

NLWJC- Kagan

Counsel - Box 002 - Folder 006

NFRC v. Glickman II [5]

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

DATE: April 5, 1996  
FROM: Albert M. Ferlo, Jr.  
RE: NFRC v. Glickman and Babbitt  
OFFICE PHONE: (202) 514-2757  
NUMBER OF PAGES: Message and pages  
PLEASE DELIVER TO: Don Barry 208-4684  
Bob Baum  
Dave Gayer 208-3877  
Dianh Bear 456-0753  
Mike Gippert, 690-2730  
Tim Obst, Jay McWhirter  
Greg Frazier 720-5437  
Jeff Handy (503) 326-3807  
Nancy Hayes 208-5242  
Elena Kagan 456-1647  
Don Knowles (503) 326-6282  
Karen Mouritsen 219-1792  
Roger Nesbit (503) 231-2166  
Diane Hoobler  
Chris Nolin 395-4941  
Tom Tuchmann (503) 326-6254  
Sue Zike (503) 326-7742  
Terry Garcia 482-4893

MESSAGE:

Attached are two documents related to the stay on the (k) (2) sales:

1. The government's Emergency Motion for Stay Pending Appeal
2. SCLDF's Emergency Motion for Stay Pending Appeal.

I have removed the attachments to both documents to conserve fax time.

The motion will be decided by the same panel that will hear oral argument on the merits on May 7, 1996. We do not know who is on that panel.

Al Ferlo

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 96-35132

---

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee

v.

DAN GLICKMAN and BRUCE BABBITT,

Defendants-Appellants

---

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

---

EMERGENCY MOTION UNDER RULE 27-3

MOTION OF APPELLANTS, DAN GLICKMAN AND BRUCE BABBITT,  
FOR STAY PENDING APPEAL

LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources  
Division  
ANNE S. ALMY  
ALBERT M. FERLO, JR.  
Attorneys, Appellate Section  
Washington, D.C. 20530

CIRCUIT RULE 27-3 CERTIFICATE

The movants hereby certify that to avoid irreparable harm relief is needed in less than 21 days, and further hereby submit the following information pursuant to Ninth Circuit Rule 27-3 and Federal Rules of Appellate Procedure 8.

Counsel for Appellant Dan Glickman, et al.:

Albert M. Ferlo, Jr  
Anne Almy  
Attorneys, Appellate Section  
Department of Justice  
Environment and Natural Resources Division  
P.O. Box 23795  
L'Enfant Station  
Washington, D.C. 20026  
(202) 514-2757

Counsel for Appellee Northwest Forest Resource Council:

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

Counsel for Appellee Scott Timber Company:

Michael E. Haglund  
Scott W. Horngren  
Shay S. Scott  
Haglund & Kirtley  
Attorneys at Law  
1800 One Main Place  
101 S.W. Main Street  
Portland, OR 97204  
(503) 225-0777

Counsel for Defendant-Intervenor Oregon Natural Resources Council:

Patti A. Goldman  
Kristen L. Boyles  
Sierra Club Legal Defense Fund  
705 Second Avenue, Suite 203  
Seattle, Washington 98104  
(206) 343-7340

The facts showing the existence and nature of the claimed emergency, as discussed more fully in the attachment Memorandum, are:

1. Section 2001(k)(1) of Public Law No. 104-19, enacted on July 27, 1995, requires the Secretaries of Agriculture and the Interior to act to award and release, within 45 days after enactment of the Act, 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)."

Section 2001(k)(2) exempts from release under Section 2001(k)(1) any unit of a timber sale in which a threatened or endangered species of bird is "known to be nesting."

2. The district court's order of January 19, 1996, requires the Secretaries of Agriculture and the Interior to release timber sales spread over 4,000 acres of old-growth coastal forests which is indisputably prime nesting habitat for the marbled murrelet, a bird which is listed as a threatened species under the Endangered Species Act. The district court rejected the Secretaries' interpretation of Section 2001(k)(2) despite finding that the statutory language was ambiguous and that the legislative history did not expressly address the meaning of the term "known to be nesting."

The district court granted a 60 day stay of its order. On February 28, 1996, the Secretaries filed a motion with the district court seeking to extend the stay until this Court could reach the merits of the appeal. The district court requested additional briefing on the motion and set it down for hearing on March 22, 1996. The initial 60 day period was to expire on March 25, 1996. At the March 22, 1996 hearing, the district court again requested briefing and extended the stay to April 3, 1996. On April 3, 1996, the district court issued an order granting, in part the request. (A copy of that order is attached as an addendum to this document). Of the 148 sale units which the Secretaries determined fell within the exemption of Section

2001(k)(2), the district court ordered that 52 units must be released for harvesting by April 8, 1996. An additional 22 sale units which the Secretaries noted had direct evidence of murrelets either circling above the sale unit or flying close to the sale unit boundary -- behaviors which the Protocol states indicates that murrelets are likely to be nesting in the area -- must be released by April 17, 1996. The court extended the stay for an additional 60 days for the 25 sale units which the plaintiffs did not claim a necessity to begin harvesting immediately. The court finally noted that the sales which had been found to fall within the court's definition of nesting -- a total of only 48 units -- there was no need for any stay, because the plaintiffs were not challenging the nesting determinations at this time. The case is now fully briefed in this Court and oral argument has been set for May 7, 1996.

3. Because the district court's order requires the immediate release of the disputed timber sales, thereby allowing the trees to be harvested, the Secretaries' appeal cannot be heard on the merits prior to such activity.
4. Absent an immediate stay from this Court, the district court's order will allow irreparable harm to occur in the forests in which the timber sales are released, before this Court has an opportunity to consider de novo the merits of the Secretaries' appeal. The district court itself has recognized that such activity may constitute "irreparable harm." (April 3, 1996 order at 4). Appellants also request that, should this Court grant a stay pending appeal, that consideration and disposition of the merits of this appeal be expedited to the extent practicable.

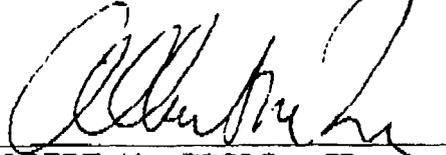
Counsel for the appellee and for the Intervenor-Defendant have been served with these papers by fax on April 4, 1996, and by hard copy via overnight mail on April 4, 1996 (to be received on April 5, 1996). Also, on April 4, 1996, the undersigned counsel for the Appellants notified by telephone all counsel for appellees and counsel for Intervenor-Defendant of Appellants' intention to file this motion for emergency relief.

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, as well as Ninth Circuit Rule 27-3, Appellants certify that application to the district court for an additional stay of

the January 19, 1996 order was made on February 28, 1996 as stated above. The district court's April 3, 1996 order constitutes a partial denial of that request.

Dated: April 4, 1996.

Respectfully Submitted,



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

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 96-35132

---

NORTHWEST FOREST RESOURCE COUNCIL,  
Plaintiff-Appellee

v.

DAN GLICKMAN, et al.,

Defendants-Appellants

---

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

---

EMERGENCY MOTION UNDER RULE 27-3

MOTION OF APPELLANTS, DAN GLICKMAN, ET AL.,  
FOR STAY PENDING APPEAL

---

Appellants, Dan Glickman and Bruce Babbitt, respectfully move for a stay pending appeal of the order of the district court dated January 19, 1996. That order directs the Department of the Interior and the Department of Agriculture to release immediately a group timber sales and allow timber harvesting activity on federal lands in Oregon and Washington.

Appellants request an immediate stay pending appeal of the January 19, 1996 order because, in Appellants' view, the order requires the agencies to release timber sales in violation of Section 2001(k)(2) of the 1995 Rescissions Act. That Section required the Secretary to withhold any timber sale otherwise subject to release under Section 2001(k)(1), if the Secretary

determined that a threatened or endangered bird species was "known to be nesting" in the sale unit.

Appellants incorporate the attached memorandum in support of this motion and the declarations of Jean E. Williams, Michael Spear, Dr. C. John Ralph, and Sarah J. Madsen, as if fully set forth herein, and request that this Court, enter an order immediately staying the January 19, 1996 order until this Court issues a decision on the merits of the appeal.

Respectfully submitted,

LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources  
Division



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

April 4, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Federal Appellants' Emergency Motion for Stay Pending Appeal was served on this 4th day of April 1996, by overnight express delivery and by telefax service addressed to the following counsel of record:

Mark C. Rutzick  
Alison Kean Campbell  
500 Pioneer Tower  
888 S.W. Fifth Ave.  
Portland, OR 97204-2089  
fax (503) 295-0915

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

Michael E. Haglund  
Scott W. Horngren  
Haglund & Kirtley  
Attorneys at Law  
1880 One Main Place  
101 S.W. Main Street  
Portland, OR 97204  
fax (503) 225-1257



ALBERT M. FERLO, JR.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

NO. 95-35132

---

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee

v.

DAN GLICKMAN and BRUCE BABBITT,

Defendants-Appellants

---

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

---

EMERGENCY MOTION UNDER RULE 27-3

---

MEMORANDUM IN SUPPORT OF  
MOTION OF APPELLANTS, DAN GLICKMAN, ET AL.,  
FOR CONTINUATION OF STAY PENDING APPEAL

LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources  
Division  
ANNE S. ALMY  
EDWARD A. BOLING  
ALBERT M. FERLO, JR.  
Attorneys, Appellate Section  
Washington, D.C. 20530

### I. STATEMENT OF JURISDICTION

The district court has jurisdiction over the underlying case pursuant to 28 U.S.C. 1331.

This Court has jurisdiction pursuant to 28 U.S.C. 1292(a). The January 19, 1996 order of the district court (E.R. 340)<sup>1/</sup> is an injunction requiring defendants/appellants to award, release, and permit to be completed in fiscal years 1995 and 1996, timber sales, located in Washington and Oregon coastal forests, which the Secretaries have determined to fall within the exemption to release under Section 2001(k)(2). By order dated January 25, 1996, the district court granted a sixty-day stay pending appeal of its January 19, 1996 order. On February 28, 1996, one day prior to filing their opening briefs on the merits with this Court, and 26 days prior to the expiration of the initial 60 day stay, the Secretaries filed a motion with the district court seeking to extend the stay pending appeal until this Court issues a decision on the merits.

The district court deferred ruling on the requested extension of the stay, ordered additional briefing, and set the request for oral argument on March 22, 1996. At the March 22, 1996 hearing, the district court requested additional briefing and granted a temporary extension of the stay to and including April 3, 1996. On April 3, 1996, the district court issued an

---

<sup>1/</sup> In this memorandum "E.R." refers to documents contained in the Excerpt of Record filed by the Pilchuck Audubon Society and Oregon Natural Resources Council as part of the appeal on the merits.

order denying the Secretaries' requested relief in favor of a much more limited stay of only a few sales. Of the 148 sale units which the Secretaries determined fell within the exemption of Section 2001(k)(2), the district court ordered that 52 units must be released for harvesting by April 8, 1996. An additional 22 sale units which the Secretaries noted had direct evidence of murrelets either circling above or flying close to the boundary the sale unit -- behaviors which the Protocol states indicates that murrelets are likely to be nesting in the area -- must be released by April 17, 1996. The district court gave no reason for the two week limitation of the stay on these sales. The court extended the stay for an additional 60 days for the 25 sale units which the plaintiffs did not claim a necessity to begin harvesting immediately. The court finally noted that for the sales which had been found to fall within the court's definition of nesting -- a total of only 48 units -- there was no need for any stay, because the plaintiffs were not challenging the nesting determinations at this time.

In issuing this partial and very limited stay, the district court stated that it was "mindful of the irreparable harm that may result from the harvesting of actual and potential marbled murrelet habitat," and that there was some "potential" that this Court would impose "some modification of the 'known to be nesting' standards articulated in the January 19, 1996 order." (April 3, 1996 order at 4).

## II. STATEMENT OF THE ISSUE

Whether this Court should grant a stay pending appeal as to all sale units which the Secretaries' determined to be exempt from release under Section 2001(k)(2).

## III. STATEMENT OF THE CASE

The Secretaries of the Interior and Agriculture (the Secretaries) respectfully request that this Court grant a stay pending appeal of the district court's Order of January 19, 1996 for all sale units which the Secretaries determined fell within the exemption from release provided by Section 2001(k)(2). That order requires the Secretaries to release for harvesting certain timber sales which the Secretaries determined fell within the "known to be nesting" exemption provided by Section 2001(k)(2) of the 1995 Rescissions Act. The district court, as described above, has issued a limited stay pending appeal. The court has recognized that "irreparable harm may result from harvesting actual or potential murrelet habitat." The court's limited stay, however, is insufficient. The release of all sale units must be stayed, because, as demonstrated in the declarations of Spear (E.R. 373), Ralph (E.R. 372) and Madsen (E.R. 374), harvesting these sales will cause irreparable injury to the continued existence of the marbled murrelet. Conversely, the plaintiffs will not be harmed by a continuation of the stay. After this Court's resolution of the merits of this appeal, plaintiffs will either be offered alternative timber or be able to proceed in accordance with their contracts as explained below. Also,

because the final decision on the appropriate scope of 2001(k) (2) must be made by this Court, see Alaska Wilderness Recreation and Tourism Association v. Morrison, 67 F.3d 723 (9th Cir. 1995), the Secretaries seek this stay pending appeal in order to preserve the status quo while this Court reviews this important question of statutory interpretation.

#### REASONS FOR GRANTING THE STAY

As discussed in our opening brief on the merits (filed February 29, 1996) and in our reply brief (filed April 1, 1996), the district court's January 19, 1996, Order articulated a new biological standard for the Secretaries to utilize in making "nesting" determinations under Section 2001(k) (2) of the Rescissions Act. The arguments presented in those briefs establish that the Secretaries have a strong likelihood of success on the merits of their appeal. Indeed, even the district court predicts (April 3, 1996 Order at 4) that this Court may find it necessary to fashion some "modification" of the January 19, 1996 Order. An even stronger showing of irreparable harm flowing from the district court's order is outlined below.

Following the January 19, 1996, Order, the Secretaries have analyzed existing murrelet survey data accumulated under the Protocol to determine which sale units remained unprotected under that order. Of the 137 sale units withheld from release by the Forest Service, 97 sale units are subject to release; 40 sale units meet the criteria for exemption from release set by the district court's January 19 Order. For the BLM, 3 of 11 sale

units are subject to release; 8 sale units meet the criteria for exemption from release. The Secretaries provided these summaries, and all other attachments to this motion, to the district court as part of their request to that court to extend the stay. See, Declaration of Jean E. Williams in Support of Motion for Extension of Stay, Exhibits 1 and 2 (as submitted to the district court). This information forms the basis for the court's statement, in footnote 2 of the April 3, 1996 order, that no injunctive relief is necessary for the sale units that fall within the standard established by the district court's January 19 Order.

Thus, in the absence of a complete stay pending resolution of the merits of this appeal, the vast majority of the sale units which the Secretaries had determined to contain nesting murrelets will be harvested, and the nesting habitat destroyed. In originally seeking a stay from the district court, the Secretaries submitted the Declarations of Michael Spear (E.R. 373), Regional Director of the U.S. Fish and Wildlife Service; Dr. C. John Ralph (E.R. 372), Research Wildlife Biologist with the Forest Service's Pacific Southwest Forest and Range Experiment Station; and Sarah J. Madsen (E.R. 374), Siuslaw National Forest Threatened and Endangered Species Coordinator. These experts' declarations demonstrate that any significant loss of murrelet nesting habitat will result in severe biological harm to this threatened species by further fragmenting the remaining murrelet nesting habitat. This harvesting will set back recovery

of the murrelet by increasing the risk of predation on a species highly subject to this danger and by increasing the rate of the species decline. (See, E.R. 373, Spear Declaration, paras. 6, 10, 12, 19, 20; Ralph Declaration, para. 12, 13; Madsen Declaration, para. 9) (referencing Marbled Murrelet Recovery Plan).

