

NLWJC- Kagan

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NFRC v. Glickman II [4]

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT & NATURAL RESOURCES DIVISION
 APPELLATE SECTION
 WASHINGTON, D.C. 20530
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DATE: April 29, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFRC v. Glickman and Babbitt

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MESSAGE:

The 9th Circuit has announced the panel for the argument on the "known to be nesting," "next high bidder," and "enjoined sales" issues. Circuit Judges Goodwin and Schroeder (both on the "owl panel") and District Court judge Sandra Armstrong (in San Francisco).

I think the panel is one of the best we could have hoped for on these issues.

Al Ferlo

THE WHITE HOUSE

WASHINGTON
April 25, 1996

MEMORANDUM FOR KATIE MCGINTY
MARTHA FOLEY
JENNIFER O'CONNOR

FROM: ELENA KAGAN *EK*
CC: JACK QUINN, KATHY WALLMAN
SUBJECT: NINTH CIRCUIT DECISION

I am attaching the Ninth Circuit's decision, issued yesterday, on the area vs. sales question. As you will see, the Ninth Circuit panel unanimously upheld Judge Hogan's decision that 2001(k) applies not only to Section 318 sales proper, but also to all later sales within the same area. The opinion, which was written by one of the President's nominees, mostly relies on the statutory language; it also argues that the legislative history -- most notably, the Conference Report -- confirms the plain meaning of the statute.

We need to decide whether we will ask the Solicitor General to file a cert petition in the Supreme Court, asking for review of this decision. In considering this question, we all should understand that the Supreme Court will never take this case. It involves interpreting a specific statutory provision that will have expired by the time the Court hears argument. And it may not even affect many trees, given purchasers' current ability to harvest. Because the case does not meet any of the standards for Supreme Court review, the SG will be reluctant (to say the least) to file a petition. Let me know what you think about this matter.

Elena -

Just be guided
by Katie and

Ann -

Jack

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

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

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

Opinion by Judge Hawkins

SUMMARY

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 ("NFRFC"), 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

¹ The 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. S 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. S 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[.]" S 318(a)(1). Other subsections of the statute imposed various

² Section 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 S 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." S 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-

³ Litigation 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-

4 NFRC 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.

ment 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

⁵ NFRC 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.

⁶ The district court also allowed ONRC to intervene with respect to

NFRC's subsequent S 2001(k) (2) claim, which is not at issue in this

appeal.

⁷ ONRC 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.

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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, con-
struing 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).⁸

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

⁸ Shortly 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[,] " S 318(a)(1), and (2) the Bureau of Land Management's "administrative districts in western Oregon." S 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* S 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[,] "
S 318(a)(1), and (2) the Bureau of Land Management's "administrative districts in western Oregon." S 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) (1) 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." S 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.

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the end

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

DATE: April 22, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 13 pages

PLEASE DELIVER TO:

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MESSAGE:

Attached is Scott Timber's reply to our motion for stay pending appeal. Under the Court's April 5, 1996 order granting the stay, Scott Timber had 14 days to file any response to the motion. The stay will remain in place at least until oral arguement.

I plan to file a short reponse to Scotts' and NFRC's memoranda by Wednesday, April 24. I will circulate the response for comment.

Please call if you have any questions.

Al Ferlo

COPY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35106

PILCHUCK AUDUBON SOCIETY, et al.,
Plaintiffs-Appellants,

v.

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

and

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

Nos. 96-35107, 96-35123 & 96-35132

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

v.

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

and

OREGON NATURAL RESOURCES COUNCIL, INC., et al.,
Defendants-Intervenors-Appellants.

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

APPELLEE SCOTT TIMBER CO.'S OPPOSITION TO STAY PENDING APPEAL

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I.

INTRODUCTION

Plaintiff-appellee Scott Timber Co. opposes federal appellants' and appellant Oregon Natural Resources Council's (ONRC) Motion for Stay Pending Appeal in these consolidated appeals.

The district court's January 19 Order compelled federal appellants to immediately award, release, and permit to be completed all timber sales subject to release under Section 2001(k) of the Emergency Salvage Timber Sale Act (Emergency Salvage Act), Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240-47 (1995). On January 26, 1996, the district court stayed that Order for sixty days through April 3, 1996. CR 363.

On April 3, 1996, on federal defendant/appellants' motion, the district court extended its earlier 60-day stay. The court divided the timber sales at issue into three categories and further stayed logging on the units for 5, 14, or 60 days, depending on the category of the sale. (Attached as Addendum to ONRC's Mot. Stay Pending App.).

Specifically, in its April 3, 1996 Order, the district court: (1) stayed for a period of 60 days 25 sale units as to which plaintiffs do not claim a necessity to commence immediate harvest in order to meet the September 30, 1996 deadline under the Emergency Salvage Act, and as to which federal defendants have determined that no murrelets are "known to be nesting"; (2) stayed for a period of 14 days 22 sale units above which overhead

circling marbled murrelets or near-boundary nesting behavior has been observed; and (3) stayed for a period of five days 52 sales as to which plaintiffs claim a need to immediately commence harvest in order to meet the September 30 deadline, and as to which federal defendants have determined that no murrelets are "known to be nesting." Id.

Federal appellants and appellants ONRC, et al. have now moved to stay the district court's April 3 Order indefinitely pending appeal. This Court granted a stay until the May 7, 1996 hearing on the merits. Appellee Scott Timber Co. opposes any further stay of the district court's January 19, 1996 Order. Any further stay until the Ninth Circuit rules on appellants' pending appeal would frustrate the intent of the statute to provide immediate release.

II.

STANDARD FOR STAY PENDING APPEAL

The standard for obtaining a stay pending appeal in the Ninth Circuit is the same as that for obtaining a preliminary injunction from the district court. The Court of Appeals evaluates: (1) the likelihood of success on the merits; (2) the irreparable harm, if any, to the movant if the stay is denied; (3) the balance of harms and potential injury to other parties if the stay is granted; and (4) the public interest. Hilton v. Braunskill, 481 U.S. 770, 776-79 (1987); Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Servs., Inc., 819 F.2d 910 (9th Cir. 1987).

III.

ARGUMENTA. Appellants Have Failed to Demonstrate a Strong Likelihood of Success on the Merits.

The parties have already briefed the merits of this appeal and appellants have not demonstrated a likelihood of success on the merits. Under Section 2001(k)(2), a sale unit may be excluded from release if a marbled murrelet "is known to be nesting within the acreage that is the subject of the sale unit." Pub. L. No. 104-19, § 2001(k)(2), 109 Stat. 194, 240-47. The district court did not err in concluding that under Pub. L. No. 104-19, Section 2001(k)(2), "a 'known to be nesting' determination may not be based only on behavioral observations of a murrelet located outside sale unit boundaries." January 19, 1996 Order at 16, ER 340.¹ The district court correctly held that an expansive interpretation using the Pacific Seabird Group (PSG) Protocol is inconsistent with the plain language of Section 2001(k)(2), which only permits sale units to be withheld where there is "sufficient evidence that a murrelet is currently nesting" within the unit. (Emphasis original.) ER 340 at 8.

Because the plain terms of the statute require nesting to be "within" the actual sale unit, the court properly rejected

¹ Rather than duplicate material already submitted by the parties in the Excerpts and Supplemental Excerpts of Record, appellee Scott Timber will refer to these existing documents on file with the Court. Scott Timber has submitted a few additional documents prepared since the briefing on the merits in Appellee Scott Timber Exhibits in Opposition to the Emergency Stay Pending Appeal ("Scott Stay Ex. ____").

the wholesale application of the PSG protocol for determining "occupancy," which evaluates non-nesting murrelet behavior in other adjacent stands within a quarter mile of the sale unit. ER 340 at 7-10. By interpreting the plain language of Section 2001(k)(2), the district court properly concluded that in order to exclude a sale based upon a murrelet "known to be nesting" determination, the agency must find that a murrelet is: (1) currently; (2) nesting; (3) within sale unit boundaries, based on the observation of evidence located sub-canopy within the actual "sale unit boundaries." ER 340 at 7-10, 20-21. This holding is derived from the clear language of the statute and should be affirmed.

Although the nesting exception in Section 2001(k)(2) plainly requires current nesting within the sale unit, the court noted a latent ambiguity behind the provision. Specifically, the court stated that "the plain language of Section 2001(k)(2) does not specify the evidence necessary" to support the nesting exception. ER 340 at 11. Facing this latent ambiguity, the court reviewed the legislative history behind Section 2001(k) and considered other extrinsic interpretive sources. Consistent with the Supreme Court's decision in Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984), the district court properly concluded that applying the PSG protocol and relying on evidence outside sale unit boundaries for a "known to be nesting" determination is an impermissible construction of the statute. ER 340 at 8, 9 n.3, 10, 14-16, and 20.

Section 2001(k) was designed to award and release these timber sales within 45 days after the date of enactment of the statute to provide emergency relief. Appellants now request for the Court to delay release of the sales even further which would frustrate the intent of Congress.

By the time of the May 7, 1996 hearing, there will be only five months to harvest approximately 63 million board feet (MMBF) in Scott Timber's remaining 13 sales. Quast Dec. ¶ 3, attached as Scott Stay Ex. B, CR 417. This represents over 10 MMBF per month, which will require over 150 people per month full time for the next five months to complete the sales. Quast Dec. ¶ 3. If this Court waits even 60 days to rule following oral argument, only three months would remain to finish the sales, and Scott Timber would need to employ over 225 per month to finish the sales. Id. There are not enough qualified logging contractors available to finish the work in just three months if there is an additional 60-day stay. Id.

To accommodate the concerns of appellants, Scott Timber has evaluated its sales to identify sales in which it must start work immediately to complete the sales by September 30, 1996, and where the marbled murrelet is not known to be nesting in a sale unit. See Scott Stay Exs. A and B. The Declaration of Peter Quast explains that Scott Timber wants to begin logging the Beamer 712, Wapati 305, Indian Hook, and the Skywalker timber sales: In addition, the company wishes to begin road

construction on the Fivemile Flume sale and falling of trees in units 3 and 5. Quast Dec. ¶ 9-14.

Unit 1 of the Beamer 712 sale was determined occupied by a survey five years ago of the Keller 605 timber sale. A road and young plantation occur between Unit 1 and the Keller 605 survey station well away from Unit 1 of the Beamer 712 sale. Quast Dec. ¶ 10. Unit 2 of the Beamer 712 sale was classified as occupied based on murrelet detections outside the unit to the west. None of the detections for Unit 1 or Unit 2 were below canopy behavior. Id.

