

NLWJC- Kagan

Counsel - Box 002 - Folder 007

NFRC v. Glickman II [6]

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 30 pages

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

*Scott Timber
 (K)(2) issue
 only*

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

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.,
Defendants-Intervenors-Appellees.

Nos. 96-35107 & 96-35132

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

v.

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

and

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

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

APPELLEE SCOTT TIMBER CO.'S BRIEF

SCOTT W. HORNGREN, OSB No. 88060
SHAY S. SCOTT, OSB No. 93421
Haglund & Kirtley
101 SW Main, Suite 1800
Portland, Oregon 97204
Telephone: (503) 225-0777

Attorney for Appellee Scott Timber Co.

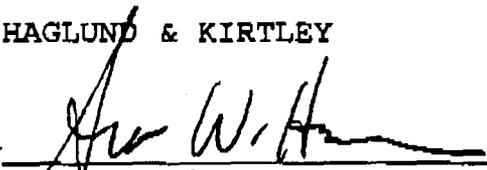
CORPORATE DISCLOSURE STATEMENT
REQUIRED BY FRAP 26.1

Plaintiff-appellee Scott Timber Co. has no parent company, subsidiary, or affiliate that has issued shares to the public.

DATED this 25th day of March, 1996.

HAGLUND & KIRTLEY

By



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

TABLE OF CONTENTS

- I. STATEMENT OF ISSUES 1
- II. STATEMENT OF THE CASE 1
 - A. Jurisdiction 1
 - B. Nature of the Case 2
 - C. Proceedings Below 3
 - D. Factual Background 5
 - 1. The Emergency Salvage Timber Sale Program 5
 - 2. Nesting, Occupancy and the Pacific Seabird Group Protocol 6
 - 3. The Administration's Interpretation 8
- III. SUMMARY OF ARGUMENT 9
- IV. ARGUMENT 11
 - A. Standards of Review 11
 - B. The District Court's Decision Concerning the Scope of the "known to be nesting" Exception in Section 2001(k) (2) Should be Affirmed 11
 - 1. Judicial review of administrative interpretations of statutes after Chevron 11
 - 2. Federal-appellants misinterpret the district court's treatment of the ambiguity in section 2001(k) (2) 14
 - 3. The phrase "is known to be nesting within . . . the sale unit" is unambiguous 15
 - 4. The only ambiguity found by the court in section 2001(k) (2) is what specific evidence within sale unit boundaries may be used to sustain a "known to be nesting" determination 17

5. The court correctly rejected the
administration's application of the PSG
protocol as contrary to the plain language of
the statute 18

V. CONCLUSION 21

TABLE OF AUTHORITIES

CASES

<u>Chevron, USA, Inc. v. Natural Resources Defense Council,</u> 467 U.S. 837 (1984)	10, 12, 13, 16, 17, 19, 20
<u>Dole v. United Steelworkers of America,</u> 494 U.S. 26 (1990)	14
<u>Hellon & Assocs., Inc. v. Phoenix Resort Corp.,</u> 958 F.2d 295 (9th Cir. 1992)	11
<u>Jesinger v. Nevada Fed. Credit Union,</u> 24 F.3d 1127, 1130 (9th Cir. 1994)	11
<u>K-Mart Corp. v. Cartier,</u> 486 U.S. 281 (1988)	14
<u>MCI Telecommunications Corp. v. AT&T,</u> 114 S. Ct. 2223 (1994)	14
<u>Nevada Land Action Ass'n v. United States Forest Service,</u> 8 F.3d 713, 716 (9th Cir. 1993)	11
<u>Nevill v. Shell Oil Co.,</u> 835 F.2d 209 (9th Cir. 1987)	11
<u>Northwest Forest Resource Council v. Glickman,</u> No. 95-6244-HO (D. Or. filed Aug. 10, 1995)	4
<u>Northwest Motorcycle Ass'n v. United States Dep't of Agric.,</u> 18 F.3d 1468, 1468 (9th Cir. 1994)	12, 13
<u>Pilchuck Audubon Soc'y v. Glickman,</u> No. 95-6384-TC (D. Or. filed Nov. 7, 1995)	4
<u>Public Employees Retirement Sys. of Ohio v. Betts,</u> 492 U.S. 158 (1989)	13
<u>Scott Timber Co. v. Glickman,</u> No. 95-6267-HO (D. Or. filed Aug. 29, 1995)	4
<u>Sierra Club v. Babbitt,</u> 65 F.3d 1502, 1507 (9th Cir. 1995)	11
<u>Spain v. Aetna Life Ins. Co.,</u> 11 F.3d 129 (9th Cir. 1993), <u>cert. denied,</u> 114 S. Ct. 1612 (1994)	11