Because release of the sale units in accordance with the district court's January 19, 1996 Order, prior to resolution of the merits of this appeal, will result in the loss of the majority of these nesting sites, it cannot be seriously disputed that severe harm will be visited upon this already tenuous species. Harvesting units ordered to be released under the January 19 Order will be especially harmful because approximately 2,700 acres of occupied nesting habitat currently withheld from harvest under Section 2001(k)(2) are on the Siuslaw National Forest, which is a "biological stronghold" for the species. (E.R. 374, Madsen Declaration, para. 11) (E.R. 373 Spear Declaration, para. 14). There are 81 sale units currently withheld from harvest that comprise this acreage; of these **only** 27 remain protected under the district court's Order. Thus, approximately 2,100 acres of this occupied nesting habitat would be harvested.

As was described in the declarations submitted, the current Siuslaw population could serve as a long-term source of dispersing murrelets as nesting habitat conditions improve elsewhere in the range of the species. (E.R. 373, Spear

Declaration, para. 14. The occupied nesting habitat on the Siuslaw is of the highest quality -- the stands are located close to the coast -- and the trees exhibit the characteristics preferred by the species with the large, moss-covered limbs used for nesting. (E.R. 372, Ralph Declaration, para. 11) (E.R. 374, Madsen Declaration, para. 11) (E.R. 373, Spear Declaration, para. 14-15). According to FWS Regional Director Spear, many of these forest stands are believed to be the most productive breeding sites for murrelets in Oregon and Washington and probably support multiple nesting pairs. (E.R. 373, paras. 14-15). Obviously, harvest of the 54 sale units in the Siuslaw subject to release under the Court's Order would have an extremely detrimental effect on the contribution this population can make to the species recovery. (E.R. 372, Ralph Declaration, para. 11) (E.R. 373, Spear Declaration, para. 14). Even the district court has acknowledged (April 3 Order at 4) the potential for irreparable harm if this vital habitat is harvested.

The Secretaries submit that this severe environmental damage far outweighs any harm plaintiffs may suffer as a result of extending the stay pending resolution of the appeal. Plaintiffs contend that continuing the stay will prevent them from harvesting the sale units subject to release under this Court's Order because the Rescissions Act expires on September 30, 1996. The contracts which have been awarded or released under Section 2001(k)(1) do not expire on September 30, 1996. However, plaintiffs are correct that the exemption from application of the

environmental laws which currently governs these contracts will expire on September 30, 1996. After that time, the environmental laws will apply to them. Further, the Secretaries' authority to award alternative timber under Section 2001(k)(3) for rights which accrue during the statutory period will continue beyond September 30, 1996.

Thus, regardless of the ultimate disposition of the appeal, plaintiffs will not be harmed by continuing the stay to permit this Court a meaningful opportunity for review. If the Secretaries prevail, the plaintiffs will have the right to receive alternative timber as provided under Section 2001(k)(3). Because the authority to award alternative timber under 2001(k)(3) does not expire on September 30, the short additional delay required to allow for appellate review will not seriously prejudice this process.

If this Court affirms the district court, plaintiffs could then operate the sale. Operations conducted prior to September 30 would be conducted without application of the environmental laws. Operations under the contracts after that time would have to be consistent with environmental laws and other original contract terms. While this would likely result in a need for modification or other contract remedies, the contracts do not expire on September 30, and plaintiffs' rights and obligations under those contracts continue. Thus it is clear that the plaintiffs simply cannot make a valid claim that failure to

harvest these sales prior to a final judicial determination of the issues now on appeal will cause them irreparable harm.

Significantly, the district court did not rely on any potential harm to the plaintiffs in refusing to grant a full stay pending appeal. It simply noted that it was "reluctant to allow judicial procedure to trump the intent of Congress." (April 4, 1996 Order at 4). However, as we argued in our Reply Brief on the merits (filed April 1, 1996), the true intent of Congress in enacting Section 2001(k)(2) was to protect murrelets and their habitat, not to allow that habitat to be destroyed. (Fed. Appellants' Reply Br. at 13). The district court's erroneous reading of Congressional intent behind Section 2001(k)(2) thus not only has infected its decision on the merits, but also its decision to refuse to grant a full stay pending appeal.

Plaintiffs and the district court (April 3, 1996 Order at 4) contend that a further stay would frustrate the legislative purpose underlying the Rescissions Act. However, failure to stay harvesting on all the units found by the Secretaries to be within the scope of the exemption provided by Section 2001(k)(2) would undermine the explicit protections of the Rescissions Act in an irreparable and more significant manner. In 2001(k)(2), Congress created "provisions prohibiting activities in timber sale units which contain any nesting threatened or endangered species." Remarks of Sen. Hatfield, 141 Cong. Rec. S 4881 (March 30, 1995). Lifting the stay now, while significant issues of interpretation

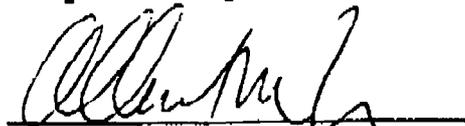
remain, would fundamentally undermine the protections for threatened and endangered bird species provided in the law.

The short delay needed to permit appellate review cannot be charged with frustrating the legislative purpose. For example, though Congress specifically limited judicial review of sales under subsections (b) and (d) by prohibiting the issuance of any injunctions pending appeal, Congress did not include subsection (k) in this provision. See, Section 2001(f)(3). Balancing the tension between these statutory directives in the context of this motion for stay mandates granting the stay. Timber sales will proceed or be replaced upon resolution of the appeal, but with consideration of the imperative need to protect this fragile species. A stay for all units subject to the January 19, 1996 order is therefore warranted.

#### IV. CONCLUSION

Granting a continuance of the stay pending appeal initially granted by the district court will preserve the status quo pending appeal and not pose any increased risk of harm to the appellees here. For the forgoing reasons, the Court should grant a stay pending appeal of the Order.

Respectfully submitted,



Albert M. Ferlo, Jr.  
Attorney, Appellate Section  
Environment and Natural Resources  
Division  
Department of Justice  
Washington, D.C. 20026  
(202) 514-2757

Dated April 4, 1996

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Nos. 96-35106 & 96-35123**

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

**Nos. 96-35107 & 96-35132**

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

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

**REQUEST FOR EMERGENCY ACTION  
ON MOTION FOR STAY PENDING APPEAL**

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**

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

**Attorneys for Oregon Natural Resources Council  
and Pilchuck Audubon Society, et al.**

CIRCUIT RULE 27-3 CERTIFICATE

I. TELEPHONE NUMBERS AND OFFICE ADDRESSES OF ATTORNEYS FOR THE PARTIES

A. for defendants-intervenors-appellants Oregon Natural Resources Council, Sierra Club, Pilchuck Audubon Society, Western Ancient Forest Campaign, Portland Audubon Society, Black Hills Audubon Society, and Headwaters:

Patti A. Goldman  
Kristen L. Boyles  
Sierra Club Legal Defense Fund  
705 Second Ave., Suite 203  
Seattle, WA 98104  
(206) 343-7340

B. for defendants Daniel Glickman, in his capacity as Secretary of Agriculture and Bruce Babbitt, in his capacity as Secretary of the Interior:

Albert M. Ferlo, Jr.  
U.S. Department of Justice  
Environmental & Natural Resources Division  
Appellate Section  
9th & Pennsylvania Ave. N.W.  
Room 2336  
Washington, D.C. 20530  
(202) 514-2757

C. for plaintiff-appellee Northwest Forest Resource Council:

Mark C. Rutzick  
Allison Kean Campbell  
Mark C. Rutzick Law Firm  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 228-3200

REQUEST FOR EMERGENCY ACTION ON MOTION FOR STAY PENDING APPEAL  
[EMERGENCY MOTION UNDER CIRCUIT RULE 27-3]

D. for plaintiff-appellee Scott Timber Company:

Michael E. Haglund  
Scott W. Horngren  
Shay S. Scott  
Haglund & Kirtley  
Attorneys at Law  
1800 One Main Place  
101 S.W. Main Street  
Portland, OR 97204  
(503) 225-0777

## II. FACTS SHOWING THE EXISTENCE AND NATURE OF EMERGENCY

The underlying action is a challenge brought by a timber industry association to the federal defendants' interpretation of § 2001(k)(2) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. 104-19.

Plaintiffs Northwest Forest Resource Council and Scott Timber Company sought summary judgment and injunctive relief to force the federal defendants to release sales determined to be nesting habitat of the marbled murrelet, a threatened seabird. Specifically, plaintiffs asked the district court to rule that § 2001(k)(2), which prohibits the release and logging of timber sale units where threatened and endangered birds are "known to be nesting," precludes any reliance on the Pacific Seabird Group survey protocol and instead requires direct, physical evidence of current nesting before the government may protect the marbled murrelet.

Defendants-intervenors Oregon Natural Resources Council, Sierra Club, Pilchuck Audubon Society, Western Ancient Forest

REQUEST FOR EMERGENCY ACTION ON MOTION FOR STAY PENDING APPEAL  
[EMERGENCY MOTION UNDER CIRCUIT RULE 27-3]

- ii -

Campaign, Portland Audubon Society, Black Hills Audubon Society, and Headwaters (collectively "ONRC") opposed plaintiffs and cross-moved for summary judgment. The district court granted timber plaintiffs' motion for summary judgment and denied ONRC's cross-motion for summary judgment on January 19, 1996. The district court held that Pacific Seabird Group survey protocol did not necessarily answer the question as to whether the marbled murrelet was "known to be nesting" within a timber sale unit; the court held that the agency must find a murrelet (1) currently (2) nesting (3) within sale unit boundaries -- based upon evidence solely found within the sale unit boundaries.

On January 25, 1996 the district court granted a 60-day stay of its January 19, 1996 ruling. On February 29, 1996, ONRC filed a motion to continue the stay pending appeal with this Court. In the meantime, the district court briefly continued its 60-day stay, which would have expired on March 25, 1996, until April 3, 1996. On April 3, 1996, the district court issued another stay order which divides the timber sale units at issue into three categories and stays logging on those units for 5, 14, or 60 days. Once these various stays expire (as early as April 8, 1996 for a third of the sales at issue), logging will begin in sale units that, according to the best available science, contain nesting habitat for marbled murrelets. Expedited review of the previously filed motion for stay pending appeal from this court

is necessary to protect this species from irreparable harm and to forestall unlawful federal agency action.

III. NOTIFICATION AND SERVICE OF COUNSEL

On April 4, 1996, counsel for ONRC notified all parties of ONRC's intent to file this motion by faxing a copy of the motion to all counsel. Copies of the motion were also served by overnight mail, for delivery on April 5, 1996. See Certificate of Service, infra.

IV. RELIEF SOUGHT IN THE DISTRICT COURT

All grounds advanced in support of ONRC's claims were submitted to the district court, which denied ONRC's cross-motion for summary judgment on the interpretation of § 2001(k)(2) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, on January 19, 1996. On January 23, 1996, pursuant to Fed. R. Civ. P. 62(c), ONRC filed a motion for a stay pending appeal with the district court; on January 25, 1996, the district court granted a 60-day stay of its order. On January 25, 1996, ONRC filed its notice of appeal. On February 29, 1996, ONRC filed its motion to continue the stay

///  
///  
///  
///  
///

pending appeal; briefing on that motion, as well as briefing on the underlying merits, has been completed.

DATED this 4th day of April, 1996.

Respectfully Submitted,

*Kristen L. Boyles*

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

Attorneys for  
Oregon Natural Resources Council  
& Pilchuck Audubon Society, et al.

521CERT.27

REQUEST FOR EMERGENCY ACTION  
ON MOTION FOR STAY PENDING APPEAL  
LEMERGENCY MOTION UNDER CIRCUIT RULE 27-31

INTRODUCTION

Defendant-intervenors-appellants Oregon Natural Resources Council et al. (collectively "ONRC") notify the Court of the imminent expiration of the district court's limited stay pending appeal of its January 19, 1996 ruling on § 2001(k)(2) of the 1995 Rescissions Act. On February 29, 1996, ONRC filed a motion with this Court to continue the stay pending appeal to prevent irreparable harm to the threatened marbled murrelet and its nesting habitat. As this Court has not yet ruled and a portion of the district court's stay will expire on April 8, 1996, ONRC respectfully requests emergency action on that motion.

BACKGROUND

The district court had granted a 60-day stay pending appeal of its January 19, 1996 order. See ER 363, Minute Order (January 24, 1996).<sup>1/</sup> The district court briefly continued its 60-day stay, which would have expired on March 25, 1996, until April 3, 1996. See Dkt 413, Minute Order (March 22, 1996). On April 3, 1996, the district court issued another stay order which divides the timber sale units at issue into three categories and stays

---

1/ ONRC will refer to the excerpts of record filed with its opening brief on the merits on February 29, 1996.

logging on those units for 5, 14, or 60 days. Second Amended Order at 4-5 (April 3, 1996) (attached as addendum).

WITHOUT EMERGENCY ACTION FROM THIS COURT,  
THE DISTRICT COURT'S ORDER WILL CAUSE IRREPARABLE HARM  
TO THE MARBLED MURRELET AND ITS NESTING HABITAT.

There is no dispute that logging the nesting habitat of the marbled murrelet will cause irreparable harm to the seabird and its habitat. Under the district court's latest stay order, a third of the marbled murrelet timber sale units will be released for logging on April 9, 1996, and half of the marbled murrelet timber sale units will be released for logging after two weeks. Ms. S. Kim Nelson, former chair of the Pacific Seabird Group's Marbled Murrelet Technical Committee, has concluded that "logging of occupied nesting sites will significantly affect and irreparably harm the continued survival and recovery" of the marbled murrelet. ER 367, Third Declaration of S. Kim Nelson at ¶ 12. Ms. Nelson continues:

The reason the impact will be so great, besides the fact that this species is threatened, has a low reproductive rate, and populations appear to be declining, is that these § 318 timber sales are located in some of the best remaining murrelet habitat in Oregon and Washington, including the oldest and most contiguous forests.

Id.

The U.S. Fish and Wildlife Service ("FWS") has issued a jeopardy biological opinion on these sales. See ER 108 (Exh. F), Final Biological Opinion regarding section 318 timber sales (June

REQUEST FOR EMERGENCY ACTION ON MOTION FOR STAY PENDING APPEAL  
[EMERGENCY MOTION UNDER CIRCUIT RULE 27-3]

12, 1995). A jeopardy biological opinion means that the FWS believes that logging these timber sales will risk the extinction of the marbled murrelet. As the expert biological agency, the FWS concluded:

However, the finding that these 17 sales are unoccupied does not change the Service's biological opinion that harvest of the remaining occupied or unsurveyed timber sales is likely to jeopardize the continued existence of the listed population of the marbled murrelet. ... The proposed harvest could therefore destroy as much as 10-20% of the total sites currently known to be occupied by the murrelet in Oregon and Washington. ... [T]he potential loss of such a large number of occupied sites due to the harvest of the 57 occupied or unsurveyed sales is expected to appreciably reduce the likelihood of the murrelet's survival and recovery in the wild....

Id. at 17 (emphasis added); see also 3d Nelson Decl. at ¶ 14 ("in my opinion, occupied habitat should not be logged so that Marbled Murrelets have a chance for recovery and survival into the future").

Even harvesting a portion of the remaining occupied nesting habitat will have a large impact of the survival of the marbled murrelet in the Pacific Northwest. See 3d Nelson Decl. at ¶ 13. See also ER 371, Declaration of William L Bradley; ER 372, Declaration of C. John Ralph; ER 373, Declaration of Michael J. Spear; and ER 374, Declaration of Sarah J. Madsen (detailing severe biological harm that would be caused by the loss of marbled murrelet nesting habitat). If this Court does not extend the stay pending appeal, at least half of these ecologically

vital sales will be logged before the Court can address the merits.

The district court itself acknowledged the magnitude of the risk of harm when it issued its latest stay order. Second Amended Order at 4 ("the court is mindful of the irreparable harm that may result from the harvesting of actual and potential marbled murrelet habitat"). The district court also stated that it "recognize[d] the potential for some modification of the "known to be nesting" standards articulated in the January 19, 1996 order." *Id.* However, instead of extending the stay pending appeal for all affected sale units until this Court ruled on the merits, the district court injected unnecessary confusion into this already complicated litigation by creating different categories of sale units and stays. The 5-day stay allows only enough time for this Court to act in an emergency manner; the 14-day stay also requires emergency consideration from this Court. See Circuit Rule 27-3. Even the 60-day stay for some of the timber sale units may not be long enough to allow this Court to rule on the merits. To preserve the on-the-ground status quo during the pendency of this expedited appeal, the Court should issue a stay pending appeal of the entire district court order. With the dramatic risk of extinction of the marbled murrelet in this region, a stay pending appeal of the entire order prevents an ecological disaster while allowing the underlying legal issues to



be fully briefed and reviewed. If the government is forced to release these timber sales, old-growth trees will be cut and vital nesting habitat for the marbled murrelet will disappear forever -- all before the underlying legal issue is finally decided.

