(2) sales from these protections, stating:

[T]he provisions of this section apply solely to the thirteen national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Management to develop similar policies on any other forest or district in Oregon or Washington.

(emphasis added)

It is true that we are not inflexible in our application of the doctrine of last antecedent, and have recognized that the principle must yield to the most logical meaning of a statute that emerges from its plain language and legislative history. *Hearn v. Western Conf. of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995). See also Singer, *Sutherland on Statutory Construction* § 47.33 ("[w]here the sense of the entire act requires that a qualifying word or phrase apply to several preceding [or] succeeding sections, that word or phrase will not be restricted to its immediate antecedent."). Here, however, both the plain language of the statute and the doctrine

of last antecedent bolster the conclusion that “subject to section 318” modifies only the geographical scope of Section 2001(k)(1).

3. The Canon of Ordinary Meaning

Having determined that the phrase “subject to section 318” modifies the phrase “in any unit [of national forests or BLM lands],” we next examine what the phrase “subject to section 318” means.

[3] Where a statutory term is not defined in the statute, it is appropriate to accord the term its “ordinary meaning.” *Van Den Berg*, 5 F.3d at 442. The meaning of “subject to” includes, among other things, “governed or affected by.” *Black’s Law Dictionary*, 1594 (4th ed. 1968). The phrase “subject to section 318” may therefore be interpreted as “governed or affected by section 318.” In this case, the phrase identifies those geographic units that were affected by Section 318. The statute defined two distinct geographical areas: Subsection 318(a)(i) covered the thirteen national forests and Bureau of Land Management districts “known to contain northern spotted owls,” while Subsection 318(a)(2) authorized a smaller set of timber sales located in BLM lands in western Oregon. Although the statute imposed different substantive and procedural requirements on timber sales in these two areas, both geographical categories may nonetheless be said to be “subject to [S]ection 318.”

The Secretaries urge a narrower interpretation of the phrase “subject to,” and argue that it means not merely “described by” but “conditioned by.” They contend that many of these land units cannot be said to have been “subject to [S]ection 318” because they were never subject to the environmental and procedural protections contained in Subsections 318(b)-(j). As discussed in the preceding section, however, that contention is clearly refuted by the explicit terms of Subsection 318(i), which limits the substantive protections contained in

Subsections 318(b)-(j) to sales under Subsection 318(a)(1), and exempts Subsection 318(a)(2) sales.

4. The Principle of Giving Effect to Every Statutory Subsection

Another principle in interpreting the phrase “subject to section 318” is that a statute must be interpreted to give significance to all of its parts. *Boise Cascade Corp. v. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). We have long followed the principle that “[s]tatutes should not be construed to make surplusage of any provision.” *Wilshire Westwood Associates*, 881 F.2d at 804 (citing *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 673 (9th Cir. 1978)).

Applying that principle to this case, we find, first, that Section 2001(k)(1)’s phrase “offered or awarded before [the date of enactment of the 1995 Rescissions Act]” would be superfluous if, as the Secretaries argue, the statute was limited to timber sales in fiscal years 1989 and 1990. That phrase defines the temporal scope of timber sales under Section 2001(k)(1), and it makes clear that the statute authorizes timber sales well after fiscal years 1989 and 1990. Second, the phrase “in any unit of the National Forest System or district of the Bureau of Land Management” would be superfluous if, as the Secretaries contend, “subject to section 318” defined “timber sales” generally, since that definition would already include the geographical scope of Section 318.

The Secretaries argue that these two phrases are not superfluous because they potentially serve other functions. First, they contend the phrase “offered or awarded before [the date of enactment of the 1995 Rescissions Act]” might refer to sales that were authorized under Section 318 in fiscal years 1989 and 1990, but that were delayed by litigation. The language of this phrase does not suggest such a limited reading, however; the phrase employed is “offered or awarded,” *not* “offered and awarded but delayed.”

Second, the Secretaries point to the phrase “in *any unit* of the National Forest System or district of the Bureau of Land Management subject to section 318” and suggest it be interpreted to include both Forest Service and Bureau of Land Management lands. That interpretation would not solve the problem of surplusage, however, since the phrase “subject to section 318,” standing alone, would include both Forest Service and Bureau of Land Management lands.

The Secretaries invoke the principle against surplusage in support of a final argument: They contend this principle supports the conclusion that *all* of Section 318’s provisions should be read into Section 2001(k)(1), rather than just its geographical definition. Reading “subject to section 318” to include only Section 318’s geographical parameter, they argue, would ignore the environmental and procedural protections of Section 318. As discussed above, however, not all of the geographic areas subject to Section 318 were accorded its substantive protections.