Scott Timber seeks release of Unit 3 and 5 on the Wapati 305 sale. The murrelet occupied behavior for Unit 3 was on the other side of the ridge and outside of the unit. Quast Dec. ¶ 11. Unit 5 is further downslope from Unit 3 and was classified as occupied by the same behavior. Id. The unit is classified occupied by association because it is in the contiguous stand within one-quarter mile of the occupied behavior associated with Unit 3. Unit 5 has six of 26 acres of timber that is already felled and bucked, and is deteriorating. Id. The balance of Unit 5 is younger timber with small limbs that provide no suitable nesting sites. See photographs attached to Quast Dec. ¶ 11.

The Indian Hook sale has several units that are stayed. Scott Timber seeks release of Units 1, 2, and 3. Unit 1 is classified as occupied based on one observation of above canopy behavior. Quast Dec. ¶ 12. The only other observation from the

survey unit were birds heard outside the unit boundary. Unit 2 was determined occupied by the same detections because it was contiguous habitat to Unit 1. Unit 3 had no above or below canopy murrelet behavior within the unit boundaries and was classified occupied based on behavior in Unit 4. Id.

The Skywalker sale has three stayed units and Scott Timber requests the release of Units 3 and 5. The murrelet detections are all outside the units. Unit 3 detections were well outside the unit in the bottom of Walker Creek. Quast Dec. ¶ 13. The classification of occupancy for Unit 5 was also based on detections outside the unit. Id.

Finally, to complete the Fivemile Flume timber sale, Scott Timber must begin road construction to Units 2 and 3. Quast Dec. ¶ 14. The Fivemile Flume sale is the only Scott Timber sale that requires road construction. There were auditory detections of murrelets in Unit 2, but no subcanopy behavior was observed. Unit 3 was classified occupied based on above canopy murrelet behavior and by flying across a ridge outside the unit through the tips of the trees. Id.

Federal defendants argue that the unit should not be released where: 1) there are nesting detections near, but outside, of sale units, and 2) there was circling above units. Such evidence cannot establish "nesting" under the statute. Section 2001(k) did not create buffer zones around units. See, e.g., prohibition of the creation of buffer zones or perimeters around land declared to be wilderness, Northwest Motorcycle

Association v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1480 (9th Cir. 1994).

Three of Scott Timber's units are argued to have evidence of "circling behavior directly over the sale unit" -- Units 2 and 3 on Fivemile Flume and Unit 1 on Indian Hook. Again, evidence of circling over a unit is not relevant to a determination that birds are "known to be nesting" within that unit. Indeed, the circling which was observed over Scott's units shows that circling over a unit cannot prove nesting in that unit. The observation of circling above the Indian Hook sale, for example, involved a bird flying from outside the unit over the northeast corner of the unit and out again. Its flight involved crossing over another unit before it crossed over the Indian Hook unit. See, Exhibit 6 to Quast Dec. Obviously, the bird did not have a nest site in each area it crossed over.

B. The Balance of Harms and Public Interest Compel the Denial of a Stay Pending Appeal.

1. Balance of Harms.

Appellants argue that without a stay there will be irreparable harm because: (1) some murrelet habitat will be lost; and (2) the loss of murrelet habitat may contribute to the species' eventual extinction. This argument, however, is simply an expression of appellants' dissatisfaction with the policy choice behind 2001(k). Congress knew that in proceeding with the sales covered by 2001(k), some murrelet habitat would be lost. As a protection, Congress chose to exempt units containing murrelets that were "known to be nesting." The fact that 2001(k)

authorizes harvest within potential murrelet habitat is insufficient to establish irreparable harm for purposes of a stay pending appeal.

The amount of murrelet habitat subject to release is less than one percent of the murrelet habitat on the Pacific Coast. There are over 4,453,200 acres of proposed critical habitat for the marbled murrelet. 60 Fed. Reg. 40892, 40901 (August 10, 1995). The total amount of murrelet habitat is even greater because not all suitable nesting habitat is included in the proposed critical habitat units. Id. at 40900. The government argues approximately 2,100 acres of timber sales would be released. Memorandum in Support of Motion for Appellants, Dan Glickman, et al. for Continuation of Stay Pending Appeal at 7. This represents .047 percent of the total proposed marbled murrelet critical habitat. Furthermore, in the first proposed rule for critical habitat, the Fish and Wildlife Service concluded that these existing sales did not need to be designated critical habitat. The Fish and Wildlife Service explained "the Service proposes to exclude sold and awarded sales from any final critical habitat designation due to economic impacts, both regionally and nationally, due to the limited amount of volume available for federal harvest." 59 Fed. Reg. 3811, 3819 (January 27, 1994).

The loss of some murrelet habitat cannot serve as a basis for irreparable injury. This is exactly what Congress intended in enacting Section 2001(k).

Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the way to be given the competing interest, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 609-610 (1952) (concurring opinion). Because Congress has already conducted the balancing in the statute by only excluding sale units in which threatened or endangered species are "known to be nesting," the Court should reject appellants' attempt to use the effect of the statute as a basis for irreparable harm.

Under Section 2001(k), the Secretaries of Agriculture and Interior were directed to award and release these timber sales within 45 days after the date of enactment of the statute. Appellants now requests for the Court to delay release of the sales even further. In view of the purpose behind Section 2001(k), the balance of harms unquestionably tips in favor of appellees against appellants' request for a stay.

2. Public Interest.

Should the Court grant appellants' motion and stay the district court's January 19 Order, appellees will undoubtedly suffer harm by continuing to be denied the volume they were promised by Congress under the terms of the Rescissions Act. The public interest lies in favor of enforcing the district court's order. Except for units in which murrelets or other threatened or endangered species are "known to be nesting," Section 2001(k)

directs the immediate release of these timber sales. The district court's order is crafted to accomplish this result and, thus furthers the public interest.

Litigation concerning release of the Section 2000(k) timber sales have already eliminated nine of the 14 months during which these sales can be operated under the Rescissions Act. Only about five months remain before the Rescissions Act expires on September 30, 1996. Scott Timber simply cannot complete its 13 timber sales in only a few months. Scott Stay Ex. B at ¶ 2: The central purpose of the Emergency Salvage Act was to provide emergency relief for timber purchasers by immediately releasing sales that have been delayed for nearly five years because of protracted consultation under with the Fish and Wildlife Service. This central purpose would be defeated by any further judicial stay. Giving effect to the January 19 Order, which compels the Secretaries to release the sales, would avoid frustrating this legislative purpose. Denying any further stay in this case is entirely consistent with this Circuit's earlier rulings.

For example, in Albano v. Schering-Plough Corporation, 912 F.2d 384, 389 (9th Cir. 1990), cert. denied, 498 U.S. 1085 (1991), the Ninth Circuit set aside a court order that would have precluded a claimant from filing a claim under the Age Discrimination Claims Assistance Act of 1988. This Court held that the order "would frustrate the will of Congress, in its attempt to remedy the harsh effects of the EEOC's inaction, by permitting further inaction by the EEOC to negate the provisions

of the remedial act." Here, further inaction by federal defendants will negate the provisions of the Rescissions Act by failing to provide needed timber to the mills from sales where no marbled murrelets are "known to be nesting." Extending the stay of the timber sales prevents an act of Congress from being enforced and frustrates the will of Congress. This will was to have the sales immediately released to be harvested in fiscal years 1995 and 1996. See, e.g., McLeod v. Local 239 Int'l Brotherhood of Teamsters, 330 F.2d 108, 111 (2nd Cir. 1964) (upholding injunction when to do otherwise "would frustrate the clear objective of Congress"). Scott Timber simply could not complete its sales as provided for in the Emergency Salvage Timber Sale Program is a stay is granted.

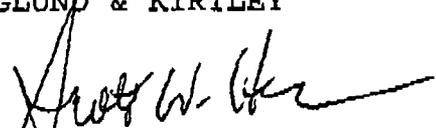
IV.

CONCLUSION

Appellants have failed to demonstrate that a stay of the district court's January 19, 1996 Order is warranted. For the reasons set forth above, the Court should deny federal appellants' and appellant ONRC's motions to stay the district court's January 19 Order pending appeal.

DATED this 19th day of April, 1996.

HAGLUND & KIRTLEY

By 

Scott W. Horngren
Shay S. Scott
Attorneys for Appellee Scott
Timber Co.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF-APPELLEE SCOTT TIMBER CO.'S OPPOSITION TO STAY PENDING APPEAL** on the following parties:

Ms. Patti A. Goldman **VIA FEDERAL EXPRESS**
Mr. Adam J. Berger
Ms. Kristen J. Boyles
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
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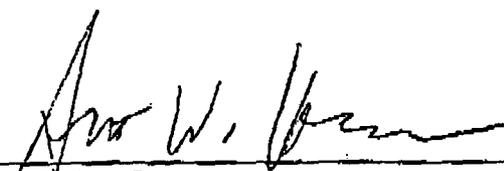
Attorney for NFRC

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

Attorneys for Defendants

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

DATED April 18, 1996.



Scott W. Horngren
Attorney for Plaintiff-
Appellee Scott Timber Co.

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

DATE: April 22, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 13 pages

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Rick Prausa	205-1045
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Sue Zike (503)	326-7742

MESSAGE:

Attached is Scott Timber's reply to our motion for stay pending appeal. Under the Court's April 5, 1996 order granting the stay, Scott Timber had 14 days to file any response to the motion. The stay will remain in place at least until oral arguement.

I plan to file a short reponse to Scotts' and NFRC's memoranda by Wednesday, April 24. I will circulate the response for comment.

Please call if you have any questions.

Al Ferlo

COPY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35106

PILCHUCK AUDUBON SOCIETY, et al.,
Plaintiffs-Appellants,

v.

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

and

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

Nos. 96-35107, 96-35123 & 96-35132

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

v.

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

and

OREGON NATURAL RESOURCES COUNCIL, INC., et al.,
Defendants-Intervenors-Appellants.

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

APPELLEE SCOTT TIMBER CO.'S OPPOSITION TO STAY PENDING APPEAL

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I.

INTRODUCTION

Plaintiff-appellee Scott Timber Co. opposes federal appellants' and appellant Oregon Natural Resources Council's (ONRC) Motion for Stay Pending Appeal in these consolidated appeals.

The district court's January 19 Order compelled federal appellants to immediately award, release, and permit to be completed all timber sales subject to release under Section 2001(k) of the Emergency Salvage Timber Sale Act (Emergency Salvage Act), Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240-47 (1995). On January 26, 1996, the district court stayed that Order for sixty days through April 3, 1996. CR 363.

On April 3, 1996, on federal defendant/appellants' motion, the district court extended its earlier 60-day stay. The court divided the timber sales at issue into three categories and further stayed logging on the units for 5, 14, or 60 days, depending on the category of the sale. (Attached as Addendum to ONRC's Mot. Stay Pending App.).