CONCLUSION

All opening, opposition, and reply briefs on ONRC's motion for continuance of the stay pending appeal have been filed.<sup>2/</sup> Plaintiff-appellee Northwest Forest Resource Council ("NFR") offered no rebuke of the irreparable harm the district court order will cause the marbled murrelet, nor did NFR offer any legitimate reasons for denying the extension of the stay. A simple, blanket stay pending appeal is necessary to prevent irreparable harm to the marbled murrelet, and ONRC respectfully

///

///

///

---

<sup>2/</sup> All parties moved for an expedited briefing and argument schedule for this appeal; this Court granted those motions and scheduled argument for May 7, 1996. All opening, opposition, and reply briefs on the merits have been filed.

asks this Court for emergency action (by April 8, 1996) on the  
previously filed motion for stay pending appeal.

DATED this 4th day of April, 1996.

Respectfully Submitted,

*Kristen L. Boyles*

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

Attorneys for  
Oregon Natural Resources Council  
& Pilchuck Audubon Society, et al.

STAY.EMO

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and a resident of the county of King. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On April 4, 1996, I served true copies of REQUEST FOR EMERGENCY ACTION ON MOTION FOR STAY PENDING APPEAL [EMERGENCY MOTION UNDER CIRCUIT RULE 27-3] by facsimile and overnight delivery service to:

Mark C. Rutzick  
Mark C. Rutzick Law Firm  
500 Pioneer Tower  
888 S.W. Fifth Ave.  
Portland, OR 97204  
Fax (503) 295-0915

Albert M. Ferlo, Jr.  
U.S. Department of Justice  
Env't & Natural Resources Div.  
Appellate Section  
9th & Pennsylvania Ave. N.W.  
Room 2336  
Washington, D.C. 20530  
Fax (202) 514-4240

Scott Horngren  
Haglund & Kirtley  
1800 One Main Place  
101 S.W. Main  
Portland, OR 97204  
Fax (503) 225-1257

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

Executed on this 4<sup>th</sup> day of April, 1996, at Seattle,  
Washington.

  
KIMBERLY K. HAWKS

Addendum A

ROM : WELC

APR. 3 1996 5:06PM P 1  
PHONE NO. : 541 485 2457

04/08/86 10:00 2541 485 8344

US DIST. COURT

001

FILED

95 APR -3 PM 3:13

CLERK U.S. DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE, OREGON

BY

Post-Net Fax Note	7671	Date	4/3
To	M. Dugan	From	USDC
City		Co.	
Phone #		Phone #	
Fax #		Fax #	

Post-Net Fax Note	7671	Date	4/3	Page	5
To	Kristen Boyles	From	WELC		
City	WLD F	Co.			
Phone #		Phone #			
Fax #		Fax #			

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

SIERRA CLUB  
LEGAL DEFENSE FUND

APR 03 1996

RECEIVED

NORTHWEST FOREST RESOURCE COUNCIL,  
an Oregon Corporation,

Plaintiff,

and

SCOTT TIMBER CO., VAAGEN BROS.  
LOMBER INC., and WESTERN TIMBER  
CO.,

Plaintiff-intervenor

vs.

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

Defendants,

and

OREGON NATURAL RESOURCE COUNCIL,  
et al.

Defendant-intervenor

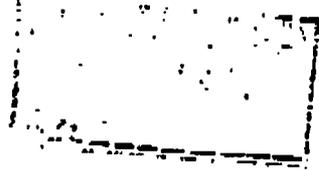
Case No. 95-6244  
Lead Case

Case No. 95-6267  
Case No. 95-6384  
Consolidated cases

ORDER

Defendants have moved (#393) to extend the court's

1 - SECOND AMENDED ORDER



APR. 3. 1996 5:07PM P 2  
PHONE NO. : 541 465 2457

M : WELC

04/03/96 16:10 #541 465 6344

US DIST. COURT

002

January 23, 1996 stay of its January 19, 1996 order until such time as the Ninth Circuit Court of Appeals issues its decision on appeal of the January 19, 1996 order. After hearing oral argument on March 22, 1996, this court extended the stay until April 3, 1996, in order to facilitate further briefing regarding which sales do not meet the court's "known to be nesting" standards and as to which harvesting must commence immediately in order to meet the September 30, 1996 expiration of the Reconciliation Act.

In response to the March 22, 1996 hearing, NFRS submitted a memorandum listing 63 sales with regard to which the government has determined no threatened or endangered bird species are "known to be nesting" under the standards articulated in this court's January 19, 1996 order.<sup>1</sup> NFRS's Second Supplemental Memorandum in Opposition to Defendants' Motion for Extension of January 31, 1996 Stay (#416) at 2-3. Scott Timber Company submitted a memorandum listing 11 sale units which should be released "[a]t a minimum." Scott Timber Co.'s Response Following March 22, 1996 Hearing (#417) at 2. In all, plaintiffs have listed 74 sale units with respect to which they contend harvesting must commence by April 1, 1996, in order to meet the Reconciliation Act's September 30, 1996 deadline.

<sup>1</sup> On one of the sale units of the Winriver sale, the Forest Service detected evidence of spotted owl nesting; since NFRS only opposes extension of the stay as to 63 sale units, it appears NFRS does not oppose extension of the stay as to this sale unit.

WM : WELC

APR. 3. 1996 5:07PM P 3  
PHONE NO. : 541 485 2457

04/03/96 10:11

541 485 2444

US DIST. COURT

003

The government concedes that, under the "standard articulated by this Court, . . . 100 units are subject to release, including the 75 units for which plaintiffs seek immediate release. . . . Defendants' Response Pursuant to Court's March 22, 1996 Order (#419) at 3. Nevertheless, the government urges the court to extend the stay as to all 100 sale units, arguing that the balance of harms is in its favor given the potential damage to marbled murrelets. In the event the court does not extend the stay, the government urges a five-day stay so that it may seek a stay with the Ninth Circuit Court of Appeals.<sup>3</sup>

In the event the court declines to extend the stay with regard to all 100 sale units, the government argues that the stay should be extended with regard to 22 sale units for which the court's "known to be nesting" standards were almost, but not quite, met. With regard to 13 of these 22 sale units (the 13 sale units are listed at page four of defendant's Response Pursuant to Court's March 22, 1996 Order (#419)), the Forest Service detected murrelets circling over sale unit boundaries. With regard to the other nine sale units (also listed at page four of defendant's response (#419)), the Forest Service observed murrelet nesting behavior near, but outside, sale unit

<sup>3</sup> The government also asks the court to extend the stay with regard to the 48 sales that meet the court's "known to be nesting" standards. However, because the court's order does not require the release of sale units meeting these standards, no injunctive relief is necessary with regard to these sale units.

3 - SECOND AMENDED ORDER

CM : WELC

APR. 3. 1996 5:08PM P 4  
PHONE NO. : 341 485 2457

04/03/96 10:12 841 485 8344

US DIST. COURT

0004

boundaries.

Throughout this litigation, the court has repeatedly emphasized its reluctance to allow judicial procedure to trump the intent of Congress. This is what may happen if plaintiffs are not able to execute their timber sale contracts by September 30, 1996. At the same time, the court is mindful of the irreparable harm that may result from the harvesting of actual and potential marbled murrelet habitat. Moreover, while deeming it unlikely the Court of Appeals will reverse this court's January 19, 1996 order, the court recognizes the potential for some modification of the "known to be nesting" standards articulated in the January 19, 1996 order.

With these principles in mind, the court decides as follows. With regard to the 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 and as to which the defendants have determined no threatened or endangered bird species is "known to be nesting" under the standards articulated by this court, the January 26, 1996 stay is extended 60 days.

With regard to the 22 sale units as to which overhead circling or near-boundary nesting behavior was observed, the January 26, 1996 stay is extended 14 days.

As to the 52 sale units as to which plaintiffs claim a need to commence harvest immediately in order to meet the

4 - SECOND AMENDED ORDER

WELC

APR. 3. 1996 5:09PM P 5  
PHONE NO. 1 541 485 2457

04/03/96 16:13 541 485 5344

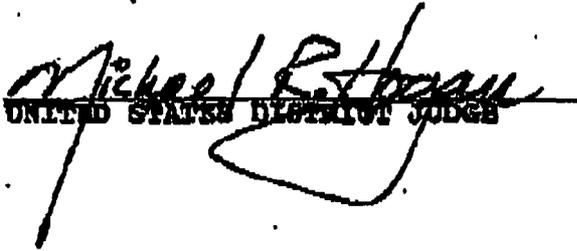
US DIST. COURT

005

September 30, 1996 deadline, as to which the defendants have determined no threatened or endangered bird species is "known to be nesting" under the standards articulated by this court, and which are not included in the 22 sale units on which threatened or endangered birds are "almost" known to be nesting, the January 26, 1996 stay is extended 5 days.

As to the 46 sale units as to which the relevant government agency determined threatened or endangered bird species are "known to be nesting" under the standards articulated in the January 19, 1996 order, there is not a sufficient controversy before the court insofar as plaintiffs have not challenged the government's "known to be nesting" determinations and do not at this time seek the release of these sale units. Furthermore, the sale unit of the Winriver sale within which spotted owls are known to be nesting need not be released.

DATED this 3<sup>rd</sup> day of April, 1996.

  
UNITED STATES DISTRICT JUDGE

5 - SECOND AMENDED ORDER

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

DATE: March 22, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message and 23 pages **NFRC BRIEF**

PLEASE DELIVER TO:

Don Barry	208-4684
Bob Baum	
Dave Gayer	208-3877
Dianh Bear	456-0753
Michelle Gilbert,	
Ellen Athas	305-0429
Mike Gippert,	690-2730
Tim Obst, Jay McWhirter	
Greg Frazier	720-5437
Jeff Handy (503)	326-3807
Nancy Hayes	208-5242
Elena Kagan	456-1647
Don Knowles (503)	326-6282
Karen Mouritsen	219-1792
Roger Nesbit (503)	231-2166
Chris Nolin	395-4941
Tom Tuchmann (503)	326-6254
Sue Zike (503)	326-7742
Jean Williams,	
Ellen Kohler	305-0275
Terry Garcia	482-4893

**MESSAGE:**

Attached are copies of three briefs which respond to the Known to be nesting and next high bidder issue. One brief is from NFRC and it combines both issues. The other two brief were filed by Scott Horngren - one on behalf of Scott timber on the Known to be nesting issue, and the other on behalf of Vegan Brothers addressing the release of the Gaterson Sale. The Gaterson Sale brief addresses argument raised by SCLDF in their appeal on the enjoined sales issue.

Our reply brief is due to be filed on April 1, 1996, and we hope to be able to circulate a draft for comment by COB Thursday, March 28. The case is set for oral argument on May 7, 1996 in Portland, OR. The court will release the identity of the Panel for these appeals on April 29, 1996.

**NOTE, THE THREE BRIEFS WILL BE FAXED SEPARATELY DUE TO THE LENGTH OF THE BRIEFS**

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 BRIEF

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

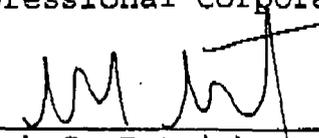
Of Attorneys for Plaintiff-  
Appellee Northwest Forest  
Resource Council

**CORPORATE DISCLOSURE STATEMENT  
PURSUANT TO FED. R. APP. P. 26.1**

Plaintiff-appellee Northwest Forest Resource Council has no parent companies, subsidiaries or affiliates that have issued shares to the public.

Dated this 21st day of March, 1996.

MARK C. RUTZICK LAW FIRM,  
A Professional Corporation

By: 

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

~~CONFIDENTIAL~~

C:\ATTY\N01-9506\18B91045.LHO

i

## TABLE OF CONTENTS

	Page
Statement of Jurisdiction . . . . .	1
Attorneys Fees . . . . .	1
Statement of the Issue . . . . .	1
STATEMENT OF THE CASE . . . . .	2
1. The emergency timber sale program of 1995 . . . . .	2
2. The Secretaries' response to section 2001(k) . . . . .	4
3. District court litigation . . . . .	6
a. FY 1991-95 sales . . . . .	6
b. Sales withheld under the "known to be nesting" exemption . . . . .	7
c. Sales withheld under various implied exemptions to subsection (k) (1) . . . . .	8
d. The <i>Pilchuck Audubon</i> case . . . . .	10
4. Timber sales in dispute under section 2001(k) . . . . .	11
5. The Secretaries' interpretation of section 2001(k) . . . . .	12
6. Recent congressional action on section 2001(k) . . . . .	12
Summary of Argument . . . . .	16
ARGUMENT . . . . .	18
I. THE DISTRICT COURT CORRECTLY HELD THAT CONGRESS DID NOT INTEND THE (k) (2) EXEMPTION TO BLOCK RELEASE OF EVERY TIMBER SALE UNIT THAT IS "OCCUPIED" UNDER THE PSG PROTOCOL . . . . .	18
A. Standard of review . . . . .	18
B. History of the Forest Service "murrelet" timber sales . . . . .	18

C. The Pacific Seabird Group Protocol . . . . . 20

D. Congressional consideration of the Forest Service murrelet timber sales . . . . . 22

E. The Secretaries' interpretation of section 2001(k)(2) has resulted in the release of none of the occupied murrelet sale units . . . . . 29

F. Neither step of the Chevron doctrine requires a court to accept an informal agency interpretation that is clearly contrary to congressional intent and frustrates congressional policy . . . . . 30

G. The district court applied Chevron correctly by interpreting the statute according to its plain meaning where the language and legislative history show an unambiguous congressional intent, and by deferring to the Secretaries where congressional intent is not clear . . . . . 32

H. The district court correctly held that the "within the acreage that is the subject of the sale unit" clause in section 2001(k)(2) unambiguously precludes the Secretaries from relying on nesting outside the boundaries of a sale unit, and therefore precludes automatic reliance on an occupancy determination under the PSG protocol . . . . . 35

1. The district court correctly applied the plain meaning of the "within the acreage that is the subject of the sale unit" clause in the statute . . . . . 36

2. The Secretaries' position is contrary to the intent expressed in the congressional reports indicating that the statute will release this group of timber sales . . . . . 37

3. The explanation of the bill by its author, and the sponsors' letter, show that Congress specifically rejected the use of the protocol's occupancy standard in (k)(2) . . . . . 38

4. The Secretaries' interpretation is contradicted by the administration's prior negotiations with Congress . . . . . 39

C:\ATTY\N01-9506\1RB91045.LHO

5. The Secretaries' position impermissibly attributes to Congress the intent of the Murray amendment rejected by the Senate in March 1995 . . . . 40

6. Congress did not merely codify the already-planned release of unoccupied sale units . . . . 41

7. The Senate's recent report and its vote against repealing section 2001 show congressional approval of the district court's rulings in this case . . . . 41

8. The Secretaries' cursory, unsupported interpretation of the statute has no persuasive force . . . . 42

9. The Secretaries' interpretation of the "known to be nesting" exemption is impermissible under either step one or step two of Chevron . . . . 43

II. THE DISTRICT COURT CORRECTLY HELD THAT SECTION 2001(k)(1) REQUIRES THE AWARD OF PREVIOUSLY ENJOINED, WITHDRAWN OR CANCELLED TIMBER SALES . . . . . 44

A. Standard of review . . . . . 44

B. The plain meaning of the statute releases all sales including cancelled, withdrawn and enjoined sales . . . . 44

C. As the Secretaries conceded below, all the sales in question were "offered" prior to enactment of the Rescissions Act . . . . . 45

D. The statute applies to "all timber sale contracts" without exception . . . . . 46

E. No action by the offering agency or a court after a sale is offered exempts a sale from release under section 2001(k)(1) . . . . . 47