5. Conclusion

[4] Based on the structure of Section 2001(k)(1), the plain and ordinary meaning of the words it contains, and several longstanding principles of statutory interpretation, we conclude that the language of Section 2001(k)(1) is clear: The phrase “subject to section 318” defines only the geographical reach of the statute, and clearly authorizes the release of timber sales “offered or awarded” up until the date of enactment. The Secretaries and amicus ONRC urge, however, that the legislative history of Section 2001(k)(1) provides persuasive evidence that Congress’s intent in enacting this section of the 1995 Rescissions Act was to release only those timber sales that Section 318 authorized for fiscal years 1989 and 1990. We therefore turn next to the legislative history of Section 2001(k)(1).

B. The Legislative History of Section 2001(k)(1)

As noted above, our approach to statutory interpretation is to look to legislative history only where we conclude the statutory language does not resolve an interpretive issue. Where a statute is ambiguous, we may look to legislative history to ascertain its purpose. *United States v. Aguilar*, 21 F.3d 1475, 1480 (9th Cir. 1994) (en banc), *aff’d in part, rev’d in part, and remanded*, 115 S. Ct. 2357 (1995). Here, although we find that the language of the statute makes clear the meaning of the phrase, “subject to section 318,” we turn now to the legislative history because the Secretaries and amici urge its importance. As we do, it is important to note that this Circuit also recognizes the principle that “[l]egislative history — no matter how clear — can’t override statutory text. Where the statute’s language ‘can be construed in a consistent and workable fashion,’ [this Court] must put aside contrary legislative history.” *Hearn*, 68 F.3d at 304 (citations omitted).

1. The House Report Introducing the Bill

As originally introduced, Section 2001(k)(1) was described as a provision “to release a group of sales that *have already been sold under the provisions of Section 318* of the fiscal year 1990 Interior and Related Agencies Appropriations Act.” H. Rep. No. 104-71, 104th Cong., 1st Sess. 20-23 (Mar. 8, 1995) (emphasis added). Although the Secretaries urge that the words “have already been sold” refers to Section 318 sales undertaken in fiscal years 1989 and 1990 only, this language, standing alone, does not so limit the provision.

2. The Senate Modification of the Bill

Next, the Senate modified Section 2001 by adding Section 2001(k)(2) to exempt forests containing endangered birds. During Senate debates on the 1995 Rescissions Act, which focused chiefly on the Act’s controversial salvage timber provisions, only passing references were made to Section 318.

Senator Gorton referred to "sales . . . pursuant to [Section 318]," while Senator Hatfield referred to "sales, originally authorized by [Section 318]." 141 Cong. Rec. S4875 & S4881 (emphasis added). The Secretaries once again urge us to interpret these phrases to limit the temporal scope of Section 2001(k)(1) as enacted. This we will not do. Neither of these passing references to Section 318 squarely addresses how Section 318 modifies Section 2001(k)(1).

3. The Conference Report

The Conference Report on the 1995 Rescissions Act, H.R. Conf. Rep. 104-124, 104th Cong., 1st Sess. (May 16, 1995), contains the following language:

The bill releases *all timber sales which were offered for sale beginning in fiscal year 1990 to the date of enactment* which are located in any unit of the National Forest System or District of the Bureau of Land Management *within the geographic area encompassed by Section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act.*

Conf. Rep. at 137 (emphasis added).

The Conference Report provides an unequivocal statement of the temporal scope of Section 2001(k)(1): The statute expressly authorizes timber sales during the period from 1990 to the enactment of the 1995 Rescissions Act.

Although we are convinced that the language of Section 2001(k)(1), standing alone, establishes this same broad temporal scope, we note that this explicit discussion in the Conference Report bolsters our conclusion. Ironically, the Secretaries urge us *not* to rely on the Conference Report, arguing that it uses the phrase "encompassed by Section 318" rather than "subject to section 318" that appears in the statute. However, a congressional conference report is recognized as

the most reliable evidence of congressional intent because it "represents the final statement of the terms agreed to by both houses." *Dept. of Health and Welfare v. Block*, 784 F.2d 895, 901 (9th Cir. 1986) (citation omitted).

4. The Post-Enactment Letter from Six Lawmakers

The final piece of legislative history relevant to Section 2001(k)(1) is a letter from Committee on Energy and Natural Resources Chairman Frank Murkowski and other Senators to Secretary of Agriculture Glickman and Secretary of Interior Babbitt, dated July 27, 1995, the enactment date of the 1995 Rescissions Act. It reads in part:

We want to make it clear that subsection (k) of the [timber sales] legislation applies within the geographic area of National Forest units and [Bureau of Land Management] districts that were subject to Section 318 . . . and within that geographic area requires the release of all previously offered or awarded timber sales, *including Section 318 sales as well as all sales offered or awarded in other years (such as Fiscal Years 1991-1995) that are not subject to Section 318.* The reference to Section 318 in subsection (k)(1) defines the geographic area that is subject to subsection (k).