Specifically, in its April 3, 1996 Order, the district court: (1) stayed for a period of 60 days 25 sale units as to which plaintiffs do not claim a necessity to commence immediate harvest in order to meet the September 30, 1996 deadline under the Emergency Salvage Act, and as to which federal defendants have determined that no murrelets are "known to be nesting"; (2) stayed for a period of 14 days 22 sale units above which overhead

circling marbled murrelets or near-boundary nesting behavior has been observed; and (3) stayed for a period of five days 52 sales as to which plaintiffs claim a need to immediately commence harvest in order to meet the September 30 deadline, and as to which federal defendants have determined that no murrelets are "known to be nesting." Id.

Federal appellants and appellants ONRC, et al. have now moved to stay the district court's April 3 Order indefinitely pending appeal. This Court granted a stay until the May 7, 1996 hearing on the merits. Appellee Scott Timber Co. opposes any further stay of the district court's January 19, 1996 Order. Any further stay until the Ninth Circuit rules on appellants' pending appeal would frustrate the intent of the statute to provide immediate release.

II.

STANDARD FOR STAY PENDING APPEAL

The standard for obtaining a stay pending appeal in the Ninth Circuit is the same as that for obtaining a preliminary injunction from the district court. The Court of Appeals evaluates: (1) the likelihood of success on the merits; (2) the irreparable harm, if any, to the movant if the stay is denied; (3) the balance of harms and potential injury to other parties if the stay is granted; and (4) the public interest. Hilton v. Braunskill, 481 U.S. 770, 776-79 (1987); Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Servs., Inc., 819 F.2d 910 (9th Cir. 1987).

III.

ARGUMENTA. Appellants Have Failed to Demonstrate a Strong Likelihood of Success on the Merits.

The parties have already briefed the merits of this appeal and appellants have not demonstrated a likelihood of success on the merits. Under Section 2001(k)(2), a sale unit may be excluded from release if a marbled murrelet "is known to be nesting within the acreage that is the subject of the sale unit." Pub. L. No. 104-19, § 2001(k)(2), 109 Stat. 194, 240-47. The district court did not err in concluding that under Pub. L. No. 104-19, Section 2001(k)(2), "a 'known to be nesting' determination may not be based only on behavioral observations of a murrelet located outside sale unit boundaries." January 19, 1996 Order at 16, ER 340.¹ The district court correctly held that an expansive interpretation using the Pacific Seabird Group (PSG) Protocol is inconsistent with the plain language of Section 2001(k)(2), which only permits sale units to be withheld where there is "sufficient evidence that a murrelet is currently nesting" within the unit. (Emphasis original.) ER 340 at 8.

Because the plain terms of the statute require nesting to be "within" the actual sale unit, the court properly rejected

¹ Rather than duplicate material already submitted by the parties in the Excerpts and Supplemental Excerpts of Record, appellee Scott Timber will refer to these existing documents on file with the Court. Scott Timber has submitted a few additional documents prepared since the briefing on the merits in Appellee Scott Timber Exhibits in Opposition to the Emergency Stay Pending Appeal ("Scott Stay Ex. _____").

the wholesale application of the PSG protocol for determining "occupancy," which evaluates non-nesting murrelet behavior in other adjacent stands within a quarter mile of the sale unit. ER 340 at 7-10. By interpreting the plain language of section 2001(k)(2), the district court properly concluded that in order to exclude a sale based upon a murrelet "known to be nesting" determination, the agency must find that a murrelet is: (1) currently; (2) nesting; (3) within sale unit boundaries, based on the observation of evidence located sub-canopy within the actual "sale unit boundaries." ER 340 at 7-10, 20-21. This holding is derived from the clear language of the statute and should be affirmed.

Although the nesting exception in Section 2001(k)(2) plainly requires current nesting within the sale unit, the court noted a latent ambiguity behind the provision. Specifically, the court stated that "the plain language of Section 2001(k)(2) does not specify the evidence necessary" to support the nesting exception. ER 340 at 11. Facing this latent ambiguity, the court reviewed the legislative history behind Section 2001(k) and considered other extrinsic interpretive sources. Consistent with the Supreme Court's decision in Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984), the district court properly concluded that applying the PSG protocol and relying on evidence outside sale unit boundaries for a "known to be nesting" determination is an impermissible construction of the statute. ER 340 at 8, 9 n.3, 10, 14-16, and 20.

Section 2001(k) was designed to award and release these timber sales within 45 days after the date of enactment of the statute to provide emergency relief. Appellants now request for the Court to delay release of the sales even further which would frustrate the intent of Congress.

By the time of the May 7, 1996 hearing, there will be only five months to harvest approximately 63 million board feet (MMBF) in Scott Timber's remaining 13 sales. Quast Dec. ¶ 3, attached as Scott Stay Ex. B, CR 417. This represents over 10 MMBF per month, which will require over 150 people per month full time for the next five months to complete the sales. Quast Dec. ¶ 3. If this Court waits even 60 days to rule following oral argument, only three months would remain to finish the sales, and Scott Timber would need to employ over 225 per month to finish the sales. Id. There are not enough qualified logging contractors available to finish the work in just three months if there is an additional 60-day stay. Id.

To accommodate the concerns of appellants, Scott Timber has evaluated its sales to identify sales in which it must start work immediately to complete the sales by September 30, 1996, and where the marbled murrelet is not known to be nesting in a sale unit. See Scott Stay Exs. A and B. The Declaration of Peter Quast explains that Scott Timber wants to begin logging the Beamer 712, Wapati 305, Indian Hook, and the Skywalker timber sales. In addition, the company wishes to begin road

construction on the Fivemile Flume sale and falling of trees in units 3 and 5. Quast Dec. ¶ 9-14.

Unit 1 of the Beamer 712 sale was determined occupied by a survey five years ago of the Keller 605 timber sale. A road and young plantation occur between Unit 1 and the Keller 605 survey station well away from Unit 1 of the Beamer 712 sale. Quast Dec. ¶ 10. Unit 2 of the Beamer 712 sale was classified as occupied based on murrelet detections outside the unit to the west. None of the detections for Unit 1 or Unit 2 were below canopy behavior. Id.

Scott Timber seeks release of Unit 3 and 5 on the Wapati 305 sale. The murrelet occupied behavior for Unit 3 was on the other side of the ridge and outside of the unit. Quast Dec. ¶ 11. Unit 5 is further downslope from Unit 3 and was classified as occupied by the same behavior. Id. The unit is classified occupied by association because it is in the contiguous stand within one-quarter mile of the occupied behavior associated with Unit 3. Unit 5 has six of 26 acres of timber that is already felled and bucked, and is deteriorating. Id. The balance of Unit 5 is younger timber with small limbs that provide no suitable nesting sites. See photographs attached to Quast Dec. ¶ 11.

The Indian Hook sale has several units that are stayed. Scott Timber seeks release of Units 1, 2, and 3. Unit 1 is classified as occupied based on one observation of above canopy behavior. Quast Dec. ¶ 12. The only other observation from the

survey unit were birds heard outside the unit boundary. Unit 2 was determined occupied by the same detections because it was contiguous habitat to Unit 1. Unit 3 had no above or below canopy murrelet behavior within the unit boundaries and was classified occupied based on behavior in Unit 4. Id.

The Skywalker sale has three stayed units and Scott Timber requests the release of Units 3 and 5. The murrelet detections are all outside the units. Unit 3 detections were well outside the unit in the bottom of Walker Creek. Quast Dec. ¶ 13. The classification of occupancy for Unit 5 was also based on detections outside the unit. Id.

Finally, to complete the Fivemile Flume timber sale, Scott Timber must begin road construction to Units 2 and 3. Quast Dec. ¶ 14. The Fivemile Flume sale is the only Scott Timber sale that requires road construction. There were auditory detections of murrelets in Unit 2, but no subcanopy behavior was observed. Unit 3 was classified occupied based on above canopy murrelet behavior and by flying across a ridge outside the unit through the tips of the trees. Id.

Federal defendants argue that the unit should not be released where: 1) there are nesting detections near, but outside, of sale units, and 2) there was circling above units. Such evidence cannot establish "nesting" under the statute. Section 2001(k) did not create buffer zones around units. See, e.g., prohibition of the creation of buffer zones or perimeters around land declared to be wilderness, Northwest Motorcycle

Association v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1480 (9th Cir. 1994).

Three of Scott Timber's units are argued to have evidence of "circling behavior directly over the sale unit" -- Units 2 and 3 on Fivemile Flume and Unit 1 on Indian Hook. Again, evidence of circling over a unit is not relevant to a determination that birds are "known to be nesting" within that unit. Indeed, the circling which was observed over Scott's units shows that circling over a unit cannot prove nesting in that unit. The observation of circling above the Indian Hook sale, for example, involved a bird flying from outside the unit over the northeast corner of the unit and out again. Its flight involved crossing over another unit before it crossed over the Indian Hook unit. See, Exhibit 6 to Quast Dec. Obviously, the bird did not have a nest site in each area it crossed over.

B. The Balance of Harms and Public Interest Compel the Denial of a Stay Pending Appeal.

1. Balance of Harms.

Appellants argue that without a stay there will be irreparable harm because: (1) some murrelet habitat will be lost; and (2) the loss of murrelet habitat may contribute to the species' eventual extinction. This argument, however, is simply an expression of appellants' dissatisfaction with the policy choice behind 2001(k). Congress knew that in proceeding with the sales covered by 2001(k), some murrelet habitat would be lost. As a protection, Congress chose to exempt units containing murrelets that were "known to be nesting." The fact that 2001(k)

authorizes harvest within potential murrelet habitat is insufficient to establish irreparable harm for purposes of a stay pending appeal.

The amount of murrelet habitat subject to release is less than one percent of the murrelet habitat on the Pacific Coast. There are over 4,453,200 acres of proposed critical habitat for the marbled murrelet. 60 Fed. Reg. 40892, 40901 (August 10, 1995). The total amount of murrelet habitat is even greater because not all suitable nesting habitat is included in the proposed critical habitat units. Id. at 40900. The government argues approximately 2,100 acres of timber sales would be released. Memorandum in Support of Motion for Appellants, Dan Glickman, et al. for Continuation of Stay Pending Appeal at 7. This represents .047 percent of the total proposed marbled murrelet critical habitat. Furthermore, in the first proposed rule for critical habitat, the Fish and Wildlife Service concluded that these existing sales did not need to be designated critical habitat. The Fish and Wildlife Service explained "the Service proposes to exclude sold and awarded sales from any final critical habitat designation due to economic impacts, both regionally and nationally, due to the limited amount of volume available for federal harvest." 59 Fed. Reg. 3811, 3819 (January 27, 1994).