F. The second sentence of section 2001(k)(1) confirms that sales must be released even if bids were previously rejected . . . . . 49

G. The existence of the express (k)(2) exemption negates the existence of an implied exemption in (k)(1) . . . . 50

H. The legislative history of section 2001(k) confirms that Congress intended to release all previously-offered sales including cancelled, withdrawn and enjoined sales where bids were previously rejected . . . . 51

1. The Conference Report . . . . . 51

2. The author's interpretation . . . . . 52

3. The recent congressional endorsement . . . . . 52

I. Section (k)(1) does not violate the separation of powers . . . . . 53

III. THE DISTRICT COURT CORRECTLY HELD THAT SECTION 2001(k)(1) REQUIRES THE AWARD OF A TIMBER SALE TO A QUALIFIED LOWER BIDDER AT THE HIGH BID PRICE IN ACCORDANCE WITH STANDARD AGENCY REGULATIONS WHERE THE ORIGINAL HIGH BIDDER ON A SALE IS NO LONGER ABLE OR WILLING TO ACCEPT AWARD OF THE SALE . . . . . 55

A. Standard of review . . . . . 55

B. Forest Service and BLM procedures provide for award of a timber sale to the highest qualified bidder, at the high bid price, when the original high bidder cannot or will not accept award of a sale . . . . . 55

C. Section 2001(k)(1) does not contain an implied exemption for sales where the high bidder is unable or unwilling to accept a sale . . . . . 56

D. The core purpose of section (k)(1) is to remove the Secretaries' discretion not to award timber sales . . . . . 57

E. The legislative history of section 2001(k) contains nothing to alter the plain meaning of the statute . . . . . 60

CONCLUSION . . . . . 62

C:\ATTY\N01-9506\AKB91045.LHO

v

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Allen v. Shalala</i> , 48 F.3d 456 (9th Cir. 1995) . . . . .	18, 44, 55
<i>Almero v. I.N.S.</i> , 18 F.3d 757 (9th Cir. 1994) . . . . .	30, 31, 36
<i>American Horse Protection Association, Inc. v. Watt</i> , 694 F.2d 1310 (D.C. Cir. 1982) . . . . .	54
<i>Amtrak v. Boston &amp; Maine Corp.</i> , 503 U.S. 407 (1992) . . . . .	31
<i>Bob Jones University v. United States</i> , 461 U.S. 574 (1983) . . . . .	42
<i>Boise Cascade Corp. v. U.S.E.P.A.</i> , 942 F.2d 1427 (9th Cir. 1991) . . . . .	50
<i>Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.</i> , 467 U.S. 837 (1984) . . . . .	30-33, 35, 36, 43
<i>Chicago v. Environmental Defense Fund</i> , - U.S.-, 128 L. Ed. 2d 302 (1994) . . . . .	31
<i>Church of Scientology v. U.S. Department of Justice</i> , 612 F.2d 417 (9th Cir. 1979) . . . . .	39
<i>CLR Timber Holdings, Inc. v. Babbitt</i> , Civil No. 94-6403-TC (D. Or. October 1994) . . . . .	19, 20, 22
<i>Commissioner v. Asphalt Products Co., Inc.</i> , 482 U.S. 117 (1987) . . . . .	47
<i>Edwards v. Bowen</i> , 785 F.2d 1440 (9th Cir. 1986) . . . . .	42
<i>FEA v. Algonquin SNG, Inc.</i> , 426 U.S. 548 (1976) . . . . .	39
<i>Fertilizer Institute v. U.S. E.P.A.</i> , 935 F.2d 1303 (D.C. Cir. 1991) . . . . .	43

<i>Gray v. First Winthrop Corp.</i> , 989 F.2d 1564 (9th Cir. 1993)	53
<i>Headrick v. Rockwell Intern. Corp.</i> , 24 F.3d 1272 (10th Cir. 1994)	32
<i>In Re Gerwer</i> , 898 F.2d 730 (9th Cir. 1990)	51
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	40, 41
<i>Keams v. Tempe Technical Institute, Inc.</i> , 39 F.3d 222 (9th Cir. 1994)	51
<i>Lewis v. United States</i> , 663 F.2d 889 (9th Cir. 1981), cert. denied, 457 U.S. 1133 (1982)	42
<i>Martin v. OSHRC</i> , 499 U.S. 144 (1991)	32
<i>Montana Wilderness Association v. U.S. Forest Service</i> , 655 F.2d 951 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982)	42
<i>National Ass'n of Regulatory Utility Com'rs v. I.C.C.</i> , 41 F.3d 721 (D.C. Cir. 1994)	36
<i>NLRB v. United Food and Commercial Workers Union</i> , 484 U.S. 112 (1987)	31
<i>Oregon Natural Resources Council v. Thomas</i> , Appeal No. 95-36256 (9th Cir.)	13
<i>Pennsylvania v. The Wheeling and Belmont Bridge</i> , 59 U.S. (18 How.) 421, 15 L. Ed. 435 (1855)	54, 55
<i>Plaut v. Spendthrift Farm, Inc.</i> , 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)	54, 55
<i>Public Employees v. Betts</i> , 492 U.S. 158 (1989)	32
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983)	38

C:\ATTY\N01-9506\1RB91045.LHO

vii

<i>Robertson v. Seattle Audubon Society</i> , 503 U.S. 429 (1992) . . . . .	4, 53, 55
<i>S.J. Amoroso Const. Co. v. U.S.</i> , 981 F.2d 1073 (9th Cir. 1992) . . . . .	38
<i>Seatrain Shipbuilding Corp. v. Shell Oil Co.</i> , 444 U.S. 572 (1980) . . . . .	42
<i>Securities Industry Ass'n v. Connolly</i> , 883 F.2d 1114 (1st Cir. 1989) cert. denied, 495 U.S. 956 (1990) . . . . .	47
<i>Sierra Club v. Department of Transp.</i> , 948 F.2d 568 (9th Cir. 1991) . . . . .	32, 42
<i>Toussaint v. McCarthy</i> , 801 F.2d 1080 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) . . . . .	54, 55
<i>Tyler v. U.S.</i> , 929 F.2d 451 (9th Cir.), cert. denied, 502 U.S. 845 (1991) . . . . .	31
<i>United States v. Klein</i> , 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871) . . . . .	53
<i>United States v. Riverside Bayview Homes</i> , 474 U.S. 121 (1985) . . . . .	42
<i>United States v. Van Den Berg</i> , 5 F.3d 439 (9th Cir. 1993) . . . . .	46
<i>Van Blaricom v. Burlington Northern R. Co.</i> , 17 F.3d 1224 (9th Cir. 1994) . . . . .	38
<b>Statutes</b>	
Administrative Procedure Act, 5 U.S.C. 551-706 . . . . .	31, 32, 48
Endangered Species Act of 1973, 16 U.S.C. 1531-44 . . . . .	5, 18, 24
Equal Access To Justice Act, 28 U.S.C. 2412(b) and (d) . . . . .	1

C:\ATTY\N01-9506\1RB91045.LHO

viii

Fiscal Year 1995 Emergency Supplemental Appropriations  
for Disaster Relief and Rescissions Act,  
Pub. L. 104-19, 109 Stat. 240 (July 27, 1995) . . . 1-8,  
10-18, 23-30, 32, 34-38, 40-53, 55-60

Pub. L. 101-121, 103 Stat. 745,  
Section 318 . . . 3, 6, 7, 10-12, 18, 23, 24, 26, 46, 49,  
51-53, 55

### **Regulations**

36 C.F.R. Part 223 . . . . . 45, 49, 56, 60  
43 C.F.R. 5430.1 . . . . . 46  
43 C.F.R. 5441.1-1 . . . . . 46

### **Legislative History**

141 Cong. Rec. H3218 (daily ed. March 15, 1995) . . . . . 23  
141 Cong. Rec. H3233 (daily ed. March 15, 1995) . . . 4, 52, 61  
141 Cong. Rec. H5686 (daily ed. June 7, 1995) . . . . . 27  
141 Cong. Rec. H6638 (daily ed. June 29, 1995) . . . . . 29  
141 Cong. Rec. S4870 (daily ed. March 30, 1995) . . . 24, 40, 41  
141 Cong. Rec. S4872 (daily ed. March 30, 1995) . . . . . 25  
141 Cong. Rec. S4873 (daily ed. March 30, 1995) . . . . . 25  
141 Cong. Rec. S4875 (daily ed. March 30, 1995) . . . . . 25  
141 Cong. Rec. S4882 (daily ed. March 30, 1995) . . . . . 4, 25  
141 Cong. Rec. S10463 (daily ed. July 21, 1995) . . . . . 4, 28  
141 Cong. Rec. S10464 (daily ed. July 21, 1995) . . . . . 28, 38  
141 Cong. Rec. S10465 (daily ed. July 21, 1995) . . . . . 27  
142 Cong. Rec. S2005-28 (daily ed. March 14, 1996) . . . 14-16  
142 Cong. Rec. S2309 (daily ed. March 19, 1996) . . . . . 13

H. Conf. Rep. 104-124 at 137, reprinted at  
141 Cong. Rec. H5013 (May 16, 1995) . . . 26, 37, 51, 61

H. Rep. 104-71 (March 8, 1995) . . . . . 23

S. Rep. 104-17 (March 24, 1995) . . . . . 26, 38, 51

S. Rep. 104-236 (March 6, 1996) . . . . . 13, 41

**Miscellaneous**

BLM Timber Sale Procedures Handbook . . . . . 46, 50, 56

H.R. 2745 . . . . . 14

S. 1594 . . . . . 12-14

**Statement of Jurisdiction**

Plaintiff-appellee Northwest Forest Resource Council ("NFERC") accepts the Federal Appellants' statement of jurisdiction and Pilchuck Audubon's statement of jurisdiction.

**Attorneys Fees**

NFERC intends to seek attorneys fees for this appeal under the Equal Access To Justice Act, 28 U.S.C. 2412(b) and (d).

**Statement of the Issue**

1. Whether the district court correctly held that the statutory exemption in section 2001(k)(2) of the 1995 Rescissions Act, prohibiting release of certain timber sale units where "any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit," does not allow the defendant Secretaries of Agriculture and Interior to withhold a sale unit based solely on the fact that the unit is "occupied" by a marbled murrelet according to a scientific protocol Congress rejected in the Rescissions Act, and which does not make the specific determination required by the statutory exemption.

2. Whether the district court correctly held that the plain language of section 2001(k)(1) of the 1995 Rescissions Act, which requires the award and release of all timber sales offered between 1990 and July 27, 1995 in a specified geographic area, (a) does not implicitly exempt otherwise-covered sales that were cancelled, withdrawn or enjoined before enactment of

the Rescissions Act, and (b) requires a timber sale to be awarded to another qualified bidder in accordance with agency regulations where the original high bidder has gone out of business or has become unable or unwilling to accept the award of the sale.

#### STATEMENT OF THE CASE

1. *The emergency timber sale program of 1995.*

In section 2001 of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. 104-19, 109 Stat. 240 (July 27, 1995), Congress enacted three important measures to restore the federal timber sale program after years of diminishing volume.

One major initiative is a nationwide program to accelerate salvage logging to promote the ecological health of forests throughout the country. Section 2001(b)-(c).

The other two measures are aimed specifically at restoring the Pacific Northwest timber sale program, which had been virtually halted for half a decade by prior lawsuits and environmental controversies.

In section 2001(d), Congress eased the way for new timber sales in the region covered by the President's Pacific Northwest Forest Plan, known as Option 9, by providing legal sufficiency for new sales in the region for 1995 and 1996.

In section 2001(k) - the subject of these appeals - Congress mandated the award and release, within 45 days of

C:\ATTY\N01-9906\1RB21045.LHO

3

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 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.*<sup>1</sup> Congress provided absolute legal sufficiency for logging

---

<sup>1</sup> Section 318 of Pub. L. 101-121, 103 Stat. 745 (1989), referred to in section 2001(k), was enacted by Congress in 1989  
(continued...)

on these sales through September 30, 1996 by ordering their award and release and permitting their completion 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 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.

**2. The Secretaries' response to section 2001(k).**

The mandatory release date for sales under section 2001(k) was September 10, 1995 - 45 days after the Rescissions Act was enacted. However, immediately after the President signed the bill, the defendant Secretaries took a series of steps that

---

<sup>1</sup> (...continued)  
to mandate timber sales in specified volumes in fiscal year 1990 in Oregon and Washington. See *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 432 (1992).

C:\ATTY\N01-9506\1RB91048.1MO

5

resulted in withholding over 90% of the timber subject to the statute, and triggered the litigation leading to these appeals:

1. On August 22, 1995 the Secretaries issued an Interpretation Memorandum asserting that section 2001(k)(1) only applies to sales offered in fiscal year 1990, and does not release sales offered in fiscal years 1991-95, or any sales offered in the national forests in eastern Oregon or Washington. ER 22-23. On that basis they refused to release some 246 million board feet of uncompleted FY 1991-95 timber sales.

2. On August 23, 1995 the Secretaries issued a second Interpretation Memorandum interpreting the "known to be nesting" exemption in subsection (k)(2) to withhold every timber sale unit<sup>2</sup> then suspended because of concerns relating to the marbled murrelet, a bird species listed as threatened under the Endangered Species Act - some 240 million board feet of FY 1990 section 318 sales. SER 22a, Exhibit 1. All these sale units were suspended because they had been judged to be "occupied" by a marbled murrelet under an unpublished protocol issued by the Pacific Seabird Group ("PSG"), a professional society of biologists. The Secretaries contended that Congress had allowed them to base their nesting decisions under (k)(2) on their previous determinations of occupancy under the PSG protocol. *Id.*

---

<sup>2</sup> Forest Service timber sales are planned as a group of "units" 10-40 acres in size in the same geographic area, but separated by intermingled stands that are not planned for logging as part of the sale.

C:\ATTY\N01-9506\1RBS1045.LHO

6

3. These two interpretations reduced the potential reach of section (k) from 650 million board feet of sales to 194 million board feet of sales. However, without explanation, the Secretary of Agriculture refused to release any of the 130 million feet of Forest Service sales subject to release. CR 69, Exhibit B.

On September 8, 1995, on the eve of the district court summary judgment hearing in this case, the Secretary of Interior released 64 million board feet of BLM section 318 sales. However, the following week the BLM was ordered by the administration to refuse to execute several of these contracts, a position maintained until NFRC threatened further litigation to achieve the release of the sales. CR 113 at 6-7.

Thus, by the mandatory September 10 release date the Secretaries had awarded and released only 64 million of the 650 million board feet of sales subject to section 2001(k), had released that small volume only when faced with this suit by NFRC, and later tried to renege on that minor step.

**3. District court litigation.**

NFRC is a coalition of several hundred timber and logging companies in Oregon and Washington. NFRC asserted three categories of claims in this case:

**a. FY 1991-95 sales.**

NFRC initially sued the Secretaries in early August for award and release of the 246 million board feet of uncompleted

C:\ATTY\NO1-9506\1RB91045.LHD

7

FY 1991-95 sales when the agencies disclosed they would not release those sales by September 10. ER 1-9. NFRC alleged that the statute requires the release of FY 1991-95 sales in addition to FY 1990 Section 318 sales, and applies to the national forests throughout Oregon and Washington that were subject to section 318(a).

On September 13, 1995 the district court ruled that the FY 1991-95 sales and sales in national forests in eastern Oregon and Washington are subject to the statute. CR 59. On October 17, 1995 the district court issued an injunction ordering award and release of these sales. 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 most of the contested sales were awarded. The Secretaries' appeal of these orders (No. 95-36042) was argued January 8, 1996 before Judges Noonan, Leavy and Hawkins, and has been submitted.

**b. Sales withheld under the "known to be nesting" exemption.**

After the Secretaries announced their broad interpretation of the "known to be nesting" exemption in section 2001(k)(2), NFRC amended its complaint to seek the release of the sales withheld under (k)(2) based on "occupancy" determinations under the PSG protocol, except where there is physical evidence of current nesting within a sale unit by a threatened or endangered bird species. CR 63.

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 on observations of behavior outside the sale unit boundaries or in the air above the canopy of the forest. The court ruled that the Secretaries have discretion to determine what evidence within the sale unit boundaries establishes murrelet nesting. ER 340 at 20-21.