United States v. McConney,
 728 F.2d 1195 (9th Cir.),
cert. denied, 469 U.S. 824 (1984) 11

STATUTES & LEGISLATIVE MATERIALS

5 U.S.C. § 706(2) (A) 12

141 Cong. Rec. S10464 5

Emergency Salvage Timber Sale Program

 Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240-47 2

 Pub. L. No. 104-19, § 2001(k), 109 Stat. 194 (1995) 3

 Pub. L. No. 104-19, § 2001(k) (1), 109 Stat. 194 (1995) 6

 Pub. L. No. 104-19, § 2001(k) (2),
 109 Stat. 194, 240-47 6, 9, 16

Endangered Species Act,
 16 U.S.C. §§ 1531-1543 5

H.R. 1927 7

H.R. 1944 7

Rescissions Act

 Pub. L. No. 104-19, 109 Stat. 194, 194-254 (1995) 2

 Pub. L. No. 104-19, 109 Stat. 240 (1995) 1

 Pub. L. No. 104-19, 109 Stat. 240 (July 27, 1995) 3

I.

STATEMENT OF ISSUES

1. In construing the statutory exception in section 2001(k)(2) of the 1995 Rescissions Act, Pub. L. No. 104-19, 109 Stat. 240 (1995), concerning when a threatened and endangered species "is known to be nesting within . . . the sale unit," did the district court correctly reject the application of a survey protocol that relies on non-nesting evidence and other evidence observed well-beyond the sale unit boundaries?

2. In construing an unambiguous portion of section 2001(k)(2), did the district court properly reject an interpretation summarily imposed by federal defendant-appellants that is contrary to the statute's plain language?

3. In construing a latent unambiguity behind the "known to be nesting" exception in section 2001(k)(2), did the district court properly reject federal defendant-appellants' interpretation, which is contrary to the statute's plain language, as an impermissible construction of the statute?

II.

STATEMENT OF THE CASE

A. Jurisdiction.

Appellee Scott Timber Co. concurs with federal defendant-appellants' statement of jurisdiction.

: : :

: : :

B. Nature of the Case.

On July 27, 1995, President Clinton signed the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Antiterrorism Initiatives, for Assistance in the Recovery From the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995. Pub. L. No. 104-19, 109 Stat. 194, 194-254 (1995). Section 2001 of the Act implements the Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240-47.

The law directs the Secretaries of Agriculture and Interior within 45 days after the date of enactment to award and release timber sales that have been delayed for years. In these consolidated appeals, federal defendant-appellants and a host of environmental organizations appeal two district court rulings: (1) the district court's January 10, 1996 Order, *as amended*, (Jan. 17, 1996), granting in part plaintiff Northwest Forest Resources Council's (NFRC) motion for clarification and enforcement of the court's October 17, 1996 order, see CR 178, requiring release of timber sales. CR 331; CR 338; and (2) the district court's January 19, 1996 Order granting in part plaintiff NFRC's and plaintiff Scott Timber Co.'s motions for summary judgment. CR 340.