The loss of some murrelet habitat cannot serve as a basis for irreparable injury. This is exactly what Congress intended in enacting Section 2001(k).

Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the way to be given the competing interest, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 609-610

(1952) (concurring opinion). Because Congress has already conducted the balancing in the statute by only excluding sale units in which threatened or endangered species are "known to be nesting," the Court should reject appellants' attempt to use the effect of the statute as a basis for irreparable harm.

Under Section 2001(k), the Secretaries of Agriculture and Interior were directed to award and release these timber sales *within 45 days* after the date of enactment of the statute. Appellants now requests for the Court to delay release of the sales even further. In view of the purpose behind Section 2001(k), the balance of harms unquestionably tips in favor of appellees against appellants' request for a stay.

2. Public Interest.

Should the Court grant appellants' motion and stay the district court's January 19 Order, appellees will undoubtedly suffer harm by continuing to be denied the volume they were promised by Congress under the terms of the Rescissions Act. The public interest lies in favor of enforcing the district court's order. Except for units in which murrelets or other threatened or endangered species are "known to be nesting," Section 2001(k)

directs the immediate release of these timber sales. The district court's order is crafted to accomplish this result and, thus furthers the public interest.

Litigation concerning release of the Section 2000(k) timber sales have already eliminated nine of the 14 months during which these sales can be operated under the Rescissions Act. Only about five months remain before the Rescissions Act expires on September 30, 1996. Scott Timber simply cannot complete its 13 timber sales in only a few months. Scott Stay Ex. B at ¶ 2. The central purpose of the Emergency Salvage Act was to provide emergency relief for timber purchasers by immediately releasing sales that have been delayed for nearly five years because of protracted consultation under with the Fish and Wildlife Service. This central purpose would be defeated by any further judicial stay. Giving effect to the January 19 Order, which compels the Secretaries to release the sales, would avoid frustrating this legislative purpose. Denying any further stay in this case is entirely consistent with this Circuit's earlier rulings.

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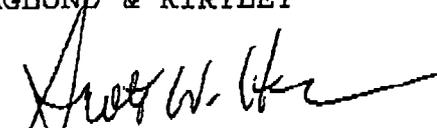
IV.

CONCLUSION

Appellants have failed to demonstrate that a stay of the district court's January 19, 1996 Order is warranted. For the reasons set forth above, the Court should deny federal appellants' and appellant ONRC's motions to stay the district court's January 19 Order pending appeal.

DATED this 18th day of April, 1996.

HAGLUND & KIRTLEY

By 

Scott W. Horngren
Shay S. Scott
Attorneys for Appellee Scott
Timber Co.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF-
APPELLEE SCOTT TIMBER CO.'S OPPOSITION TO STAY PENDING APPEAL** on
the following parties:

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Mr. Adam J. Berger
Ms. Kristen J. Boyles
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705 Second Avenue, Suite 203
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Attorneys for Plaintiffs

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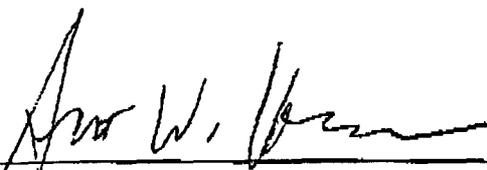
Attorney for NFRC

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

Attorneys for Defendants

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

DATED April 18, 1996.



Scott W. Horngren
Attorney for Plaintiff-
Appellee Scott Timber Co.

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

DATE: April 10, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFERC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 4 pages

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MESSAGE:

Attached is a copy of a draft response to NFERC's motion for leave to file a supplemental brief. The response must be filed tomorrow. Please call with any comments.

Please call if you have any questions.

Al Ferlo

Comments by 11:00 am tomorrow
Please.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35106, 35107, 35123, 35132

NORTHWEST FOREST RESOURCE COUNCIL, et al.,
Plaintiffs-Appellees

v.

DAN GLICKMAN and BRUCE BABBITT,
Defendants-Appellants

and

OREGON NATURAL RESOURCES COUNCIL, et al.,
Defendants-Intervenors-Appellants

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

RESPONSE IN OPPOSITION TO MOTION BY NFRC FOR LEAVE TO
FILE SUPPLEMENTAL BRIEF

On April 4, 1996, NFRC filed a motion requesting permission to "supplement" its opening brief to respond to what it claims is a new issue raised for the first time in the April 1, 1996 Reply brief of Secretaries Glickman and Babbitt. This "new" issue is as stated by NFRC "whether NFRC or the companies it represents have 'chosen to forgo' replacement timber under section 2001(k)(3) of Public Law 104-19 by litigating this case, and whether they have 'elected to litigate rather than harvest timber." (NFRC Motion at 2). NFRC's claim that the Secretaries have raised a "new issue" is based on a faulty reading of the reply brief.

In their opening brief, the Secretaries stated that "in enacting Section 2001(k)(3) * * * Congress also ensured that the flexible protections afforded the murrelets did not harm the timber operators who had been awaiting the release of timber since 1990." (Secretaries' Opening Brief at 39). The April 1, 1996 Reply brief the Secretaries reiterated that point, stating that in allowing for replacement timber under Section 2001(k)(3), Congress "ensured not only that the murrelet nesting areas could be protected, but that millions of board feet of timber previously held-up over the murrelet nesting issue would become available for harvest." (Reply Br. at 12). The Secretaries then stated:

For reasons never articulated, NFRC has chosen to forgo, for the time being, its members' rights to replacement timber under Section 2001(k)(3), in order to litigate the Secretaries' interpretation of the ambiguous phrase "known to be nesting."

(Reply Br. at 12). It is this single statement out of the entire reply brief which NFRC claims raises a "new" issue requiring the filing of a supplemental brief. The Secretaries have not and do not allege that NFRC has forever waived its members' right to alternative timber under the terms of Section 2001(k)(3). The only point made by that single sentence is that NFRC has elected to pursue its challenge to the Secretaries interpretation of the meaning of "known to be nesting" in Section 2001(k)(2) rather than simply accept the Secretaries' determination and seek alternative timber under Section 2001(k)(3). Indeed, nothing in NFRC's proposed supplemental brief refutes that simple statement.

NFRC's proposed brief does nothing to explain its decision to contest the interpretation of Section 2001(k)(2), rather than immediately seek alternative timber for its members under Section 2001(k)(3). NFRC's proposed brief argues (Proposed Br. at 3) that the Secretaries "have refused to provide replacement timber for any sale unit withheld under section 2001(k)(2)." The proposed supplemental brief attempts to support this argument by referring, without support in the record, to two "examples" of the Secretaries' alleged "refusal" to award replacement timber until this litigation is resolved. These alleged "examples" however, do nothing to answer the question as to why NFRC elected to litigate rather than pursue its members rights under Section 2001(k)(3). Moreover, NFRC's reliance (NFRC Proposed Supp. Br. at 4 n.1) on the fact that there is "nothing in the record" to support the Secretaries' statement that NFRC has elected to forgo alternative timber for the time being in favor of litigation, is misplaced. Indeed, the lack of any formal request by NFRC for alternative timber provides the clearest support for the Secretaries' contention that NFRC has elected to litigate first and harvest later.

Finally, NFRC's reference (Proposed Supp. Br. at 4) to the Secretaries' response to Scott Timber's recent request that alternative timber be supplied while the litigation over the interpretation of Section 2001(k)(2) is pending, does not indicate any "disregard" of the "duty to provide replacement timber under section 2001(k)(3)." (NFRC proposed Br. at 5).

Indeed, the response is consistent with the Secretaries position throughout this litigation. Given the virtually immediate challenge to the Secretaries' implementation of Section 2001(k)(2), the type and amount, if not the need to supply, replacement timber remains undetermined. Exercise of any rights available to individual contract holders under Section 2001(k)(3) properly await this Court's resolution of NFRC's challenge to the interpretation and implementation of Section 2001(k)(2).

CONCLUSION

NFRC's "supplemental" brief adds nothing to the legal issues raised in this appeal. The motion to file the supplemental brief should, therefore, be denied.

Respectfully submitted,

Albert M. Ferlo, Jr.
Attorney, Appellate Section
Environment and Natural Resources
Division
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P.O. Box 23795
L'Enfant Plaza Station
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Nos. 96-35106, 35107, 35123, and 35132

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon
corporation,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants,

and

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

Defendant-Intervenors-Appellants.

NORTHWEST FOREST RESOURCE COUNCIL'S
SUPPLEMENTAL OPPOSITION BRIEF

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

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ARGUMENT

NFRC HAS NOT "CHOSEN TO FORGO" REPLACEMENT TIMBER UNDER SECTION 2001(k)(3) BY FILING THIS ACTION; TO THE CONTRARY, THE SECRETARIES HAVE VIOLATED THE LAW BY FAILING TO PROVIDE REPLACEMENT TIMBER FOR ANY OF THE TIMBER SALE UNITS THEY HAVE WITHHELD UNDER SECTION (k)(2).

The defendant Secretaries have argued in their reply brief that "NFRC has chosen to forgo, for the time being, its members' rights to replacement timber under Section 2001(k)(3), in order to litigate the Secretaries' interpretation of the ambiguous phrase 'known to be nesting.' . . . NFRC has simply elected to litigate rather than harvest timber." Federal Defendants' Reply Brief at 12-13.

This contention is so far from the truth that a response is required. The truth is that the Secretaries have categorically refused to provide replacement timber for any of the units they have withheld. No purchaser has ever been given a "choice" between litigating and harvesting timber. The Secretaries' wilful refusal to provide the mandated replacement timber is simply another glaring example of their inexcusable defiance of the plain language of this statute.

A. Section 2001(k)(3).

Section 2001(k)(3) provides:

(3) ALTERNATIVE OFFER IN CASE OF DELAY.--If for any reason a sale cannot be released and completed under the terms of this subsection within 45 days after the date of the enactment of this Act, the Secretary concerned shall provide the purchaser an equal volume

of timber, of like kind and value, which shall be subject to the terms of the original contract and shall not count against current allowable sale quantities.

Id. Section (k)(3) does not give a timber sale purchaser a "choice" between litigating and harvesting replacement timber for units withheld under (k)(2). It unconditionally mandates the Secretaries to provide an equal volume of replacement timber, of like kind and value.

The Secretaries' duty to provide replacement timber under (k)(3) came into existence on September 10, 1995 - 45 days after the date of enactment of Public Law 104-19, and applied on that date to all sales then withheld under (k)(2).