The district court also ruled that while there must be evidence of current nesting, the Secretaries have discretion to determine what historical evidence establishes that the nesting remains current. ER 340 at 20.

The district court ordered the Secretaries to release the sale units that cannot be withheld under the statute. ER 340 at 21. On January 25, 1996 the court stayed the order for 60 days pending appeal. ER 63.

**c. Sales withheld under various implied exemptions to subsection (k)(1).**

When the Secretary of Agriculture refused without explanation to release the 130 million board feet of sales he had conceded to be covered by the statute, NFRC expanded the case

C:\ATTY\N01-9506\1RB91045.1HO

9

again to challenge that inaction. CR 64. In response to NFRC's motion for relief as to those sales, the Agriculture Secretary belatedly released about half the sales - 66 million board feet - between late September and early November. CR 113.

The Agriculture Secretary continued to withhold the remaining sales, and also refused to award and release certain of the FY 1991-95 sales subject to the October 17 injunction. Some sales had previously been enjoined by a court; some sales had been withdrawn or cancelled by the Forest Service after being challenged in court; some sales could not be awarded under their original terms because of physical changes on the ground such as eradication of tree markings; and some sales could not be awarded to the original high bidder because the company had in the interim gone out of business, become ineligible to receive the sale, or had declined the award. The Forest Service argued that it was not required to proceed further with most of these sales, although it ultimately agreed that seven of the challenged sales must be awarded.<sup>3</sup>

On January 10, 1996 the district court ruled that the cancelled, withdrawn and enjoined sales must be awarded, and that where the original high bidder on a sale could no longer accept the award, the agencies are required to award the sale to

---

<sup>3</sup> The Forest Service conceded that the Boulder Krab, Elk Fork, First, Last, Gatorson, Tip and Tiptop sales must be awarded and released. CR 224. The first four of these sales have in fact been awarded and released.

another qualified bidder, at the high bid price, in accordance with existing agency regulations. ER 331 at 22. The district court ruled, however, that sales need not be awarded if it is impossible to do so. *Id.* at 24.<sup>4</sup>

The district court ordered the award and release of the sales that are subject to the statute, except sales enjoined by another court, to which the ruling was limited to a declaratory judgment pending further proceedings in the other courts. ER 331 at 24-25. The district court denied a stay of this order, as did a motions panel of this court on February 8, 1996. Order (February 8, 1996) at 1. The Secretaries are complying with the January 10 order.

d. *The Pilchuck Audubon case.*

In November 1995 Pilchuck Audubon Society and other environmental groups filed an action against the Secretaries challenging their interpretation of section 2001(k) in two respects: (1) they alleged that section (k) does not release timber sales that were cancelled by the offering agency before enactment of the Rescissions Act, including more than three dozen sales that had already been awarded and released by the Secretaries under section (k)(1), as well as many of the

---

<sup>4</sup> A timber company, not represented by NFERC, had intervened to seek award of a sale offered in 1989. NFERC did not join in that argument. Judge Hogan ruled that section (k) does not require award of sales offered before October 23, 1989, the date of enactment of section 318. ER 331 at 13. The timber company has not appealed that ruling.

C:\ATTY\NO1-9606\1RB91049.1HO

11

remaining sales still then in dispute in the district court; and (2) they alleged that section (k) does not apply to timber sales offered before the date of enactment of section 318.

In the January 10 order, the district court rejected Pilchuck's first claim, and found that other rulings in the order had mooted the second claim. ER 331 at 25. Pilchuck moved for an injunction pending appeal barring award and release of the challenged sales. CR 335. The district court denied the motion on January 25, 1996, and the motions panel of this court denied the motion on February 8, 1996.

**4. Timber sales in dispute under section 2001(k).**

The Forest Service and BLM advised the district court that the volume of currently-delayed timber sales in controversy under section 2001(k) is approximately 656 million board feet, consisting of 410 million board feet of section 318 sales and 246 million board feet of FY 1991-95 sales, as follows:<sup>5</sup>

	<u>Forest Service</u>	<u>BLM</u>	<u>Total</u>
	<i>(millions of board feet)</i>		
FY 1990 Section 318 Sales	336	74	410
FY 1991-95 Sales	<u>121</u>	<u>125</u>	<u>246</u>
Total	457	199	656

---

<sup>5</sup> There is no single record citation for these figures. NFRFC derived these figures from various reports and declarations filed by the defendants, e.g., CR 21, CR 69, Exhibit B, CR 176, and from various compliance reports ordered by the district court. NFRFC presented these figures to the district court, and the defendants did not question the accuracy of the figures.

5. *The Secretaries' interpretation of section 2001(k).*

The Secretaries contend that they have completely fulfilled the intent of Congress under section 2001(k) by releasing 130 million board feet of the 650 million board feet of sales at issue: 64 million feet of BLM sales and 66 million feet of Forest Service sales. This contention rests on the following interpretations of section 2001(k):

1. Congress did not intend to release any of the 246 million board feet of uncompleted FY 1991-95 sales.

2. Congress did not intend to release any sale units occupied by a marbled murrelet under the PSG protocol - 240 million board feet of uncompleted sales.

3. Congress did not intend to release 80 million board feet of FY 1990-95 enjoined sales, withdrawn sales and sales where the original high bidder can no longer accept the award of the sale.<sup>6</sup>

6. *Recent congressional action on section 2001(k).*

On March 6, 1996 the Senate Appropriations Committee reported out S. 1594, Making Omnibus Consolidated Rescissions And Appropriations For the Fiscal Year Ending September 30, 1996 And For Other Purposes. Section 325 of the bill amends section 2001(k) by deleting the phrase "in fiscal years 1995 and 1996" and by adding new paragraphs (k)(4) and (k)(5) to allow the

<sup>6</sup> Some of the withheld sales fall into more than one of these categories.

KEY

C:\ATTY\N01-9506\1RB91045.1HO

*Can provide rep w/out murrelets w/ a purchaser  
but we've heavily figured out way to do exactly this!*

*Only poss diff - sufficiency?*

13

Secretaries to provide replacement volume for section (k) timber sales, with the agreement of the purchaser, even if a threatened or endangered species is not known to be nesting within the sale unit. The Senate Report, S. Rep. 104-236 (Attachment A to this brief), discusses the district court rulings in this case:

SEC 325. The previous language regarding the redefinition of the marbled murrelet nesting area is replaced with a provision that amends section 2001(k) of Public Law 104-19. The language does not expand the sales to be released under this provision, and does not affect prior judicial decisions. 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.

*Order sales*

*?  
be hidden etc.*

*murrelets*

S. Rep. 104-236 at 46 (emphasis added). On March 19, 1996 the Senate passed S. 1594 by a vote of 79-21, approving Senate Report 104-236. 142 Cong. Rec. S2309 (daily ed. March 19, 1996).

The September 13, 1995 order is the order in this case on the geographic and temporal scope of section (k)(1) that is the subject of pending appeal No. 95-36042; the December 5, 1995 order is the order on section (d) and section (k) in Oregon *Natural Resources Council v. Thomas*, Civil No. 95-6272, that is the subject of pending appeal No. 95-36256; the January 17, 1996 order is the Amended Order in this case (replacing the January

10 order) that is the subject of these appeals, and the January 19, 1996 order is also the subject of these appeals.

On March 14, 1996 during the debate on S. 1594, the Senate rejected, by a vote of 54-42, a proposal by Senator Murray to repeal section 2001. 142 Cong. Rec. S2005-28 (daily ed. March 14, 1996) (Attachment B to this brief).<sup>7</sup> The district court's decisions in this case were a central issue in the debate on the floor of the Senate. Senator Murray submitted a letter from the President that urged repeal because of "[j]udicial interpretation of the timber rider as it has been applied to old growth forests . . ." - referring to this case. 142 Cong. Rec. S2019. Senator Murray argued that repeal was needed because "[t]he rider that passed last year suspended environmental safeguards . . . and, under subsequent court rulings, mandated unscientific timber sales." 142 Cong. Rec. S2006 (daily ed. March 14, 1996).

Senator Hatfield, floor manager of the bill (as of the 1995 Rescissions Act), also discussed "[a] Federal district judge and a court suit that he had to rule on relating to his interpretation of the rider." *Id.* at S2009.

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

---

<sup>7</sup> A measure to repeal section 2001 was also introduced in the House on December 7, 1995, but was never brought to a vote. H.R. 2745.

1. Here's what we give up.

2. Here's what we get

But:

1) We may have this already

- a. Emory is internal market
- b. Ref allowing bypass going bidding process to offer net tender

Problems

- 1. No notice + comment
- 2. Deben of emergency hit
- 3. ViState 2001k

1 1/2) Diff re  
sufficiency  
language ←

2) Even if not, it may not be something we can use very often.

C:\ATTY\N01-9506\1RB91045.1HO

15

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: "The only mandate in the rescissions act was this 650 million board feet . . . ." S2012.

In opposing repeal, Senator Hatfield disputed the administration's post-enactment claim that it was surprised by the content of section 2001:

If the administration's position now is one of surprise, or they did not realize what they were signing and they want it repealed, let them talk to their foresters, their experts, and not to the pollsters and the political counsel at the White House. . . .

. . . They knew every inch of the way and every word of the rider, and now they are trying to get out from under it. . . .

S2009. Senator Hatfield also confirmed the negotiations between Congress and the administration last year that preceded enactment of section 2001:

Oh, did we have long discussions with the White House on how do you define the presence of a marbled murrelet. They are reclusive kind of birds. If you find an eggshell, is that sufficient evidence? If you heard one fly over? So we said, "nesting." And we said the replacement for those areas and those sales, if you found a marbled murrelet nesting, could then be set aside

and replaced in like kind as a substitute sale.

S2009.

#### *Summary of Argument*

1. The district court properly interpreted section (k)(2) by enforcing its plain meaning where the intent of Congress is unambiguous, and by deferring to the defendant Secretaries where the statute may be ambiguous. Congress unambiguously rejected the use of the PSG protocol by limiting the (k)(2) exemption to nesting "within the acreage that is the subject of the sale unit," which is much narrower than occupancy under the PSG protocol.

All three congressional reports state that the suspended murrelet timber sales are to be released unless nesting is occurring within the sale unit, contradicting the Secretaries' argument that Congress intended every suspended sale unit to remain blocked. The floor statement of Senator Gorton, the author of (k)(2), expressly states that Congress rejected the administration's request to expand the (k)(2) exemption to include "occupancy." The Senate rejected an amendment by Senator Murray in 1995 that is identical to the Secretaries' interpretation of (k)(2). Finally, in March 1996 the Senate endorsed the district court's rulings in this case, and defeated a proposal to repeal section 2001 that was motivated largely by controversy over the district court's decisions.

2. The district court correctly ruled that the plain meaning of section (k)(1) requires the release of all previously-offered sales covered by the statute including sales that were cancelled, withdrawn or enjoined prior to enactment of the Rescissions Act. There is no implicit exemption in the statute for these categories of sales. The second sentence of (k)(1) addresses this issue directly by requiring award and release even if the bid bond of the original high bidder has been returned, an event that occurs only when a sale is cancelled, withdrawn or enjoined.

3. The district court also correctly ruled that the plain meaning of section (k)(1) requires the release of sales where the original high bidder has gone out of business or is otherwise unable or unwilling to accept award. The district court correctly ordered the defendant Secretaries to follow their own regulations to award a sale to a qualified lower bidder at the high bid price if the original high bidder is unable or unwilling to accept the award. Section (k)(1) removes the Secretaries' discretion not to award these sales.

**ARGUMENT**

**I. THE DISTRICT COURT CORRECTLY HELD THAT CONGRESS DID NOT INTEND THE (k)(2) EXEMPTION TO BLOCK RELEASE OF EVERY TIMBER SALE UNIT THAT IS "OCCUPIED" UNDER THE PSG PROTOCOL.**

**A. Standard of review.**

NFRC agrees with the appellants that this court's review of a district court interpretation of a statute is *de novo*. *Allen v. Shalala*, 48 F.3d 456, 457 (9th Cir. 1995).

**B. History of the Forest Service "murrelet" timber sales.**

The marbled murrelet was listed as a threatened species in September 1992. Within days, the Forest Service suspended 88 uncompleted Section 318 timber sales in murrelet habitat in coastal forests in Oregon and Washington pending consultation with the U.S. Fish and Wildlife Service ("FWS"). ER 108, Exhibit D (May 11, 1994 FWS biological opinion) at 1, 12. Although consultation is legally required to be completed in 135 days, 16 U.S.C. 1536(b), the consultation of these 88 sales took over one and one-half years, resulting in a biological opinion dated May 11, 1994.

The opinion found that 12 of the sales could proceed, but that 76 sales could not proceed due to jeopardy to the marbled murrelet: 43 because they contained at least one unit determined to be "occupied" by a marbled murrelet under the 1993 version of the PSG protocol, and 33 because two years of murrelet surveys had not yet been completed. ER 108, Exhibit D

at 5 and Table 1. One additional sale was withheld in a supplemental opinion, bringing the total to 77.

As a "reasonable and prudent alternative" for the 33 unsurveyed sales, the FWS proposed to complete two years of surveys and release a sale if none of its units were occupied. For the sales with one or more occupied units, no reasonable and prudent alternative was proposed. *Id.*, Exhibit D at 26. Although both the contract holders and the Forest Service had asked FWS to release individual unoccupied sale units even if another sale unit was occupied, the FWS refused to consider this alternative.

This biological opinion created severe problems for the contract holders, the local counties, the affected communities and the Forest Service. The contract holders faced the loss of 300 million board feet of timber they had relied on since 1990. The Forest Service faced tens of millions of dollars of contract claims by the purchasers, and also faced the loss of the millions of dollars of revenue it would receive from the harvest of the sales. The local counties, which receive 25% of Forest Service timber harvest receipts, faced millions of dollars of losses.

A group of eight of the Oregon contract holders, along with Coos County, Oregon, filed a lawsuit in the district court in Oregon against the FWS, *CLR Timber Holdings, Inc. v. Babbitt*, Civil No. 94-6403-TC (D. Or. October 1994), challenging the

biological basis of the May 11, 1994 biological opinion, challenging the use of the 1993 PSG protocol, and challenging the FWS' failure to consider the reasonable and prudent alternative of releasing individual unoccupied units. Amended Complaint, *CLR Timber Holdings, Inc. v. Babbitt* (October 1994). CR 49.

On June 12, 1995 the FWS issued an amended biological opinion on the 77 sales. ER 108, Exhibit F. It released 17 sales where surveys had been completed without finding occupancy. It released three sales that had been modified to eliminate occupied murrelet habitat.

As to the remaining 57 sales, the FWS modified its jeopardy opinion in two significant ways that the contract holders had urged: (1) it allowed the Forest Service to use the narrower 1994 PSG protocol to determine occupancy (rather than the broader 1993 protocol), and (2) it allowed the Forest Service to release individual unoccupied units on a sale even if another unit on the sale is occupied. *Id.* at 19-20. However, the result of the amended opinion was to continue to block harvest on all of the 140 occupied sale units. *Id.* at 7-9.

**C. The Pacific Seabird Group Protocol.**

The PSG protocol is an unpublished report entitled "Methods For Surveying For Marbled Murrelets In Forests: A Protocol For Land Management and Research" issued by the Pacific Seabird

Group Marbled Murrelet Technical Committee in March 1994. ER 22a, Exhibit 3.

The protocol is not designed to identify nesting by murrelets: "If biologists are interested in verifying nesting within the stand, PSG has developed a protocol that assists observers with nest verification . . . ." *Id.* at 8. Rather than identify nest sites, the protocol's objective is to "determine the probable presence or probable absence of murrelets in a forest stand . . . ." *Id.* at 2.

The protocol is designed to classify "forest stands" up to 350 acres in size. *Id.* at 3. The protocol distinguishes between a "nest stand" and an "occupied stand":

A **nest stand** is a stand with an active nest or a recent nest site as determined from a fecal ring or eggshell fragment. Evidence of a nest site also includes discovery of a chick or eggshell fragment on the forest floor.

An **occupied stand** is defined as the stand of potential habitat where murrelets have been observed exhibiting behaviors which have been observed in stands with evidence of nesting . . . .