We accord little weight to these statements, consistent with the principle that post-enactment legislative history merits less weight than contemporaneous legislative history. *Cose v. Getty Oil Co.*, 4 F.3d 700, 708 (9th Cir. 1993). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). We simply note that these statements are not inconsistent with our conclusion based on the language of the statute.

5. Conclusion

[5] The legislative history surrounding Section 2001(k)(1), far from refuting our interpretation of the statutory language, serves to confirm it. The Conference Report, in particular, suggests Section 2001(k)(1) authorizes timber sales between the expiration of Section 318 and the enactment of the 1995 Rescissions Act. Moreover, it suggests the term "subject to section 318" defines solely the geographic scope of Section 2001(k)(1). Although the Secretaries point to scattered legislative statements characterizing the timber sales variously as "already sold" or "previously sold," such characterizations do not exclude post-1990 sales from the scope of Section 2001(k)(1). Moreover, these statements do not refute the Conference Report's clear description of the chronological scope of Section 2001(k)(1). The legislative history of the 1995 Rescissions Act, particularly the Conference Report, offers strong evidence that the phrase "subject to section 318" defines only the geographic scope of Section 2001(k)(1).

II. Whether the District Court Erred in Denying ONRC's Motion to Intervene in NFRC's Declaratory Action

Intervention is governed by Fed. R. Civ. P. 24, which permits two types of intervention: intervention as of right and permissive intervention. ONRC pursued and was denied both forms below. We review de novo the district court's decision regarding intervention as a matter of right under Fed. R. Civ. P. 24(a)(2), *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995), although we review for abuse of discretion its decision as to the timeliness of the intervention motion. *Id.* at 1397 (citations omitted). We review for abuse of discretion the district court's decision concerning permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2). *Beckman Industries, Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir.), *cert. denied*, 506 U.S. 868 (1992).

A. Intervention as of Right

Regarding intervention of right, Fed. R. Civ. P. 24(a)(2) provides:

Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

We have outlined four requirements for intervention of right under Fed. R. Civ. P. 24(a)(2): (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the transaction; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties in the lawsuit. *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1493 (9th Cir. 1995) (citation omitted).

1. Whether ONRC's Motion to Intervene Was Timely

We consider three criteria in determining whether a motion to intervene is timely: (1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for any delay in moving to intervene. *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991).

ONRC's motion to intervene was timely. ONRC moved to intervene less than one week after NFRC filed its Section

2001(k)(1) claim, before the Secretaries had filed an answer, and before any proceedings had taken place. Moreover, ONRC's motion to intervene does not appear to have prejudiced either party in the lawsuit, since the motion was filed before the district court had made any substantive rulings.

2. Whether ONRC has a Significantly Protectable Interest in NFRC's Declaratory Action

Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a "practical, threshold inquiry," and "[n]o specific legal or equitable interest need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993), *aff'd*, 64 F.3d 1266 (9th Cir. 1995). The movant must, however, demonstrate a "significantly protectable interest" in the lawsuit to merit intervention. *Forest Conservation Council*, 66 F.3d at 1493 (internal quotation marks omitted). To demonstrate this interest, a prospective intervenor must establish that (1) "the interest [asserted] is protectable under some law," and (2) there is a "relationship between the legally protected interest and the claims at issue." *Id.* (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)).

ONRC asserts several interests in NFRC's declaratory action, and insists these support its intervention of right. First, it asserts that ONRC and other prospective intervenors "are non-profit environmental organizations dedicated to the prudent stewardship of national forestlands and public lands in Oregon and Washington," and have a "longstanding interest in the proper management and environmental protection of the public forestlands at issue in this case." Second, it notes that this Circuit "has repeatedly recognized the standing of many of these [organizations seeking to intervene]." Third, ONRC urges that "the proposed intervenors have long advocated for strong environmental protections in logging on public lands in Washington and Oregon," and that they have been "catalysts for the environmental protections that are now in

place in both eastern and western Washington and Oregon[,] protections ONRC insists would be violated by the timber sales NFRC seeks in this case. It reasons that because Section 2001(k)(1) orders the release of timber sales "[n]otwithstanding any other provisions of law," ONRC has a right to intervene to prevent "defiance of our environmental laws."

But Section 2001(k)(1) does not defy or violate existing environmental laws; rather, it explicitly preempts them with its phrase "[n]otwithstanding any other provision of law." § 2001(k)(1). While it is true that a prospective intervenor's interest need only be protected under *some* law, *see Sierra Club*, 995 F.2d at 1484, the interest must relate to the litigation in which it seeks to intervene. 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 therefore cannot protect ONRC's various interests with respect to NFRC's claims under Section 2001(k)(1).