On August 23, 1995 the Secretaries had announced their intention to employ the Pacific Seabird Group Protocol to make the nesting determinations under (k)(2). SER 22a, Exhibit 1. On that basis the Forest Service has withheld 140 "occupied" timber sale units, and the BLM has withheld 11 additional units, with a total timber volume of approximately 240 million board feet.

Despite the immediate triggering of the (k)(3) duty to provide 240 million board feet of replacement volume, the August 23 direction did not order any replacement volume to be offered. Instead, it cryptically proposed to "assess the availability of alternative volume ... within the limits of available personnel and appropriated funds." SER 22a, Exhibit 1 at 2.

B. The Secretaries have refused to provide replacement timber for any sale unit withheld under section 2001(k)(2).

Since the enactment of section 2001, the defendant Secretaries have not provided replacement timber for a single unit withheld under (k)(2). They have not proposed replacement timber on a single unit. They have not even identified any possible replacement timber on a single unit. They have rebuffed inquiries by purchasers asking for replacement timber. On March 28, 1996, they filed papers in the district court in this case strenuously opposing the purchasers' motion to compel them to provide replacement timber. The contention that NFRC or individual timber purchasers have "foregone" replacement timber is utterly baseless.

1. The Secretaries have refused to provide replacement timber even where the purchaser has not contested a (k)(2) determination. For example in September 1995 the Forest Service announced that it was withholding 14 sale units on three timber sales because a northern spotted owl is nesting within the sale unit area. CR 118. (Declaration and Supplemental Declaration of A Grant Gunderson, Sept. 27, 1995). No purchaser contested those decisions, and they have never been an issue in any lawsuit. Yet the Forest Service has not provided, offered or identified replacement timber for any of those units.

2. The Secretaries have refused to provide replacement timber even where the purchaser has requested replacement

timber. When Freres Lumber Co. asked the Forest Service for replacement timber on the unit of its Red 90 timber sale withheld because of spotted owl nesting, the company was told that no replacement timber could be provided until some time after this case is over.

Similarly, Murphy Timber Co. asked the BLM for replacement timber on unit #2 of the Bear Air sale, which has been withheld due to a murrelet nesting determination. Murphy was told that no replacement volume could be offered until after this case ends.¹

3. Recently Scott Timber Co. asked the district court in this case to order the Forest Service and BLM to provide replacement volume on 51 million board feet of its sales within 30 days. The Secretaries strongly opposed this motion:

Defendants contend that, until the Court of Appeals rules, Defendants should not be required to proceed with the award of replacement timber. The amount of volume required, and indeed the existence of any obligation to offer alternative volume, cannot be determined until the Court of Appeals rules. Therefore the Court should deny Scott Timber's request to require identification of replacement volume.

Defendants' Response Pursuant to Court's March 22, 1996, Order at 9-10 (March 28, 1996). (Attachment A hereto.)

¹ Since there is absolutely nothing in the record to support the Secretaries' claim that NFRC has "chosen to forgo" replacement timber, the facts disproving this claim are also not in the record. NFRC can supplement the record with declarations if necessary.

In opposing the motion, the government also filed a declaration from a deputy chief of the Forest Service explaining that it would take 60 days to even identify and map the general location of this volume of timber (which is approximately 20% of the total amount the Secretaries are withholding under (k)(2)). Declaration of Gray F. Reynolds, ¶ 3 (March 28, 1996) (Attachment B hereto). The agency made no commitment about when it could actually give any replacement volume to Scott Timber Co. *Id.*

Thus, for the government to claim that NFRC or the timber purchasers have "elected to litigate rather than harvest timber" or have "chosen to forgo" replacement timber is nonsense. The Secretaries have not given NFRC or any purchaser that choice. Rather, they have disregarded their duty to provide replacement timber under section 2001(k)(3) just as they have disregarded their duties under (k)(1) and (k)(2).

CONCLUSION

The January 10, 1996 and January 19, 1996 orders of the district court should be affirmed.

Dated this 4th day of April, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: _____



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

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

I, Mark C. Rutzick, an attorney for plaintiff-appellee Northwest Forest Resource Council ("NFRRC"), certify compliance with FRAP Circuit Rule 32, as follows:

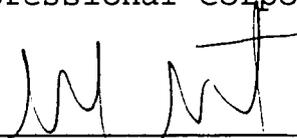
1. This brief is double spaced, and the line spacing is a monospaced typeface with 10 characters per inch.

2. In reliance on the word count of the word processing system used to prepare this brief, the word count of this brief is 1,065, not including the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of compliance, statement of related cases, and addenda.

Dated this 4th day of April, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: _____



Mark C. Rutzick
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11

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

13

14	NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
15	Plaintiff,)	
)	
16	v.)	Civil No. 95-6244-HO
	)	(lead case)
17	)	Civil No. 95-6267-HO
	)	(consolidated case)
18	DAN GLICKMAN, in his capacity)	DEFENDANTS' RESPONSE
	as Secretary of Agriculture,)	PURSUANT TO COURT'S
19	BRUCE BABBITT, in his capacity)	MARCH 22, 1996, ORDER
	as Secretary of the Interior,)	
20)	
	Defendants,)	
21)	
22	OREGON NAT. RES. COUNCIL, et al.,)	
	Defendants-Intervenors)	

23

24 I. INTRODUCTION

25 The Secretaries of Agriculture and the Interior (the
 26 Secretaries) seek an extension of the stay currently in effect of
 27 this Court's January 19, 1996, Order regarding sale units

1 proximity to the unit makes it appropriate to include these units
2 within the protections of Section 2001(k)(2).

3 At a minimum, and in the alternative if the Court does not
4 continue the stay of its January 19, 1996, Order, the Secretaries
5 request that the Court extend the stay for the 22 units described
6 above, as well as for the 25 units for which plaintiffs do not
7 seek immediate release, and for the 48 units withheld by the
8 Secretaries in accordance with this Court's Order, pending the
9 ruling of the Court of Appeals.⁴

10 Finally, if the Court does not grant a stay as to all units,
11 the Secretaries re-urge their previous request that the Court
12 grant a temporary five-day stay to permit the Secretaries the
13 opportunity to seek a stay pending appeal from the Court of
14 Appeals.

15 C. The Court should not require identification of
16 replacement timber at this time.

17 Plaintiff Scott Timber Company requests that the Court order
18 the Forest Service to identify replacement volume for those of
19 its sale units that remain stayed. Defendants contend that,
20 until the Court of Appeals rules, Defendants should not be
21 required to proceed with the award of replacement timber. The
22 amount of volume required, and indeed the existence of any
23 obligation to offer alternative volume, cannot be determined

24 ⁴ Six of the sale units for which plaintiffs do not seek
25 immediate release have either circling over the sale unit, or
26 detections of subcanopy behavior close to the unit. However,
because plaintiffs apparently do not oppose a stay as to units
for which they do not need immediate release, these units have
not been included in the above discussion.

1 until the Court of Appeals rules. Therefore the Court should
2 deny Scott Timber's request to require identification of
3 replacement volume.

4 In the event this Court finds the requested relief
5 warranted, the Secretaries advise as follows. In the Federal
6 Defendants' March 28, 1996 Compliance Report filed today, William
7 L. Bradley of the Bureau of Land Management addresses the
8 identification of replacement volume; the Forest Service
9 addresses this issue in the Declaration of Gray F. Reynolds,
10 attached as Exhibit 26. The agencies specify that they will
11 "identify" replacement volume, i.e., identify a candidate stand
12 (or stands) that in the agencies' view is of like kind and value,
13 and notify the purchaser of the stand's location. BLM, which has
14 eight units withheld under Section 2001(k)(2), estimates that
15 this process can be accomplished in 30 days. March 28, 1996,
16 Compliance Report, parag. 6. The Forest Service, which has
17 significantly more units withheld, estimates that this process
18 will require 60 days. Reynolds Declaration, parag. 3.

19 **IV. CONCLUSION**

20 For the above reasons, and those set forth in the original
21 motion for stay, and in the motion for extension of the stay, the
22 Secretaries respectfully contend that the stay of this Court's
23 January 19, 1996, Order, should be extended until the Court of
24 Appeals rules on the Secretaries' appeal.

1
2 Dated: March 28, 1996

3 Respectfully submitted,

4 KRISTINE OLSON
5 United States Attorney

6 LOIS J. SCHIFFER
7 Assistant Attorney General

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

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,)	
	)	Civil No. 95-6244-HO
v.)	
	)	DECLARATION OF
DAN GLICKMAN, in his capacity as	)	GRAY F. REYNOLDS
Secretary of Agriculture,)	
BRUCE BABBITT, 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



Exh 26.
p. 1

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

I hereby certify that I served the foregoing NORTHWEST FOREST RESOURCE COUNCIL'S SUPPLEMENTAL OPPOSITION BRIEF on:

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Washington, D.C. 20530

Patti A. Goldman
Sierra Club Legal Defense Fund
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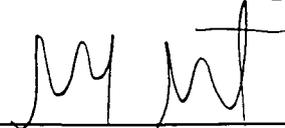
on April 4, 1996, by delivering to said attorneys via Federal Express true copies thereof, certified by me as such, contained in sealed envelopes, prepaid, addressed to said attorneys at said attorneys' last known addresses, and deposited with Federal Express in Portland, Oregon, on said day, and on:

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

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

Dated this 4th day of April, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: 

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

13	NORTHWEST FOREST RESOURCE COUNCIL,)	
	Plaintiff,)	
14		Civil No. 95-6244-HO
	v.)	(lead case)
15		Civil No. 95-6267-HO
		(consolidated case)
16		
17	GLICKMAN and BABBITT,)	DEFENDANTS' STATUS
	Defendants,)	REPORT ON FIRST AND
18	OREGON NAT. RES. COUNCIL, et al.)	LAST TIMBER SALES
	Defendants-Intervenors)	
19		
20		

20 The federal defendants hereby notify the Court of recent
 21 actions taken in connection with the First and Last timber sales,
 22 which are subject to this Court's January 10, 1996 Order.

23 The First and Last sales, consist of approximately 11.8 MMBF
 24 of timber in the Tiller Ranger District of the Umpqua National
 25 Forest in Oregon. The sales are located within a Late
 26

1 Successional Reserve and a Key Watershed as those terms are
2 defined in the Northwest Forest Strategy. At the time of
3 strategy preparation, the Forest Service had no intention of
4 going forward with these sales.

5 Interpreting Section 2001(k)(1) of the Rescissions Act of
6 1995, this Court ordered the award and release of the First and
7 Last sales. After a pending motion to clarify and enforce a
8 judgment relating to these sales was resolved by Judge Dwyer of
9 the Western District of Washington, the Forest Service awarded
10 the sales to the identified high bidder, Scott Timber Company, on
11 March 8, 1996. Since that date, the purchaser has been operating
12 on four units of the two sales.