*Id.* at 3-4 (emphasis and underscore in original).

The protocol recognizes that an occupied stand is not necessarily a nesting site: "Subcanopy behaviors in a stand, while **not necessarily indicating nesting**, means nesting could occur at some time, or the stand has some importance for breeding." *Id.* at 13 (emphasis added).

C:\ATTY\H01-2506\1RB91045.1HO

22

The protocol is not designed to determine occupancy within an individual sale unit, which is no more than 40 acres in size. It assesses entire stands, and surveys at least one quarter mile outside an individual sale unit. *Id.* at 9. A single detection of "occupied behavior" anywhere in the stand classifies the entire stand permanently as "occupied." *Id.* at 13.

The Secretary of Interior admitted the key features of the protocol in his answer to the complaint in *CLR Timber Holdings, Inc. v. Babbitt*, Civil No. 94-6403-TC:

. . . [T]o defendants' knowledge, murrelet nest surveys were not conducted in the sale units. . . . [F]ederal defendants admit that occupancy for the timber sales . . . may have been based on a murrelet flight over the stand, beneath the canopy, or occupancy within a quarter mile in a contiguous stand.

[I]n some instances, the 1993 Pacific Seabird Protocol provides that only one observation of any of the flying behaviors . . . may be sufficient to constitute occupancy.

*CLR Timber Holdings, Inc. v. Babbitt*, Civil No. 94-6403-TC, Federal Defendants Answer (December 9, 1994), ¶¶ 42, 43, CR 49, Exhibit 105.

**D. Congressional consideration of the Forest Service murrelet timber sales.**

From the beginning of Congress' consideration of an emergency salvage timber sale program in early 1995, the Forest Service murrelet sales were the central focus of the special Pacific Northwest timber supply problem Congress sought to address legislatively.

The House emergency salvage timber bill released all existing contracts in 30 days with no exceptions. 141 Cong. Rec. H3218 (daily ed. March 15, 1995), SER 32, Exhibit 3. The House report states that what is now section 2001(k)(1) would release the Forest Service murrelet sales:

The section also includes subsection (i), 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. The harvest of these sales was assumed under the President's Pacific Northwest Forest Plan, but their release has been held-up due to subsequent review by the U.S. Fish and Wildlife Service. Release of these sales will remove tens of millions of dollars of liability from the government for contract cancellation. Also, the revenues from timber receipts will increase by over \$155 million from current estimates.

H. Rep. 71 (104th Cong., 1st Sess. March 8, 1995), ER 42 at 22 (emphasis added).<sup>8</sup> The Forest Service murrelet sales are the only group of Section 318 sales "held-up due to subsequent review by the U.S. Fish and Wildlife Service," and the only group of sales threatening the government with "tens of millions of dollars of liability." The Secretaries do not dispute that these are the sales to which the House was referring in its report. Federal Appellants' Opening Brief at 37-38.

---

<sup>8</sup> Representative Taylor clarified in his March 15, 1995 floor statement that the section also released sales offered after fiscal year 1990 as well as non-murrelet Section 318 sales held up for other reasons. SER 32, Exhibit 3.

The Secretaries acknowledge that section 2001(k)(1) applies to all the murrelet sales, and that the House bill would have released all the sales. Their position is based solely on the "known to be nesting" exemption in (k)(2), which was added by Senator Gorton in the Senate. According to the Secretaries, the Senate's addition of (k)(2) reversed the effect of the House bill, blocked harvest of all of the suspended murrelet sale units, and merely ordered replacement volume for all these sales under (k)(3). The legislative history refutes this claim.

On the floor of the Senate, Senator Murray offered an amendment that would have replaced section (k) with the following language:

With respect to each timber sale awarded pursuant to section 318 of Public Law 101-121 (103 Stat. 745) the performance of which is, on or after July 30, 1995, precluded under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) due to requirements for the protection of the marbled murrelet, **the Secretary of Agriculture shall provide the purchaser replacement timber, at a site or sites selected at the discretion of the Secretary, that is equal in volume, kind and value to that provided by the timber sale contract.**

141 Cong. Rec. S4870 (daily ed. March 30, 1995), SER 32, Exhibit 7 (emphasis added). The Murray amendment would have blocked release of all of the murrelet sales, and would have provided replacement timber for all of them - exactly as the Secretaries now interpret section (k)(2).

In deliberating on Senator Murray's amendment, the Senate was informed by the President that the FWS would be releasing the unoccupied murrelet sale units by mid-summer 1995. The President advised the Senate, in a letter to Senator Murray that was printed in the Congressional Record on March 30, 1995, 141 Cong. Rec. S4872: "There will be an additional 20.3 mmbf offered by mid-summer pursuant to issuance of a biological opinion by the U.S. Fish and Wildlife Service on unoccupied units for Marbled Murrelets." *Id.* at S4873 (underscoring added). Thus, the Senate was aware that only the occupied sale units would continue to be withheld.

In opposition to the 1995 Murray amendment, Senator Gorton stated on the floor of the Senate that the law, with (k)(2), would release Section 318 sales that "have been held up by subsequent environmental actions . . . unless they involve places in which endangered species are actually found, in which case, substitute lands will take their place." 141 Cong. Rec. S4875 (daily ed. March 30, 1995).

Senator Murray's amendment was rejected 48-46 in the Senate. *Id.* at S4882, SER 32, Exhibit 7. The Senate Report gives no hint that Senator Gorton's amendment had reversed the effect of the House bill and blocked release of all the occupied sale units. It states, in language virtually identical to the House Report:

C:\ATTY\N01-9506\18891045.LHO

26

The Committee also includes language to release a group of sales that have already been sold in the region affected by section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act. . . . The harvest of these sales was assumed under the President's Pacific Northwest Forest Plan, but their release has been held up due to extended subsequent review by the U.S. Fish and Wildlife Service. Release of these sales will remove tens of millions of dollars of liability from the Government for contract cancellation. The only limitation on release of these sales is in the case of a nesting of an endangered bird species with a known nesting site in a sale unit. In this case, the Secretary must provide a substitute volume under the terms of subsection (e) (3).

S. Rep. 104-17 at 123 (March 24, 1995), SER 32, Exhibit 2.

The Senate bill, with (k) (2), was approved by the House-Senate conference committee on the Rescissions Act. 141 Cong. Rec. H5013 (daily ed. May 16, 1995), SER 32, Exhibit 8. The Conference Report affirms the intent to release the murrelet sales, using virtually the same language as the Senate Report and the House Report:

The harvest of many of these sales was assumed under the President's Pacific Northwest forest plan, but their release has been held up in part due to extended subsequent review by the U.S. Fish and Wildlife Service. The only limitation on release of these sales is in the case of a nesting of an endangered bird species with a known nesting site in a sale unit. In this case, the Secretary must provide a substitute volume under the terms of subsection (k) (3).

H. Conf. Rep. 104-124 at 137, SER 32, Exhibit 1. Nothing in the Conference Report supports the view that (k) (2) reverses the

C:\ATTY\N01-9506\1RB91045.1HO

27

intent of House bill and prevents release of all of the occupied murrelet sale units.

The President vetoed the initial rescissions bill, see 141 Cong. Rec. H5686 (daily ed. June 7, 1995), citing the timber provisions as one of the reasons for the veto. Subsequently Congress and the President had extensive negotiations over the bill, including the timber provisions. 141 Cong. Rec. S10465 (daily ed. July 21, 1995) (remarks of Senator Gorton), SER 32, Exhibit 14. Ultimately, the President accepted the timber provisions of the bill with section 2001(k) unchanged except the release of sales was extended to 45 days after enactment. *Id.*

After the President reached agreement with Congress, Senator Gorton again confirmed the congressional intent to release the murrelet sales:

The emergency salvage timber provision in this legislation, which has been the subject of many intense negotiations over the past few days, was included in the original rescission bill vetoed by the President, as a way of providing some short-term relief to the timber communities in my State.

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

The language of (k) (2) requires that if a threatened or endangered bird species is "known to be nesting" in the sale unit that the administration not harvest that unit, but come up with an equal amount of timber in exchange for preserving that unit. This was written up to give the administration flexibility to protect that individual sale unit in which the bird resides.

I wish to clarify that it is the intention of the House and Senate authors of this provision that the administration must provide physical evidence that the bird is "nesting" in that unit before the administration may enact (k) (3) to avoid the harvest of that sale unit.

141 Cong. Rec. S10463-64 (daily ed. July 21, 1995), SER 32, Exhibit 14 (emphasis added). Thus, Congress understood that the suspended sale units had been determined to be "occupied," and that expanding (k) (2) to include occupancy would block the units from being released. Congress refused to adopt the occupancy standard, and intended all the occupied units to be released unless there is "physical evidence" of nesting.

On the date the President signed the bill, six influential sponsors and committee chairman in both houses of Congress wrote the defendant Secretaries to address the very issue in this appeal:

We discussed these matters during our negotiations with the Administration. At the conclusion of this discussion, we refused to agree that evidence of occupancy would qualify a timber sale as "known to be nesting" under subsection (k) (2). The legislative history is explicit on this point.

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

We further intended the requirement that a threatened or endangered bird "is" known to be nesting to require information that nesting is currently occurring. Nesting in a prior year is not sufficient. Unless there is direct evidence of current nesting, the sale unit must be released.

Letter to Secretary Dan Glickman and Secretary Bruce Babbitt from Senators Frank Murkowski, Larry Craig and Slade Gorton and Representatives Don Young, Charles Taylor and Pat Roberts (July 27, 1995) (emphasis added), SER 32, Exhibit 4.<sup>9</sup>

**E. *The Secretaries' interpretation of section 2001(k)(2) has resulted in the release of none of the occupied murrelet sale units.***

As the President had advised the Senate, the Forest Service released all the unoccupied murrelet sale units in the summer of 1995. All 140 of the occupied sale units, however, remained

---

<sup>9</sup> Senator Murkowski is Chairman of the Senate Energy and Natural Resources Committee; Senator Craig is Chairman of the Forestry, Conservation and Rural Revitalization subcommittee of the Senate Agriculture, Nutrition and Forestry Committee; Senator Gorton is Chairman of the Interior Appropriations subcommittee of the Senate Appropriations Committee; Rep. Young is Chairman of the House Resources Committee; Rep. Taylor is the author of section 2001(k)(1); and Rep. Roberts is Chairman of the House Agriculture Committee, which has jurisdiction over forestry. Section 2001 was developed "after close consultation with the authorizing committees." 141 Cong. Rec. H6638 (daily ed. June 29, 1995), SER 32, Exhibit 11.

suspended on the date the Rescissions Act was enacted. The Secretaries have refused to release any of these sale units based on their interpretation of the "known to be nesting" exemption in (k)(2).<sup>10</sup>

**F. Neither step of the Chevron doctrine requires a court to accept an informal agency interpretation that is clearly contrary to congressional intent and frustrates congressional policy.**

The Secretaries argue that the meaning of section 2001(k)(2) is not plain on its face, and the court must therefore defer to their August 23 interpretation under the principles in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* ("Chevron"), 467 U.S. 837 (1984). Federal Appellants' Opening Brief at 31-32. They maintain that "the district court's fundamental error here is in its faulty application of Chevron." *Id.* at 32.<sup>11</sup>

Under step one of the Chevron analysis, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron* at 842 n.9; *Almero v. I.N.S.*, 18 F.3d 757, 763 (9th Cir.

---

<sup>10</sup> In addition, 11 BLM "occupied" sale units have also been withheld under the (k)(2) exemption.

<sup>11</sup> In contrast to the Secretaries' position that the statute is ambiguous and the court should defer to their interpretation, appellant Pilchuck argues that the statute is not ambiguous, and the court should apply its plain meaning under step one of *Chevron*. Pilchuck Opening Brief at 50-51.

1994). Courts can look to the legislative history to ascertain the intent of Congress in the step one analysis. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 123-24 (1987).

If the statute and legislative history are ambiguous, the court proceeds to step two of the *Chevron* analysis, where "a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable." *Amtrak v. Boston & Maine Corp.*, 503 U.S. 407, 417-18 (1992). "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *Almero v. I.N.S.*, 18 F.3d at 763. "A court may defer to an agency's interpretation of a statute only when it is consistent with the statutory mandate and does not frustrate the underlying legislative policy." *Tyler v. U.S.*, 929 F.2d 451, 455 (9th Cir.), cert. denied, 502 U.S. 845 (1991).

The existence of some ambiguity in a statute does not compel the court to accept the agency's interpretation if the agency position "goes beyond the scope of whatever ambiguity [the statute] contains." *Chicago v. Environmental Defense Fund*, - U.S.-, 128 L.Ed. 2d 302, 312 (1994).

An informal agency memorandum like the Secretaries' August 23 Interpretation Memorandum does not deserve the same deference as a formally-issued regulation or adjudication. "A purely interpretative rule, unpromulgated under the Administrative

sublim

harvest till ag.

- mutual model - cut out initially  
[incl. price for budget.]
- 45 day.  $\rightarrow$  no work.

Procedure Act . . . does not carry the force of law and we are in no way bound to afford it any special deference under *Chevron*." *Headrick v. Rockwell Intern. Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (White, J.). While a court may consult an informal agency interpretation, *Martin v. OSHRC*, 499 U.S. 144, 157 (1991), the weight a court gives an informal agency interpretation depends on its thoroughness and persuasiveness. *Sierra Club v. Department of Transp.*, 948 F.2d 568, 573 (9th Cir. 1991).

If a reviewing court determines that the agency's interpretation is not valid under step two of *Chevron*, it proceeds to "determin[e] the precise meaning of the term" at issue. *Public Employees v. Betts*, 492 U.S. 158, 175 (1989).

**G. The district court applied *Chevron* correctly by interpreting the statute according to its plain meaning where the language and legislative history show an unambiguous congressional intent, and by deferring to the Secretaries where congressional intent is not clear.**

The district court applied these *Chevron* principles correctly in its rulings on section (k)(2). NFRC had argued below that the statute is narrower than the PSG protocol in three respects:

1. The statute requires current nesting, while the protocol determines occupancy permanently based on a single observation any time in the past.

2. The statute requires that the nesting must occur within the boundaries of the sale unit, while the protocol bases

occupancy on any detection in a contiguous forest stand up to one-quarter mile outside a sale unit.

3. The statute requires direct, physical evidence of nesting, while the protocol allows occupancy to be based on hearing a bird or seeing a bird flying through or above the forest canopy. ER 340 at 8.

The district court correctly applied *Chevron* to each of these three arguments:

1. The district court held that the use of the present tense noun "is" in the phrase "is known to be nesting" unambiguously means that "the relevant federal agency may not withhold a sale without sufficient evidence that a murrelet is currently nesting within the sale unit." ER 340 at 8. However, the court found that the statute does not specify what evidence is required to establish current nesting, and left this fact to be determined by the Secretaries for each individual sale unit. *Id.* at 8-9.

2. The district court found that the statute unambiguously requires the nesting to occur "within the acreage that is the subject of the sale unit," and that this clause precludes reliance on a determination of occupancy under the protocol based on an observation outside the sale unit boundaries. *Id.* at 9. The court also found that the statutory language precludes reliance on an observation of "circling" above the forest canopy, and precludes reliance on hearing a bird in the same

forest stand outside the sale unit boundaries. *Id.* The court found that to the extent that the PSG protocol bases occupancy on these broader factors, the protocol is inconsistent with the plain language of the statute, and cannot, without additional information, provide the basis for a valid nesting determination under (k) (2).

3. The district court found that the statute does not unambiguously prescribe what evidence within sale unit boundaries is required for a determination of nesting, and that deference to the Secretaries was proper on that question: "[T]he language and legislative history of section 2001(k) (1) 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." *Id.* at 20.<sup>12</sup>

Based on these rulings, the district court directed the Secretaries to review all the sale units and to release those that could not properly be withheld under the statute. *Id.* at 20-21.

---

<sup>12</sup> NFRC had argued that nesting requires evidence of a nest, eggshell fragments or other tangible proof. The district court's ruling essentially defers that question to a case by case determination to be made by the Secretaries for each sale unit.