Moreover, the cases in which we have allowed public interest groups to intervene generally share a common thread: Unlike ONRC, these groups were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose. *See, for example, Idaho Farm Bureau Fed'n*, 58 F.3d at 1397 (conservation groups have interest in litigation challenging the listing of a snail under the Endangered Species Act, where they were active in getting the snail listed); *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), *aff'd in part, rev'd in part by Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1995), *on reh'g en banc*, 69 F.3d 920 (9th Cir. 1995), *cert. granted*, ___ S. Ct. ___, 1995 WL 761639 (Mar. 25, 1996) (sponsors of ballot initiative had sufficient interest to intervene as of right in case challenging the constitutionality of prospective intervenors' initiative); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), *aff'd*, 790 F.2d 760 (9th Cir. 1986) (Audubon

Society's interest in the protection of birds and other animals and its active participation in the proceedings to establish a wildlife sanctuary entitled it to intervene as of right in a case challenging the validity of that sanctuary); *Washington State Bldg. Construction Trades v. Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied by *Don't Waste Washington Legal Defense Found. v. Washington*, 461 U.S. 913 (1983); (allowing intervention of public interest group in lawsuit challenging measure group has supported); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (National Organization for Women permitted to intervene in suit challenging validity of ratification procedures surrounding the Equal Rights Amendment, where the organization had actively supported the amendment).

[6] Although we do not here rule out the possibility that a public interest organization might adduce sufficient interest to intervene even where it had not participated in or supported the legislation, we conclude that ONRC has not shown a sufficient interest to warrant intervention in this action.

3. Whether ONRC's Interests Would Be Impaired or Impeded by the Disposition of the Case

The third factor presupposes that the prospective intervenor has a protectable interest. Because ONRC lacks such an interest in NFRC's declaratory action, we need not elaborate on this factor. Although the disposition of the case may infringe on ONRC's generalized environmental interests, those interests do not rise to the level of "significantly protectable interests."

4. Whether the Secretaries' Representation is Inadequate to Protect ONRC's Putative Interests

In determining whether an applicant's interest is adequately represented by the parties, we consider (1) whether the interest of a present party is such that it will undoubtedly make all

the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). The prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests. *Sagebrush*, 713 F.2d at 528. However, we follow *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972), in holding that the requirement of inadequate representation is satisfied if the applicant shows that representation "may be" inadequate. *Sagebrush*, 713 F.2d at 528.

ONRC argues that the federal defendants in the case, the Secretaries of Agriculture and Interior, do not adequately represent ONRC's interests.

ONRC insists, first, that the Secretaries cannot adequately represent its interests because it took a "differen[t] . . . position[]" than the Secretaries did with respect to the district court's decision to enter a permanent injunction. Whereas the Secretaries favored such an order because it would be appealable, ONRC disagreed. This disagreement is minor, however, and it is not central to NFRC's declaratory action. Moreover, it reflects only a difference in strategy.

ONRC's next argument is that the Secretaries cannot represent it adequately because ONRC and other would-be intervenors have sued the government numerous times to compel compliance with various environmental statutes. In this case, however, the Secretaries and ONRC are seeking the same limited interpretation of Section 2001(k)(1). Where an applicant for intervention and an existing party "have the same ultimate objective, a presumption of adequacy of representation arises." *Oregon Env'tl. Council v. Oregon Dept. of Env'tl. Quality*, 775 F. Supp. 353, 359 (D. Ore. 1991) (citing *American Nat'l Bank and Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 n. 3 (7th Cir. 1989)).

[7] Because ONRC alleges only minor differences in opinion with the Secretaries, it fails to demonstrate inadequacy of representation in this case.

B. Permissive Intervention

Regarding permissive intervention, Fed. R. Civ. P. 24(b)(2) provides:

Upon timely application anyone shall be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

We have held that a court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common. *Greene*, 996 F.2d at 978.

[8] In this case, ONRC fails to satisfy the first prong of the permissive intervention standard, since it asserts no independent basis for jurisdiction. Because Section 02001(k)(1) contains a mandate to the Secretaries to release certain timber sales, and admits of no limitations posed by other laws, it appears that ONRC cannot allege grounds for jurisdiction in this case.

CONCLUSION

We AFFIRM the district court's summary judgment order of September 13, 1995, and we AFFIRM its October 17, 1995 permanent injunction.

We AFFIRM the district court's decision to deny Oregon Natural Resource Council's motion to intervene in Northwest Forest Resources Council's declaratory action.