13 On April 3, 1996, the Forest Service published an interim
14 final rule revising existing regulations regarding noncompetitive
15 sale of timber based on the Secretary of Agriculture's
16 determination that extraordinary conditions exist. See 61 Fed.
17 Reg. 14618 (April 3, 1996), Interim Final Rule, Disposal of
18 National Forest System Timber; Modification of Timber Sale
19 Contracts in Extraordinary Conditions (attached hereto as Exhibit
20 A). The rule allows forest officers to modify timber sale
21 contracts awarded or released pursuant to section 2001(k), by
22 substituting timber from outside the sale area specified in the
23 contract for timber within the sale area, without advertisement.

24 On April 6, 1996, pursuant to the interim final rule, the
25 Contracting Officer for the Umpqua National Forest and the
26 purchaser of the First and Last sales entered into an agreement

NOTICE OF FILING

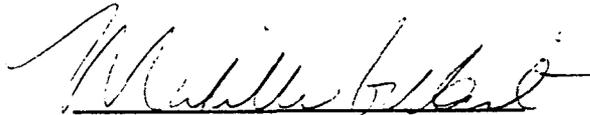
1 to implement contract modifications whereby substitute timber
2 will be provided for the First and Last sale units that have not
3 been harvested. The substitute harvest units are in matrix
4 lands, as defined in the Northwest Forest Strategy, on the Tiller
5 Ranger District. A copy of the parties' agreement is attached
6 hereto as Exhibit B.

7 Dated this 8th day of April 1996.

8 Respectfully submitted,

9 KRISTINE OLSON
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13 LOIS J. SCHIFFER
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15 

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Washington, DC

NOTICE OF FILING

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. 96-7978 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 Rescissions 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).

EX A, p. 1

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. Butruille*, 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 reinitiated consultation with the FWS under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(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

Ex A, p 2

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

EX A, p. 3

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 Gasquet-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

Ex A p-4

United States
Department of
Agriculture

Forest
Service

Ogawa 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. 083947

TO: Scott Timber Company
P.O. Box 1008
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 unit 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. 083947 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 recruise the original sale units. The Forest Service will then contract with an independent cruiser to recruise to the cruising and quality standards that were used at the time of the original cruise. The results of the recruise 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 Tillier 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.

EX.B, p.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 critique 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 Bidsense 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, bore-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 retrospective adjustment will be made to the charges for timber removed so that all substituted volume is charged at the adjusted rates.

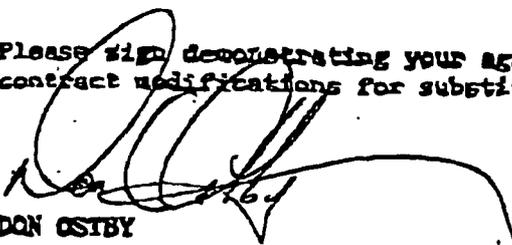
6. An executed Agreement to Modify Contract, 2400-9, will be prepared and offered to Scott Timber Company to delete the existing units and add the substitute units. This latter of Agreement is sufficient to allow both parties to proceed with the substitution of volume.

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 falling 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 falling after the date of this agreement to the absolute minimum necessary for yarding feasibility and safety.

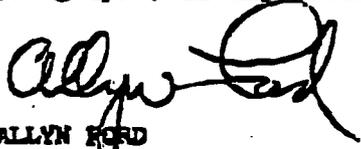
Ex. B, p. 2

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



DON OSTBY
Contracting Officer
Unpqua 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 8.



ALLYN FORD
Vice President
Scott Timber Company

cc: Tiller RD, Regional Forester

Ex.B.p.3

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 8, 1996 she caused one copy of the foregoing DEFENDANTS' STATUS REPORT ON FIRST AND LAST TIMBER SALES to be served by facsimile upon the counsel of record hereinafter named:

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500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
Telephone: (503) 499-4572
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SCOTT HORNGREN
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Portland, OR 97204
Telephone: (503) 225-0777
Fax: (503) 225-1257


Michelle L. Gilbert

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

DATE: April 9, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 3 pages

PLEASE DELIVER TO:

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

MESSAGE:

Attached is a copy of the order from the 9th Cir. granting the stay. The language is standard for a stay from the court of appeals. Because the court granted the stay without waiting for any response from NFRC or Scott Timber, the order allowing a response by them within 14 days is not unusual. The order does make clear, however, that the stay will remain in place until sometime after oral argument on May 7.

Please call if you have any questions.

Al Ferlo

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

FILED

APR - 5 1996

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

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

Plaintiffs-Appellants,)

v.)

DAN GLICKMAN, et al.,)

Defendant,)

and)

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

Defendants-Intervenors-)
Appellees.)

NORTHWEST FOREST RESOURCE COUNCIL,)
an Oregon corporation;)

Plaintiff-Appellee,)

v.)

DAN GLICKMAN, et al.,)

Defendant,)

and)

OREGON NATURAL RESOURCES CENTER,)
et al.,)

Defendants-Intervenors-)
Appellants.)

No. 96-35106

DC. No. CV-95-06244-MRH

No. 96-35107

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

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

Plaintiffs,)

v.)

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

Defendants-Appellants,)

v.)

NORTHWEST FOREST RESOURCE COUNCIL,)
 an Oregon corporation;)

Defendant-Intervenor-Appellee.)

NORTHWEST FOREST RESOURCE COUNCIL,)
 an Oregon corporation;)

Plaintiff-Appellee,)

v.)

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

Defendants-Appellants,)

and)

No. 96-35123

DC. No. CV-95-06384-MRH

No. 96-35132

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

ORDER

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

DATE: April 17, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 20 pages

PLEASE DELIVER TO:

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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 NFRC's reply to our motion for stay pending appeal. Under the Court's April 5, 1996 order granting the stay, NFRC had 14 days to file any response to the motion. The stay will remain in place at least until oral arguement.

I plan to file a short reponse to NFRC's memorandum by Tuesday, April 23. I will circulate the response for comment.

Please call if you have any questions.

Al Ferlo

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon
corporation,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants,

and

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

Defendant-Intervenors-Appellants.

NORTHWEST FOREST RESOURCE COUNCIL'S
OPPOSITION TO MOTION FOR STAY PENDING APPEAL
OF JANUARY 19, 1996 ORDER

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INTRODUCTION

Plaintiff-Appellee Northwest Forest Resource Council ("NFRC") - a coalition of timber and logging companies in Oregon and Washington - strongly opposes the Secretary of Agriculture and Secretary of Interior's third motion for a stay pending appeal in this case of a district court order releasing timber sales under 2001(k) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. 104-19, 109 Stat. 240-247 (July 27, 1995). NFRC represents 12 of the companies that hold timber sale contracts to be released this month.

This court has twice before refused to stay district court orders releasing timber sales under section 2001(k). The Secretaries' latest motion is no more meritorious, and should likewise be denied. The Secretaries have no likelihood of success on their appeal, and have not demonstrated a balance of hardships tipping sharply in their favor. Since the Secretaries have met neither of the alternative standards for a stay pending appeal, their motion should be denied.

a. No likelihood of success on the merits. The Secretaries have no chance of success on the merits. The only issue in this appeal is the intent of Congress in enacting section 2001(k). The Secretaries' argument that Congress intended to release none of the 140 timber sale units "occupied" by a marbled murrelet under the Pacific Seabird Group ("PSG")

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Protocol is refuted by the congressional reports accompanying the 1995 Rescissions Act, by the floor statement of the author of the section, Senator Gorton, expressly stating that Congress had "soundly rejected" the administration's request to expand the nesting exemption to "occupancy," 141 Cong. Rec. S10463-64 (daily ed. July 21, 1995), SER 32, Exhibit 14, by the Senate's recent endorsement of the district court decision releasing these sales "insofar as it determined that the administration's interpretation of subsection (k)(2) was in error," S. Rep. 104-236 (104th Cong., 2d Sess.) (March 6, 1996) at 46, and by Senator Hatfield's and Senator Gorton's recent confirmation that section (k) releases 650 million board feet of sales, a figure necessarily including the murrelet sales at issue here.

b. The balance of hardships does not tip sharply toward the Secretaries because timber purchasers and the public will be harmed if a stay is granted. Granting a stay will deny the timber purchasers, and the public, the benefit of section 2001(k) since immediate release of timber sales is the central purpose of the statute. The law mandates the immediate release of timber sales within 45 days, and provides the released sales with absolute legal sufficiency for a limited period through September 30, 1996 so they can be promptly logged.

This court refused to stay the district court's earlier order releasing sales last October because it found that granting a stay would cause hardship to timber purchasers, and

that the balance of hardships did not strongly favor a stay. The hardship to the purchasers is even stronger here since all 74 of the sale units in question require work to start in April 1996 in order to complete operations by September 30 when the legal sufficiency for the sales expires and they can no longer be operated.

Any further stay of logging on these units means that the sales cannot be logged by September 30 as Congress intended. Since government biologists have determined that none of the 74 units contains a nesting bird within the sale unit boundaries, any hardship to the Secretaries from releasing the sales does not outweigh the clear harm to the purchasers from the loss of the congressionally-assured opportunity to log the sales. The motion for a stay should be denied.

STATEMENT OF FACTS

1. Section 2001(k).

Section 2001(k) of the 1995 Rescissions Act, part of a broad emergency timber sale program, mandates the award and release, within 45 days of enactment, of existing Forest Service and Bureau of Land Management ("BLM") timber sales that had been offered as far back as 1990 but never completed due to a variety of environmental controversies. Section 2001(k) directs:

(1) AWARD AND RELEASE REQUIRED. -- Notwithstanding any other provision of law, within 45 days of the date of enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed

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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 high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph.

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

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

Id. To allow prompt logging of the section (k) sales without disruption, Congress provided absolute legal sufficiency for the sales through September 30, 1996 by permitting the completion of the sales in fiscal years 1995 and 1996 "[n]otwithstanding any other provision of law." Section 2001(k)(1).

The goal of section 2001(k) is the immediate release of the existing timber sales. Congressman Charles Taylor of North Carolina, the author of section 2001(k), explained that it will "immediately provid[e] substantial amounts of timber for mills hurt by Federal supply reductions." 141 Cong. Rec. H3233 (daily

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ed. March 15, 1995), Supplemental Excerpts of Record ("SER") 32, Exhibit 3. Its Senate sponsors intended it "to provide some short-term relief to timber communities," 141 Cong. Rec. S10463 (daily ed. July 21, 1995) (remarks of Sen. Gorton), SER 32, Exhibit 14, and "to get wood to the mills of the Pacific Northwest in the next 18 months." 141 Cong. Rec. S4882 (daily ed. March 30, 1995) (remarks of Senator Hatfield), SER 32, Exhibit 7.