H. The district court correctly held that the "within the acreage that is the subject of the sale unit" clause in section 2001(k)(2) unambiguously precludes the Secretaries from relying on nesting outside the boundaries of a sale unit, and therefore precludes automatic reliance on an occupancy determination under the PSG protocol.

The Secretaries do not specify what portion of the district court opinion reflects a "faulty application of Chevron." They argue as if the district court had relied solely on step one of Chevron to decide the entire case. Yet in fact the district court accorded deference, under step two of Chevron, to the Secretaries' determination of what evidence within sale unit boundaries establishes nesting, and whether the nesting is current.

The district court properly relied on step one of Chevron to interpret the "within the acreage that is the subject of the sale unit" clause of the statute. The district court found that the plain meaning of this clause requires evidence of nesting within the sale unit boundaries, and that the PSG protocol is inconsistent with the statute because it allows nesting determinations to be based on murrelet activity up to a quarter mile outside a unit or above the top of the forest canopy. ER 340 at 9-10.

In the Secretaries' view, the "within the acreage that is the subject of the sale unit" clause has no plain meaning, and Congress' intent in section (k)(2) is completely ambiguous. The Secretaries therefore argue that they may reasonably conclude

that Congress intended the statute to prohibit the release of every sale unit previously determined to be occupied under the PSG protocol, and that the courts must defer to this interpretation under step two of *Chevron*.

The Secretaries' position is refuted by the plain language and legislative history of the statute, is contrary to the clear congressional intent, frustrates the central purpose of section 2001(k), and should be rejected under either step one or step two of *Chevron*. *Almero v. I.N.S.*, 18 F.3d at 763 (rejecting agency position as contrary to congressional intent under step one of *Chevron*); *National Ass'n of Regulatory Utility Com'rs v. I.C.C.*, 41 F.3d 721, 728 (D.C. Cir. 1994) (rejecting agency position as contrary to congressional intent under step two of *Chevron*).

1. ***The district court correctly applied the plain meaning of the "within the acreage that is the subject of the sale unit" clause in the statute.***

The district court correctly determined that Congress had expressed an unambiguous intent in the "within the acreage that is the subject of the sale unit" clause in section 2001(k)(2), and that the PSG protocol is inconsistent with this intent.

The plain language of the statute requires nesting to be occurring within the sale unit boundaries. The protocol, which is only designed to "determine the probable presence or probable absence of murrelets in a forest stand," ER 22a, Exhibit 3 at 2, labels a sale unit "occupied" if nesting behavior is observed

anywhere in a forest stand up to a quarter mile outside the sale unit, or in the air above the sale unit. The protocol is inconsistent with the plain language of the statute.

Thus, the district court did not reject the "scientifically sound" protocol in favor of its own standards, as the Secretaries argue. Rather, the district court found that whatever the scientific merit of the protocol may be, it simply does not make the narrow determination required by the statute: whether a murrelet is "nesting within the acreage that is the subject of the sale unit." For that reason, an occupancy determination under the protocol does not, standing alone, support an exemption under (k)(2).

**2. The Secretaries' position is contrary to the intent expressed in the congressional reports indicating that the statute will release this group of timber sales.**

None of the congressional reports on the Rescissions Act supports the Secretaries' theory that the Senate reversed the House's direction by adding a broad exemption in (k)(2) that withholds all the occupied sale units.

The Conference Report on the Rescissions Act indicates that section 2001(k) will release the suspended murrelet sales, which were "held up in part due to extended subsequent review by the U.S. Fish and Wildlife Service." H. Conf. Rep. 104-124 at 137, SER 32, Exhibit 1. The (k)(2) exemption was "the only limitation" on release, not the absolute barrier to releasing all 140 units that the Secretaries claim it to be.

Similarly, the Senate Report expresses no intention to withhold all the murrelet sales, but to the contrary indicates that section 2001(k) will release the sales. S. Rep. 104-17 at 123, SER 32, Exhibit 2.

The Secretaries' view that Congress intended not to release a single unit of the murrelet sales under section 2001(k) is contrary to the virtually identical language of the Conference Report, the Senate Report and the House Report. The Secretaries' position is "fundamentally at odds with the statute," *S.J. Amoroso Const. Co. v. U.S.*, 981 F.2d 1073, 1075 (9th Cir. 1992), and would impermissibly "frustrate the policy that Congress sought to implement." *Van Blaricom v. Burlington Northern R. Co.*, 17 F.3d 1224, 1225 (9th Cir. 1994).

3. *The explanation of the bill by its author, and the sponsors' letter, show that Congress specifically rejected the use of the protocol's occupancy standard in (k)(2).*

Senator Gorton, the author of the "known to be nesting" exemption, stated 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.

The remarks of the sponsor of a bill "are particularly valuable in determining the meaning of [the bill]" and provide "an authoritative guide to the statute's construction." *Rice v. Rehner*, 463 U.S. 713, 728 (1983). "[A] statement of one of the legislation's sponsors . . . deserves to be accorded substantial

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

The Secretaries suggest that Senator Gorton may not have been referring to the PSG protocol in recounting Congress' rejection of the administration's "definition of 'occupancy.'" Federal Appellants' Opening Brief at 36. Yet the PSG protocol's definition of occupancy is the only definition anyone has ever identified, and the President must have understood the term in his March letter to Senator Murray regarding the release of "unoccupied units." The notion that Senator Gorton was referring to some other, never-revealed definition of occupancy is simply not plausible.

In any event, the July 27 sponsors/committee chairmen letter, signed by Senator Gorton just six days after his floor statement, resolves any uncertainty by referring specifically to "the 1994 Pacific Seabird Group marbled murrelet protocol" as the basis of the administration's definition of occupancy. SER 32, Exhibit 4 at 2.

**4. The Secretaries' interpretation is contradicted by the administration's prior negotiations with Congress.**

The Secretaries have never denied that the negotiations described by Senator Gorton in his July 21 floor statement occurred. Senator Hatfield confirmed the negotiations in his March 14, 1996 floor statement against repeal. The very fact

that the negotiations occurred, as well as the outcome, undermines the Secretaries' current position.

If the Secretaries were correct that Congress intended "nesting" to mean "occupancy," there was no reason for the administration to ask Congress in July to change the "known to be nesting" language to occupancy. And if Congress already intended the "known to be nesting" exemption to protect all occupied sites, it would readily have agreed to the administration's request rather than "soundly reject[ing]" it. Both the fact and the result of the negotiations between the administration and Congress contradict the Secretaries' position.

**5. *The Secretaries' position impermissibly attributes to Congress the intent of the Murray amendment rejected by the Senate in March 1995.***

"Congress is not deemed to have silently adopted a position it previously rejected." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987).

Contrary to this rule, the Secretaries' interpretation of section 2001(k)(2) would attribute to Congress precisely the intent of the amendment offered by Senator Murray that was rejected by the Senate on March 30, 1995. See 141 Cong. Rec. S4870, SER 32, Exhibit 7. Senator Murray's amendment would not have released any of the occupied sale units, but would have provided replacement timber for all of them - exactly as the Secretaries now interpret section 2001(k)(2). The court cannot

sustain an interpretation of this law that ascribes to Congress the intent of the Murray amendment that the Senate defeated. *INS v. Cardoza-Fonseca*, 480 U.S. at 446-49.

**6. Congress did not merely codify the already-planned release of unoccupied sale units.**

In an attempt to explain the House, Senate and Conference Report language, both the Secretaries and Pilchuck argue that all Congress really intended to do in (k)(2) was to release unoccupied sale units, and it intended to withhold all the occupied sale units. Federal Appellants' Opening Brief at 37-38 ("it is equally plausible that the [Senate] Report was referring to the need to release unoccupied sale units"); Pilchuck Opening Brief at 52.

The problem with this argument is that in March 1995 the President had already informed Congress, in his letter to Senator Murray, 141 Cong. Rec. S4870, SER 32, Exhibit 7, that all of the unoccupied sale units were going to be released later in fiscal year 1995. At that point, the only suspended units were those that were considered occupied under the PSG protocol. Only the occupied units required congressional intervention.

**7. The Senate's recent report and its vote against repealing section 2001 show congressional approval of the district court's rulings in this case.**

The recent Senate Report expressly approves the district court's January 19, 1996 order. S. Rep. 104-236 (March 6, 1996). The views of the same Congress that enacted section

2001, expressed just seven months after enactment, are entitled to "significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Montana Wilderness Association v. U.S. Forest Service*, 655 F.2d 951, 957 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982) (subsequent conference report); *Edwards v. Bowen*, 785 F.2d 1440, 1442 (9th Cir. 1986) (subsequent conference report approving district court interpretation of statute).

The Senate's recent vote against repeal of section 2001 also shows that Congress approves of the district court's orders in this case. When, as here, a judicial or administrative interpretation of a statute has been the subject of intense debate and scrutiny in Congress, Congress' refusal to overrule the interpretation shows its approval. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 137 (1985); *Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983); *Lewis v. United States*, 663 F.2d 889, 891 (9th Cir. 1981), cert. denied, 457 U.S. 1133 (1982) (Congress' failure to amend statute after Supreme Court decision shows approval of decision).

**8. The Secretaries' cursory, unsupported interpretation of the statute has no persuasive force.**

"The degree of deference to an agency's interpretation turns on the manner in which the agency advances its interpretation," *Sierra Club v. Department of Transp.*, 948 F.2d at 573. The Secretaries' August 23 Interpretation Memorandum merits no

deference. It cites no legislative history on the statute, and it cites no cases or other legal authorities to support its position. "[T]he [agency's] failure to discuss either the legislative history or the statutory language may have prevented the [agency] from correctly construing the statute." *Fertilizer Institute v. U.S. E.P.A.*, 935 F.2d 1303, 1308 (D.C. Cir. 1991). The August 23 memorandum gives no indication that its authors attempted to discern congressional intent, or to honor it.

**9. The Secretaries' interpretation of the "known to be nesting" exemption is impermissible under either step one or step two of Chevron.**

Six separate factors compel the conclusion that the Secretaries' interpretation of (k)(2) is contrary to congressional intent: it conflicts with the congressional reports; it conflicts with the author's "authoritative" interpretation; it conflicts with both the fact and the outcome of the negotiations between the administration and Congress on this exact issue in July 1995; it would implement the Murray amendment that was rejected by the Senate in March 1995; it is contradicted by the recent Senate report and the Senate's vote against repeal of section 2001; and it lacks any independent persuasive force. For these reasons the Secretaries' position was properly rejected under either step one or step two of Chevron.

**II. THE DISTRICT COURT CORRECTLY HELD THAT SECTION 2001(k)(1) REQUIRES THE AWARD OF PREVIOUSLY ENJOINED, WITHDRAWN OR CANCELLED TIMBER SALES.**

**A. Standard of review.**

This court's review of a district court interpretation of a statute is *de novo*. *Allen v. Shalala*, 48 F.3d at 457.

**B. The plain meaning of the statute releases all sales including cancelled, withdrawn and enjoined sales.**

Pilchuck Audubon argues that section (k) (1) only applies to timber sales where a "viable offer" was outstanding on the date of enactment of the Rescissions Act, and does not release any timber sale that was cancelled by the offering agency prior to enactment of the Rescissions Act. Pilchuck Opening Brief at 30-39. Pilchuck's argument would overturn the award of well over three dozen timber sales. *Id.* at 9-16. The Secretaries generally dispute Pilchuck's interpretation, but argue more narrowly that section 2001(k) (1) does not apply to four specific timber sales offered in 1990 that were later enjoined by the district court for the Western District of Washington. Federal Defendants' Opening Brief at 52-56.

The district court ruled in the January 10, 1996 order that section 2001(k) (1) on its face requires the award and release of all cancelled or enjoined timber sales that were offered between 1990 and the date of enactment of the Rescissions Act in the relevant region:

The plain meaning of "offered," as well as the meaning that the parties agree is

relevant in this context, does not exclude canceled or enjoined sales.

.....

If Congress had intended "offered" to have a narrower meaning than its plain meaning suggests, it could have stated so. The plain language of section 2001(k) requires the agency to award certain previously offered sales, even those cancelled or enjoined prior to section 2001(k)(1)'s enactment, so long as there are no threatened or endangered birds known to be nesting in the sale unit.

ER 331 at 16-17. Thus, the district court rejected both Pilchuck's and the Secretaries' arguments on this point.

**C. As the Secretaries conceded below, all the sales in question were "offered" prior to enactment of the Rescissions Act.**

Pilchuck argues that cancelled or enjoined sales were never "offered" and therefore need not be awarded and released. The Secretaries (as well as NFRC) dispute this assertion: "[t]he government concedes that a timber sale is 'offered' when bids are opened at auction, and the parties agree that the bids were opened in each of the challenged sales." ER 331 at 15.

The Forest Service and BLM timber sale contracting regulations, which Pilchuck never acknowledges, expressly confirm that an offer occurs when bids are opened. The Forest Service timber sale contracting regulations state: "Competitive sales of National Forest timber shall be **offered** through either sealed or oral auction bidding." 36 C.F.R. 223.88(a) (emphasis added).

Thus, by regulation the "offer" of a timber sale occurs at the time of the auction.

BLM timber sale contracting regulations similarly provide that an offer occurs at the time of the auction of a timber sale. The regulations apply where "timber or other vegetative resources are being offered," 43 C.F.R. 5430.1, and provide for "offerings at oral auction." 43 C.F.R. 5441.1-1. The BLM Oregon state office Timber Sale Procedure Handbook establishes procedures for "the process of conducting a public offering of forest product." CR 297, Exhibits B and C (BLM Timber Sale Procedures Handbook 5440-1, ¶ III).

**D. The statute applies to "all timber sale contracts" without exception.**

Section 2001(k)(1) requires the Secretaries to award and release "all timber sale contracts offered or awarded" between 1990 and July 27, 1995 in the section 318 geographic area. Since all the sales Pilchuck challenges, and all four of the sales the Secretaries seek to exempt from the statute, were offered between 1990 and July 27, 1995 in the section 318 geographic area, all the sales must be awarded and released. "All timber sale contracts" means "all timber sale contracts." The statute does not contain an exception for canceled, withdrawn or enjoined sales.

A statute is interpreted and applied according to its plain meaning. *United States v. Van Den Berg*, 5 F.3d 439, 442 (9th

c:\ATTY\No1-ppoc\18891045.1HO

47

Cir. 1993). There are few words in the English language clearer than "all." See *Commissioner v. Asphalt Products Co., Inc.*, 482 U.S. 117, 120 (1987) ("any" means "any"; no implied exceptions exist); *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114, 1118 (1st Cir. 1989), cert. denied, 495 U.S. 956 (1990) ("any contract" means "any contract"; no implied exceptions exist). There is no room in the term "all timber sale contracts" in section 2001(k)(1) for the implied exemptions urged by Pilchuck and the Secretaries.

**E. No action by the offering agency or a court after a sale is offered exempts a sale from release under section 2001(k)(1).**

Pilchuck argues that even if an offer had occurred on a sale, the subsequent cancellation or withdrawal of the sale, due to court injunction or unilateral action by the agency, exempts the sale from release under section 2001(k)(1). The Secretaries generally dispute this position, but agree that a subsequent court injunction based on the statute authorizing the sale takes the sale outside the scope of section (k)(1). The district court correctly rejected these arguments.

Section (k)(1) is simple and mechanical in its application: if a sale was offered between 1990 and July 27, 1995 in the relevant geographic area, it is to be awarded and released. The plain meaning of the statute forecloses both Pilchuck's argument and the Secretaries' argument. Once a sale has been "offered," it is to be awarded and released under section (k)(1).

Pilchuck argues that cancelled or withdrawn sales cannot be awarded because cancellation or withdrawal means there is no current willing offeror as a matter of contract law. This argument is meritless because present agency willingness is not relevant under the plain language of the statute.

The very reason Congress had to enact section 2001(k) was that the agencies had not voluntarily awarded and released the outstanding sales. Congress has the right to mandate agency action, the federal agencies must obey those mandates, and the courts can compel agency action that is unlawfully withheld. 5 U.S.C. 706(1). The agencies' current subjective "willingness" to proceed with a sale has no bearing on the interpretation of the mandate in section (k)(1).