The district court's January 10 order enjoined federal defendants to award, release, and permit to be completed all timber sales subject to section 2001(k)(1) of the Emergency Salvage Timber Sale Program. Pub. L. No. 104-19, 109 Stat. 240

(July 27, 1995). CR 331 at 24-25. The district court's January 19 order further enjoined federal defendants to award and release the remaining sales subject to section 2001(k)(1) that had been withheld, unless federal defendants made a "known to be nesting" determination consistent with section 2001(k)(2) and the court's order. CR 340 at 20-21.

Appellants allege that the district court erred in its January 10 ruling by ordering federal defendants to award and permit to be completed timber sales that were previously canceled by the Forest Service or the Bureau of Land Management (BLM) prior to enactment of section 2001(k). Fed. Appellants' Opening Br. (Fed. App. Br.) at 39-50; Appellants' Pilchuck Audubon Soc'y & Oregon Natural Resources Council's Opening Br. (Pilchuck Br.) at 30-46.

Appellants also allege that the district court erred in its January 19 order by rejecting federal defendants' interpretation of when threatened or endangered species are "known to be nesting" within timber sale units under section 2001(k)(2) for purposes of excluding these units from release. Fed. App. Br. at 30-39; Pilchuck Br. at 46-60.

C. Proceedings Below.

Following the enactment of the Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, § 2001(k), 109 Stat. 194 (1995), NFRC filed an action in the District of Oregon seeking to compel federal defendants to release timber sale units under section 2001(k)(1). CR 63; Northwest Forest Resource Council v.

Glickman, No. 95-6244-HO (D. Or. filed Aug. 10, 1995). In a separate proceeding, Scott Timber Co. sought to compel federal defendants to release timber sale units consistent with section 2001(k)(2). See CR 1b; Scott Timber Co. v. Glickman, No. 95-6267-HO (D. Or. filed Aug. 29, 1995). The two actions were consolidated, and the following organizations were allowed limited intervention as to the section 2001(k)(2) "known to be nesting" issue: Oregon Natural Resources Council (ONRC), Sierra Club, Pilchuck Audubon Society, Western Ancient Forest Campaign, Portland Audubon Society, Black Hills Audubon Society, and Headwaters.

In a third proceeding, Pilchuck Audubon Society and 15 other environmental plaintiffs brought a declaratory action concerning the scope of section 2001(k)(1). CR 1b; Pilchuck Audubon Soc'y v. Glickman, No. 95-6384-TC (D. Or. filed Nov. 7, 1995). This case was also consolidated with Northwest Forest Resource Council v. Glickman, No. 95-6244-HO (D. Or. filed Aug. 10, 1995).

The parties filed cross motions for summary judgment. The court granted in part NFRC's and Scott Timber Co.'s motions for summary judgment, and issued the January 10 and January 19 orders which are the subject of these appeals. CR 331; CR 340. Federal defendants and the environmental groups sought an emergency stay of the court's January 10 order pending appeal. The Ninth Circuit denied the motion. Both federal defendants and ONRC moved to stay the district court's January 19 order. On

January 25, 1996, Judge Hogan granted a 60-day stay pending appeal of the January 19 order. CR 363.

Four appeals have been filed concerning these two orders. Federal defendants and Pilchuck Audubon Society, on behalf of the other environmental appellants, have appealed the district court's January 10 and January 19 orders.¹

D. Factual Background.

1. The Emergency Salvage Timber Sale Program.

The Emergency Salvage Timber Sale Program was not designed to preserve marbled murrelet habitat. Rather, the purpose of section 2001(k) was to immediately award and release timber sales that had been subject to half a decade of protracted government gridlock. CR 340 at 14 (citing 141 Cong. Rec. S10464, daily ed. July 21, 1995) (Statement of Sen. Gorton); SER 32 at Ex. 14. These sales had been delayed because of multiple consultations with the Fish and Wildlife Service under the Endangered Species Act, 16 U.S.C. §§ 1531-1543. Because of the emergency nature of the legislation, Congress directed that timber sales be released within forty five days of enactment. Pub. L. No. 104-19, § 2001(k)(1), 109 Stat. 194 (1995). The only exception to the broad award and release provisions of previously offered timber sales is for the protection of a "known" nesting threatened or endangered species, as follows:

¹ In this brief, Scott Timber Co. only addresses the court's January 19, 1996 ruling on the "known to be nesting" exception in section 2001(k)(2). As to the remaining issues, Scott Timber Co. adopts the arguments set forth in the briefs of plaintiff-appellee NFRC.