In March 1996 the Senate defeated, by a vote of 54-42, a proposal by Senator Murray to repeal section 2001. 142 Cong. Rec. S2005, S2105-07 (daily ed. March 14, 1996). During the debate on the proposal, Senator Hatfield explained to the Senate that section (k) releases 650 million board feet of timber sales:

The third provision [of section 2001] releases certain sales offered or awarded since 1990 in the geographic area covered by section 318 of the fiscal year 1990 Interior and Related Agencies Appropriations Act. . . .

These delayed sales represent approximately 650 million board feet of timber affecting less than 10,000 acres of Federal forest land in Oregon and Washington.

S2023. Senator Gorton, the author of section (k) (2), confirmed the 650 million board feet figure: "This is what we are talking about, 650 million board feet, somewhat less than one-tenth of the amount of growth each year. . . . The only mandate in the

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rescissions act was this 650 million board feet" S2011, S2012.

On March 19, 1996 the Senate approved Senate Report 104-236, 142 Cong. Rec. S2309 (daily ed. March 19, 1996), on S. 1594, Making Omnibus Consolidated Rescissions And Appropriations For the Fiscal Year Ending September 30, 1996 And For Other Purposes. The Senate Report expresses approval of the district court's orders in this case including the January 19 order that is the subject of these appeals:

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

S. Rep. 104-236 at 46 (emphasis added).

2. *The Secretaries' refusal to comply with section 2001(k).*

The defendant Secretaries have consistently and steadfastly refused to comply with section 2001(k):

1. By the September 10, 1995 deadline for releasing timber sales, they had awarded only 12 BLM timber sales with 64 million board feet ("mmbf") of volume - less than 10% of the total volume to be released under the statute. In response to a motion from NFRC in this case, they released an additional 66 mmbf of sales in September.

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2. In October 1995 the district court in this case ordered the release of section (k) sales offered in fiscal years 1991-95, which the Secretaries had withheld. On October 25, 1995 a motions panel of this court (Judges Beezer, Thompson and T.G. Nelson) denied a motion for a stay of the injunction, and the Secretaries awarded another 180 mmbf of sales.

3. On January 10, 1996 the district court ordered the release of another 100 mmbf of sales the Secretaries had also withheld based on various interpretations of section 2001(k) (1). On February 8, 1996 a motions panel of this court (Judges Canby and Hawkins) denied a stay of that order, and the Secretaries awarded these sales.

4. The Secretaries have also continued to withhold 245 mmbf of timber in 148 timber sale units based on their view that the "known to be nesting" exemption in section 2001(k) (2) allows them to withhold every sale unit previously determined to be "occupied" by a marbled murrelet under the unpublished PSG Protocol.

On January 19, 1996 the district court ruled that section (k) (2) does not permit the Secretaries to withhold a sale unit based solely on an occupancy determination under the PSG protocol. ER 340. The court ruled that the limitation of the (k) (2) exemption to "nesting within the acreage that is the subject of the sale unit" means that murrelet nesting must be occurring within the sale unit boundaries, and cannot be based

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on observations of behavior outside the sale unit boundaries or in the air above the canopy of the forest, as the PSG Protocol permits.

The district court ordered the Secretaries to release the sale units that cannot be withheld under the statute. ER 340 at 21. The Secretaries have since determined that 100 of the units must be released under the district court's ruling.

On January 25, 1996 the court stayed the January 19 order for 60 days pending appeal. ER 63. However, when the Secretaries asked for an extension of the stay, NFRC and co-plaintiff Scott Timber Co. informed the court that logging on 74 of the 100 releasable sale units has to begin by April 1 in order to be completed by the September 30 expiration of the legal sufficiency for the sales. The Secretaries concede that after that date they will halt logging on all the sales. Thus, if the sales are not logged by September 30, they will not be logged at all. NFRC did not oppose a 60 day extension of the stay for 24 other units where work can begin later in the summer and still be completed by September 30.

Based on this information, on April 3 the district court declined to extend the stay for the 74 units beyond a five day period (for 54 units) or a 14 day period (for 22 units the Secretaries claimed were especially sensitive). The district court granted a 60 day extension of the stay for the 24 units that do not require immediate work.

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The Secretaries, joined by appellant Pilchuck Audubon Society, now ask this court, for a third time, to stay the district court's order requiring the release of timber sales under section 2001(k).

ARGUMENT

THE SECRETARIES' MOTION FOR A STAY PENDING APPEAL SHOULD BE DENIED BECAUSE THEY HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS, AND THE BALANCE OF HARDSHIPS DOES NOT TIP SHARPLY IN THEIR FAVOR SINCE A STAY WILL CAUSE IRREPARABLE HARM TO TIMBER PURCHASERS AND WILL FRUSTRATE THE INTENT OF CONGRESS.

A. Standard for stay pending appeal.

A court can grant a stay pending appeal only after considering:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

This court evaluates a stay pending appeal on a standard that is similar to a request for a preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), rev'd in part on other grounds, 463 U.S. 1328, 464 U.S. 879 (1983). A preliminary injunction can only be granted if the applicant has a likelihood of success on the merits and shows irreparable harm, or if the applicant shows serious questions going to the merits, and the balance of hardships tips sharply in favor of

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the applicant. *Native Village of Quinhagak v. U.S.*, 35 F.3d 388, 392 (9th Cir. 1994).

B. The Secretaries meet neither test for a stay pending appeal because they have no likelihood of success on the merits, and the balance of hardships does not tip sharply in their favor.

1. The Secretaries do not have a sufficient likelihood of success on the merits to obtain a stay pending appeal.

The Secretaries' stay motion relies almost exclusively on the alleged irreparable harm they fear will result from complying with the district court's order. But a stay requires more than irreparable harm, even if the Secretaries' claims are taken at face value. They must also demonstrate a likelihood of success on the merits; a stay pending appeal cannot be granted when the appellant has no chance of success on appeal. *Barber v. State of Hawai'i*, 42 F.3d 1185, 1199 (9th Cir. 1994). The Secretaries have not demonstrated a sufficient likelihood of success to justify a stay.

The only issue in this appeal is the intent of Congress in enacting section 2001(k). As NFRC demonstrated in its merits brief, many factors compel the conclusion that the Secretaries' interpretation of (k)(2) is contrary to congressional intent: the congressional reports; the interpretation of the statute by its author, Senator Gorton; the negotiations between the administration and Congress on the exact issue in this case in July 1995; the Murray amendment that was rejected by the Senate

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in March 1995; the recent Senate report and the Senate's vote against repeal of section 2001; and others.

Of these factors, three are especially compelling:

a. Senator Gorton expressly stated on the floor of the Senate in July 1995 that Congress had "soundly rejected" the administration's request "to include in (k) (2) its definition of 'occupancy.'" 141 Cong. Rec. S10464, SER 32, Exhibit 14.

b. In March 1996 the Senate expressly endorsed the district court's January 19, 1996 order "insofar as it determined that the administration's interpretation of subsection (k) (2) was in error." S. Rep. 104-236 at 46. Congress' endorsement of the district court's order should lay to rest any doubt that the district court has correctly interpreted the intent of Congress.

c. The 240 million board feet of timber withheld under (k) (2) contribute to the 650 million board feet of sales that Senator Hatfield and Senator Gorton explained were to be released by section (k). 142 Cong. Rec. S2011, S2012, S2023 (daily ed. March 14, 1996). Without the release of these sales, the volume would not even approach the 650 million foot level.

2. The balance of hardships does not tip sharply toward the Secretaries because a stay will cause irreparable harm to the timber purchasers and frustrate the intent of Congress.

The Secretaries also fail to justify a stay under the alternative standard because even if their claims of harm are

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valid, the balance of hardships does not tip sharply in their favor.

The hardship claimed by the Secretaries is limited by the fact that none of the units subject to release under the district court's order have a threatened or endangered bird nesting within the sale area. Government biologists have determined that birds are not nesting within any of the sale areas. The Secretaries' claim of irreparable harm is that because a bird once circled above the sale area, or nested up to a quarter mile away from the sale area, the sale area itself should be protected.

Even if this rather attenuated impact is a hardship, it does not tip the balance of hardships sharply toward the Secretaries. This court has already found that staying an order releasing section (k) sales will cause hardship to the timber purchasers. The Secretaries attempted to justify their first stay motion in this case last October with claims of harm to wildlife similar to those raised here. In denying the motion, this court ruled: "Although some hardship may result from either a grant or a denial of a stay pending appeal, the balance of hardships does not tip sharply in favor of one party or the other." *NFRC v. Glickman*, No. 95-36042, Order (October 25, 1995). The same is true here.

The Secretaries are now in their ninth month of resistance to section 2001(k). They have fought every effort to release

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section (k) sales, opposed every motion in court, invented wave after wave of excuses for not releasing sales, and dragged their feet in every way possible. Though they have lost every significant issue in this case, including the two prior stay motions in this court, they continue to resist the award and release of sales.

What they have been unable to achieve in court rulings, they may well achieve solely by delaying the court proceedings. The period of legal sufficiency in section (k) expires on September 30, 1996 - less than six months from now. The Secretaries' refusal to release these sales has already cost the timber purchasers more than half the window for logging sales provided by Congress.

NFRC's opposition to extending the stay is based on the timber purchasers' undisputed projections of the minimum time they need to log the sales by September 30. All the 74 units that are to be released in April require work to start in April in order to be completed by September 30. In many cases roads have to be constructed before logging can begin.

Where the timber purchasers do not need to start work in April, NFRC did not oppose an extension of the stay. That is why 24 units that should be released under section (k)(2) remain stayed by the district court for another 60 days.

The Secretaries do not dispute that logging on all these units will have to stop on October 1 when the legal sufficiency

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expires. Memorandum In Support Of Motion For Stay at 9 (April 4, 1996). They obliquely suggest the purchasers will then be left with "contract remedies," by which they mean the purchasers can file breach of contract claims against the government.

The purpose of section (k) is not to create tens of millions of dollars of contract liability for the government; the purpose is to release timber. Extending the stay on the 74 units in question will frustrate that purpose, and needlessly expose the government to contract liability.

Nor does the hope of replacement timber in the future under (k)(3) reduce the irreparable harm to the timber purchasers. Consistent with their general defiance of section (k), the Secretaries have not to date provided any replacement timber for a single unit of section (k) timber, and have opposed purchasers' efforts to obtain replacement timber. See NFRC Supplemental Opposition Brief (lodged April 4, 1996). The availability of this timber remains wholly speculative.