Likewise, an intervening court injunction does not change the fact that a sale was offered, and does not create an implied exception under the statute. The Secretaries concede that some court injunctions do not create such an exception, but argue that an injunction under the statute authorizing a sale does create an exception. Section (k)(1) simply does not recognize this fine distinction: every sale that was "offered" is to be awarded and released. The district court properly interpreted

C:\ATTY\N01-9506\1RB91045.LHO

49

the statute to require award of four timber sales enjoined in 1990 for violating section 318.<sup>13</sup>

*F. The second sentence of section 2001(k)(1) confirms that sales must be released even if bids were previously rejected.*

Pilchuck's argument (and the Secretaries' more limited argument) also fails to give any meaning to the second sentence of section 2001(k)(1), which states: "The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph."

This sentence directly addresses the issue Pilchuck raises here: its only meaning is that a sale must be released even if bids were previously rejected and the sale was cancelled.

Every bidder at a Forest Service timber sale must submit a bid bond. 36 C.F.R. 223.83(a)(2). Following the auction, all the bid bonds are returned except that of the high bidder. The sale is awarded to the high bidder except in narrow circumstances specified in the regulations. 36 C.F.R. 223.100. If the high bid cannot be accepted, the Forest Service has only two choices: (1) reject all bids or (2) award the sale at the high bid price to the next highest qualified bidder. Section 223.102. Similarly, after a BLM sale auction, the agency either awards

---

<sup>13</sup> The district court limited its ruling on these four sales to a declaratory judgment. ER 331 at 24-25. The district court in the Western District of Washington ruled on February 23, 1996 that it will vacate its injunction against the four sales if this court affirms the district court decision in this case.

the contract or rejects all bids. *Id.*, ¶ III (E); 5450-1, ¶ VII (D).

Thus, a bid bond is returned to a high bidder only when bids on a sale are rejected and the sale is cancelled. There is no other circumstance in which a bid bond is returned to a high bidder. The second sentence of (k)(1) has no meaning except to require the award and release of sales where bids were rejected, and the bid bond returned to the high bidder.

The defendant Secretaries concede that sales must be awarded and released under section 2001(k)(1) even when bids have been rejected: "Section 2001(k)(1) clearly covers timber sales . . . for which the Forest Service or the Bureau of Land Management had rejected all bids prior to enactment of Section 2001(k)(1)." Memorandum In Support Of Motion Of Appellants, Dan Glickman, et al., For Stay Pending Appeal, No. 96-35123 at 13 (January 31, 1996).

A statute must be interpreted to give significance to all of its parts. *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). Pilchuck's position gives no effect to the second sentence of (k)(1) and should be rejected.

**G. The existence of the express (k)(2) exemption negates the existence of an implied exemption in (k)(1).**

The express exemption in subsection (k)(2) for sale units where a threatened or endangered bird species is "known to be nesting" negates the existence of an implied exemption in

(k)(1). Under the doctrine of *expressio unius est exclusio alterius*, "[t]he express enumeration [of an exception] indicates that other exceptions should not be implied." In *Re Gerwer*, 898 F.2d 730, 732 (9th Cir. 1990); *Keams v. Tempe Technical Institute, Inc.*, 39 F.3d 222, 226 (9th Cir. 1994). There is no implied exemption for sales that were cancelled, withdrawn or enjoined.

*M. The legislative history of section 2001(k) confirms that Congress intended to release all previously-offered sales including cancelled, withdrawn and enjoined sales where bids were previously rejected.*

**1. The Conference Report.**

The conference report on the Rescissions Act, H. Rep. 104-124, confirms that section 2001(k)(1) requires the release of all sales whether or not bids were previously rejected by the offering agency:

. . . . Included are all sales offered, awarded, or unawarded, whether or not bids have subsequently been rejected by the offering agency, with no change in original terms, volumes, or bid prices. The sales will go forward regardless of whether the bid bond from the high bidder has been returned, provided it is resubmitted before the harvesting begins.

Conference Report at 137, SER 32, Exhibit 1.<sup>14</sup> There is no hidden exemption for cancelled, withdrawn or enjoined sales.

---

<sup>14</sup> The Senate Report contains a similar statement. S. Rep. 104-17 at 123, SER 32, Exhibit 2.

## 2. *The author's interpretation.*

Before the House voted on the bill, Rep. Taylor, the author of section (k), offered an explanation of this section on the floor of the House which also confirms its plain meaning:

Section (i) of section 307 addresses another related timber supply problem of an emergency nature. . . .

Previously-offered timber sales in the Northwest cannot be operated due to administrative delays and reviews. . . . Many of these sales were awarded to purchasers years ago . . . . Other sales were auctioned years ago but never awarded; in some cases the agencies rejected bids well after the auction due to administrative reviews and delays and changing standards. . . .

Subsection 307(i)(1) frees up all these sales. . . . It directs the award of all unawarded sales as originally advertised, whether or not bids on a sale previously rejected . . . .

141 Cong. Rec. H3233, SER 32, Exhibit 3 (emphasis added). Congressman Taylor's floor statement shows that all previously-offered sales are to be released, and there is no hidden exclusion for cancelled, withdrawn or enjoined sales.

## 3. *The recent congressional endorsement.*

The recent Senate Report expresses Congress' agreement with the district court's January 17, 1996 order (which replaced the January 10 order by making a non-substantive amendment), and provides further support for the district court's interpretation of the section (k)(1). *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. at 596.

**I. Section (k)(1) does not violate the separation of powers.**

Pilchuck also argues that its interpretation of section (k)(1) is compelled by the constitutional infirmity it claims would arise from the plain meaning: that the separation of powers bars Congress from changing the law to order the award and release of sales previously enjoined by a court. The district court properly rejected this argument.

Pilchuck presents the same separation of powers argument that was rejected by the Supreme Court regarding section 318 of Public Law 101-121. *Robertson v. Seattle Audubon Society*, 503 U.S. at 432. Like section 318, section 2001(k) provides a temporary legislative resolution to a portion of the forestry controversy in the Pacific Northwest. By requiring the immediate award and release of certain timber sales notwithstanding any other provision of law, section 2001(k) properly "compelled changes in law, not findings or results under old law." *Robertson v. Seattle Audubon Society*, 503 U.S. at 432.

In section 2001(k) Congress did not direct a particular decision in a case, while leaving the applicable substantive and remedial law in place. *Cf. United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993). Instead, Congress properly changed the applicable substantive law by requiring release of these sales "notwithstanding any other provision of law."

The fact that previous litigation concerning enjoined sales is concluded does not lessen Congress' authority to change the law and permit what formerly was prohibited. In *Pennsylvania v. The Wheeling and Belmont Bridge*, 59 U.S. (18 How.) 421, 15 L. Ed. 435 (1855), the Supreme Court held that there is no constitutional bar to Congress changing the underlying substantive law after a final judgment was entered, thereby removing the basis for a previous order, thus requiring the dissolution of the existing injunction. *Id.*

Pilchuck's argument is also refuted by the well-established rule that courts are **obligated** to vacate an injunction when Congress removes the statutory basis of the order:

When a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law.

*Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987), quoting *American Horse Protection Association, Inc. v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982).

Pilchuck argues that the recent case of *Plaut v. Spendthrift Farm, Inc.*, - U.S. -, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995), has changed two hundred years of constitutional analysis. No such result occurred. There, the Court was faced with legislation that "prescribes what the law was at an earlier time," and retroactively required courts to reopen closed cases

and apply the new law to those old cases. 131 L. Ed. 2d at 346 (emphasis in original). The court held that Congress could not retroactively pronounce what the law was at an earlier time.

In enacting section 2001(k) Congress has not prescribed what the law was prior to the statute's enactment, nor ordered a court to set aside a final judgment. Instead, Congress has simply changed the substantive law, as in *Robertson and Wheeling and Belmont Bridge*. The courts are obligated to enforce the new law, *Toussaint v. McCarthy*, 801 F.2d at 1090, and there is no separation of powers defect to section 2001(k).

**III. THE DISTRICT COURT CORRECTLY HELD THAT SECTION 2001(k)(1) REQUIRES THE AWARD OF A TIMBER SALE TO A QUALIFIED LOWER BIDDER AT THE HIGH BID PRICE IN ACCORDANCE WITH STANDARD AGENCY REGULATIONS WHERE THE ORIGINAL HIGH BIDDER ON A SALE IS NO LONGER ABLE OR WILLING TO ACCEPT AWARD OF THE SALE.**

**A. Standard of review.**

This court's review of a district court interpretation of a statute is *de novo*. *Allen v. Shalala*, 48 F.3d at 457.

**B. Forest Service and BLM procedures provide for award of a timber sale to the highest qualified bidder, at the high bid price, when the original high bidder cannot or will not accept award of a sale.**

Both the Forest Service and the BLM have adopted procedures to handle the situation where the original high bidder on a sale either cannot or will not accept the award of a sale. See *Federal Appellants' Opening Brief* at 9-10.

The Forest Service regulation provides that if the high bidder cannot accept award of a sale, "award at the highest bid

price may be offered to the next highest qualified bidder or to the other qualified bidders in order of their bids until the award is accepted by one or refused by all of the qualified bidders." 36 C.F.R. 223.102.

The BLM Oregon state office Timber Sale Procedure Handbook similarly provides: "When the successful bidder fails to sign and return the contract, and any required bond and payments, the contract may be offered or awarded for the amount of the high bid to the highest of the bidders who is qualified, responsible, and willing to accept the contract . . . ." BLM Timber Sale Procedures Handbook 5450-1, ¶ VII (D). See ER 331 (January 10 Order) at 20 n.13.

**C. Section 2001(k)(1) does not contain an implied exemption for sales where the high bidder is unable or unwilling to accept a sale.**

The district court ordered the Secretaries to proceed to award seven timber sales where the original high bidder is now unable or unwilling to accept award of the sale.<sup>15</sup> Five of these sales involve situations where the original high bidder went out of business between the original auction and the enactment of the Rescissions Act. In two cases, the original high bidder declined the award between the auction and the

---

<sup>15</sup> NFRC does not contend that a sale could be awarded to anyone who did not originally bid on the sale, or who is not financially responsible. If every original bidder on a sale is offered the sale at the high bid price and declines award, no further compliance with section 2001(k) is possible for that sale.

enactment of the Rescissions Act, although in both cases the BLM has subsequently allowed the original high bidder to revive the high bid, and has awarded each sale (Ollala Wildcat and Twin Horse) to the original high bidder.<sup>16</sup>

In ordering these seven sales released, the district court ruled that "Section 2001(k)(1)'s objectives are the award, release, and completion of timber sales . . . ." ER 331 at 20. The court reasoned that the words "notwithstanding any other provision of law" in the statute "pre-empt regulations that obstruct the . . . statute's objectives." The court held:

Regulations which give the agency discretion not to try to award an offered sale to other bidders would frustrate section 2001(k)(1)'s objectives. . . . Section 2001(k)(1), therefore, requires the agencies to award these sales to other qualified bidders at the terms originally agreed on by the unqualified high bidder according to agency regulations and policy.

*Id.* at 20 (underscoring in original). This conclusion follows from the plain language of the statute, and should be affirmed.

**D. The core purpose of section (k)(1) is to remove the Secretaries' discretion not to award timber sales.**

The Secretaries do not claim that any language in section (k)(1) exempts the award and release of sales where the high bidder is no longer able or willing to accept award. Although the Secretaries admit they have the power to award the sales to

---

<sup>16</sup> Since the BLM has now awarded these two sales to the original high bidder, and not to a lower bidder, it does not appear that these sales are subject to any issue in this appeal.

lower bidders as the district court ordered, they argue that the statute does not implicitly repeal the agency regulations that give the agencies the discretion to cancel a sale rather than award the sale to a lower bidder at the high bid price. Federal Appellants' Opening Brief at 42-43.

The Secretaries' position is at odds with the plain language of section (k)(1) as well as the core purpose of the statute. The statute commands the Secretaries to award and release timber sales. The basic purpose of the law is to deny the Secretaries the discretion to refuse to move forward with the sales, as they had for years before the Rescissions Act was passed.

Thus, as the district court held, section (k) implicitly repeals all laws that grant the Secretaries discretion not to award and release timber sales. The Secretaries admit that is its purpose: "Thus, there is no doubt that Section 2001(k) preempts those laws that would prevent the Forest Service and BLM from acting to award suspended timber sales within the required time." Federal Appellants' Opening Brief at 42.

Having recognized this effect of the statute, the Secretaries can point to nothing in the words of the statute that gives them any discretion to refuse to award a sale because the high bidder has gone out of business or is unable or unwilling to accept award. The statute orders them to award, release and permit completion of sales, not to perform a meaningless

bureaucratic gesture of trying to award a sale to a non-existent company or to one that has already declined it.

The purpose of section 2001(k) is not to confer a personal privilege on an original high bidder of a sale; the purpose is to get timber into the market promptly. See *supra* at 2-4. Refusing to award a sale frustrates the intent of Congress, and therefore violates the statute. The objectives of the statute are achieved by awarding the sale to lower bidders in accordance with existing agency procedures. That is what the district court ordered.

The second sentence of (k)(1) - "The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph" - does not implicitly endorse the Secretaries' refusal to award these sales, as they argue. Quite to the contrary, it supports the district court's order to release the sales.

The Secretaries argue that a bid bond is returned only when the offering agency chooses not to award a sale to a willing high bidder, so that the second sentence of (k)(1) does not apply where the high bidder is unable or unwilling to accept award. Federal Appellants' Opening Brief at 46. Yet the Secretaries' earlier description of their regulations contradicts this argument: they admit a bid bond is returned to the high bidder when a sale is not awarded for any reason, including the high bidder's inability or unwillingness to accept

award: "The high bidder's bid bond may be returned if: (1) after 90 days, the high bidder elects to withdraw its bid . . . ." Federal Appellants' Opening Brief at 10 (emphasis added).<sup>17</sup>

Thus, the second sentence of section (k)(1) applies where a bid bond is returned because the high bidder is unable or unwilling to accept award. Bid bonds were in fact returned to the high bidders on the seven sales, CR 303 (Declaration of Lyndon Werner, December 8, 1995), ¶ 8; CR 303 (Tenth Declaration of Jerry L. Hofer, December 8, 1995), ¶ 20, except where the high bidder continues to seek award of the sales. *Id.*, ¶¶ 17-18; CR 261 (Declaration of Les Bridges, November 27, 1995), ¶ 5.

The second sentence of (k)(1) serves to clarify that the first sentence applies to these sales. The second sentence does not limit the first sentence; it reinforces it. Since there is no exclusion in the first sentence for sales where the high bidder is unable or unwilling to proceed, those sales must be released under the first sentence.

**E. The legislative history of section 2001(k) contains nothing to alter the plain meaning of the statute.**

The conference report's statement that the statute releases "all sales offered, awarded, or unawarded, whether or not bids

---

<sup>17</sup> The Secretaries are describing BLM contracting procedures in the quoted passage; Forest Service contracting procedures are the same on this point. See 36 C.F.R. 223.102 (procedures the same whether agency or high bidder declines to proceed with award).

have subsequently been rejected by the offering agency" shows there is no hidden exemption for sales where the original high bidder is unable or unwilling to accept award. Conference Report at 137, SER 32, Exhibit 1.

Nor is there a limitation to the plain words of the statute in the sentence of the conference report that states: "The sales will go forward regardless of whether the bid bond from the high bidder has been returned, provided it is resubmitted before the harvesting begins." See Federal Appellants' Opening Brief at 51. The point of the sentence is simply that before a company can receive the award of a sale under section (k), the company has to meet the normal timber sale contracting obligations including submission of a bid bond. Nothing in that sentence shows a congressional intent to exempt award of a sale because the original high bidder is unable or unwilling to accept the award.

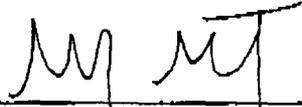
Congressman Taylor's floor statement equally forecloses any hidden limitations to the unqualified language in the statute. Nothing in his statement implies that a sale should not be awarded because the original high bidder is out of business or otherwise cannot accept award. 141 Cong. Rec. H3233, SER 32, Exhibit 3. The plain language of the statute controls.

**CONCLUSION**

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

Dated this 21st day of March, 1996.

MARK C. RUTZICK LAW FIRM,  
A Professional Corporation

By: 

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