In any event, the prospect of replacement timber at some unspecified time in the future does not achieve the congressional purpose of providing short term relief to mills and timber communities in 1995 and 1996. Congress enacted section 2001(k) because mills were running short of federal timber after years of delays and disruptions. Mills cannot operate today with a promise of logs some time in the future.

The district court was unwilling to allow the passage of time in litigation to frustrate the intent of Congress. It refused to extend the stay on the 74 units in question based on its "reluctance to allow judicial procedure to trump the intent of Congress." Order, April 3, 1996 at 4. That concern should lead this court to deny the stay on these units so that timber purchasers can operate these sales by September 30 as Congress intended.

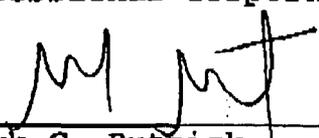
Because the purchasers will suffer hardship and the public interest will be harmed if a stay is granted, the balance of hardships does not tip sharply toward the Secretaries, and their motion for a stay should be denied.

CONCLUSION

The motions for a stay of the district court's January 19, 1996 order should be denied.

Dated this 16th day of April, 1996.

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

13	NORTHWEST FOREST RESOURCE COUNCIL,)	
	Plaintiff,)	
14		Civil No. 95-6244-HO
	v.)	(lead case)
15		Civil No. 95-6267-HO
		(consolidated case)
16		
17	GLICKMAN and BABBITT,)	FEDERAL DEFENDANTS'
	Defendants,)	April 11, 1996
		COMPLIANCE REPORT
18	OREGON NAT. RES. COUNCIL, et al.)	
	Defendants-Intervenors)	
19		

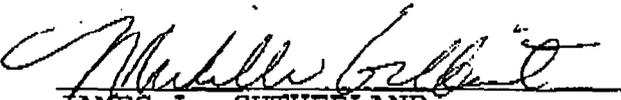
20 Pursuant to this Court's October 17, 1995 Order, federal
 21 defendants hereby file a eleventh progress report describing
 22 actions taken by the Forest Service and Bureau of Land Management
 23 to award and release timber sales offered or awarded between
 24 October 1, 1990 and July 27, 1995 and within the scope of this
 25 Court's September 13, 1995 Order.
 26

1 Attached are the declarations of William L. Bradley and
2 Jerry L. Hofer updating the Court on the actions of the Bureau of
3 Land Management and Forest Service as to these timber sales.

4 Dated this 11th day of April, 1996.

5 Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,	)	Civil No. 95-6244-HO
	)	(lead case)
v.	)	Civil No. 95-6267-HO
	)	(consolidated case)
DAN GLICKMAN, in his capacity as)	
Secretary of Agriculture,	)	FEDERAL DEFENDANTS'
BRUCE BABBITT, in his capacity as	)	APRIL 11, 1996
Secretary of Interior	)	COMPLIANCE REPORT
)	
Defendants.)	

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

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

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

3. In its March 28, 1996, compliance report, the BLM provided two tables showing the status of its sales which are covered under Section 2001(k). This compliance report is being filed to update the court on the status of these sales. Table 1 shows the status of sales covered by Judge Hogan's October 17, 1995, order and Table 2 shows the status of section 318 sales which were subject to Section 2001(k) of Public Law No. 104-19.

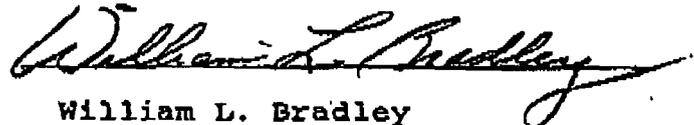
4. As stated in our addendum to the March 14, 1996, compliance report dated March 19, 1996, the BLM has completed its review of the survey information on the 11 units which were not awarded because they were determined to be occupied by marbled murrelets. Occupancy determinations on 8 of the 11 units were consistent with the court's interpretation of section 2001(k)(2).

5. The BLM has directed the pertinent district offices to award replacement volume to the purchasers of these 8 sale units plus the one sale unit of Olalla Wildcat on which a northern spotted owl is known to be nesting no later than September 30, 1996.

6. As stated in our previous compliance report, it was concluded that the occupancy determinations on three of the units were not consistent with the court's interpretation of section 2001(k)(2). The release of these units is stayed pending further action by the Ninth Circuit.

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

Executed at Portland, Oregon, on April 10, 1996.


William L. Bradley

APRIL 11, 1998

REPRODUCTION PROHIBITED

TABLE 1

ELEVENTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #2	SEE #3	STATUS
					SEE #1 BELOW	BELOW		BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	
91 LOWER DUDLEY'S SUMMIT	BOISE CASCADE	2340	71			2340	Executed
91 MILLERS VIEW	DR JOHNSON	3863	53			3863	Executed
ANOTHER FAIRVIEW	DOUGLAS CO. FP	4589	53			4589	Executed
BATTLE AXE	RESERVATION RANCH	1205	44			1205	Executed
BIRDSEYE ROGUE	CROMAN	3876	671			3876	Executed
CAMP	TIMBER PRODUCTS	7127	548			7127	Executed
CAT TRACKS	SENECA	472	45			472	Executed
CHERRY TREE PLUM	HULL-OAKES	1038	10			1038	Executed
CORNER SOCK	LONE ROCK	1721	52			1721	Executed
CRAZY 8'S	CLR	3957	140			3957	Executed
DAFFI DORA	SCOTT	4654	87			4654	Executed
DEAD MIDDLEMAN	DR JOHNSON	7154	197			7154	Executed
DEEP CREEK	CLR	3120	130	MM OCC. - #1,2	3120	0	Sale will not be awarded
GOLDEN SUCKER	ROUGH & READY	4367	160			4367	Executed
JEFFERS REVENGE	LONE ROCK	3914	74			3914	Executed
LICK II	WESTERN TIMBER	811	218			811	Executed
LOBSTER HILL	SCOTT	8471	211			8471	Executed
LOST SOCK	LONE ROCK	3596	47	MM OCC. - #4	1050	2536	Executed
MARTEN POWER	ROSBORO	9668	127			9668	Executed
NORTH FORK GHETCO	CLR	7372	267	MM OCC. - #1	1070	6302	Executed
PARK RIDGE BASIN	HULL-OAKES	2710	34			2710	Executed
POND VIEW	DR JOHNSON	4777	84			4777	Executed
PP&J	BOISE CASCADE	6387	269			6387	Executed
ROCKY ROAD	THOMAS CREEK	1574	23			1574	Executed
SHADY	TIMBER PRODUCTS	7635	588			7635	Executed
TOBE WEST	HULL-OAKES	4807	78			4807	Executed
UGLY ECKLEY	LONE ROCK	5815	217			5815	Executed
WREN 'N DOUBT	SCOTT	8803	163	MM OCC. - #2,3,5,7	4937	3866	Executed
TOTALS		125823	4661		10187	115636	

1. Information regarding the status of threatened or endangered nesting birds. MM OCC. = marbled murrelet occupancy; # = sale unit number
2. The volume contained in units with marbled murrelet occupancy. This is the volume which is subject to SEC. 2001(k)(3) of Public Law 104-19.
3. The original sale volume minus the volume contained in occupied units. This is the volume which was awarded.
4. Executed = sale contract has been awarded, accepted, and approved

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 04/10/98 12:41
 DIV. OF LANDS AND REN. RESOURCES
 007/011

APRIL 11, 1996

NO. 00000000000000000000

TABLE 2

ELEVENTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	STATUS	
88 BLACK JACK	WEYCO	6863	96				6863	EXECUTED
90 PITCHER PERFECT THINNING	SWANCO	2438	180				2438	EXECUTED
90 ROMAN DUNN	HULL-OAKES	10646	142	MM OCC. - #1,2	5264		5382	EXECUTED
BEAR AIR	MURPHY TIMBER	11564	201	MM OCC. - #2	4617		6947	UNAWARDED
BIG WINDS	SPALDING	6864	236				6864	EXECUTED
CANTON CREEK II	DOUGLAS CO. FP	3440	47				3440	EXECUTED
CHANEY ROAD	LONE ROCK	3800	75				3800	EXECUTED
HOXIE GRIFFIN	CROMAN	2809	255				2809	EXECUTED
OLALLA WILDCAT	LONE ROCK TIMBER	10568	280	NSO - #5	852		9716	EXECUTED
SUMMIT CREEK	SCOTT	7910	126				7910	EXECUTED
SWINGLOG THINNING	SWANCO	1542	95				1542	EXECUTED
TEXAS GULCH	DR JOHNSON	6212	119				6212	EXECUTED
TWIN HORSE	DOUGLAS CO. LUMBER	1498	17				1498	EXECUTED
UPPER RENHAVEN	BOHEMIA	1796	45				1796	EXECUTED
WHITT'S END	SENECA	1097	38				1097	EXECUTED
YELLOW CR. MTN.	SCOTT	7080	141				7080	EXECUTED
TOTALS		86127	2093		10733		75394	

1. Information regarding the status of threatened or endangered nesting birds. MM OCC. = marbled murrelet occupancy; # = sale unit number, NSO = northern spotted owl
2. The volume contained in units with marbled murrelet occupancy. This is the volume which would be subject to SEC. 2001(k)(3) of Public Law 104-19.
3. The original sale volume minus the volume contained in occupied units. This is the volume which will be awarded.
4. Executed = sale contract has been awarded, accepted, and approved

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 B4/10/96
 12142
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 008/011

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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.)	
	)	NINETEENTH DECLARATION
DAN GLICKMAN, in his capacity as	)	OF JERRY L. HOFER
Secretary of Agriculture,)	
BRUCE HABBITT, in his capacity as)	
Secretary of the Interior)	
)	
Defendants.)	

I, Jerry L. Hofer, hereby declare the following to be true and correct:

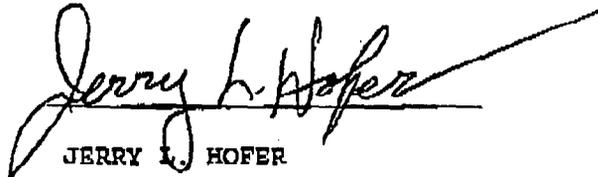
1. I have previously filed declarations in this case putting forth my experience and qualifications with the United States Forest Service.

2. On March 27, 1996, my Eighteenth Declaration included a report describing the status of 33 timber sales which are subject to the Court's Order of October 17, 1995.

3. There have been no changes in the status of sales since March 27, 1996.

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

Executed at Portland, Oregon, on April 11, 1996.


JERRY L. HOFER