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.

Pub. L. No. 104-19, § 2001(k)(2), 109 Stat. 194, 240-47. This provision, which provides that a sale unit under section 2001(k)(1) may not be released if a marbled murrelet "is known to be nesting within . . . the sale unit," is one of two issues at the heart of these appeals.

2. Nesting, Occupancy and the Pacific Seabird Group Protocol.

The Pacific Seabird Group marbled murrelet survey protocol (PSG protocol) is an unpublished report by the Pacific Seabird Group, which is designed to "assist wildlife biologists by providing guidance to . . . determine the probable presence or absence of murrelets in a forest stand" CR 22a at Ex. 3, p. 2. The PSG protocol explicitly distinguishes a "nest stand" from an "occupied stand" as follows:

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 egg shell 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 These behaviors have been termed subcanopy behaviors and are those behaviors occurring at or below canopy level. . . . Circling is also an indication a stand may be occupied.

CR 22a at Ex. 3, pp. 3-4. Under the survey protocol, "nest stands" are given a narrower definition and would encompass less area than would "occupied stands." A distinction between "nesting" and "occupancy" is further supported by the Pacific Seabird Group's development of a paper entitled "Techniques for Finding Tree Nests of the Marbled Murrelet," which is a separate document and addition to the survey protocol. SER 10a at Ex. 3.²

In addition, under the protocol, a broader range of criteria are used in evaluating murrelet behavior to determine whether a stand is "occupied," as opposed to whether a stand is a "nest stand." For example, in addition to evidence such as discovering an active nest, recent nest site, finding fecal rings, eggshell fragments, or discovering a chick - which would be evidence of a "nest" - determination of "occupancy" of a stand may also be evidenced by non-nesting behavior such as: (1) a murrelet flying through, into, or out of an adjacent stand; (2) a murrelet flying over or along a logging road in an adjacent stand; and (3) birds perching or attempting to land in adjacent stands. CR 22a at Ex. 3, pp. 9; see also SER 10a, 12a, & 13a. The protocol deems a particular stand "occupied" where this non-nesting behavior is evidenced up to one-quarter mile away in a separate, adjacent stand. CR 22a at Ex. 3, p. 9.

² The distinction between nesting and occupancy was reflected in two different versions of Section 2001(k)(2) introduced in the House. Compare H.R. 1927 with H.R. 1944. SER 10a at Ex. 5.

"The practical effect of this standard," as noted by the district court, "is that a sale unit may be deemed 'occupied' under the Protocol even though there are no murrelets nesting within the boundaries of the sale unit." CR 340 at 5; see also SER 10a at Ex. 6, pp. 194-95.

3. The Administration's Interpretation.

On August 23, 1995, federal defendants issued a memorandum, which stated that the Forest Service and BLM would rely on the PSG protocol for determining murrelet nesting since the protocol's criteria were the "best available evidence." CR 22a at Ex. 1.

Federal defendants stated that consistent with the PSG protocol, timber sale units under section 2001(k)(1) would be prohibited from award, release, and completion even if there was no physical evidence of a particular marbled murrelet nest within a sale unit, such as evidence of an active nest site, egg shell fragments, fecal rings, or chicks. Instead, federal defendants resolved to rely on PSG protocol "occupancy" determinations for invoking section 2001(k)(2), despite the fact that "occupancy" criteria are much broader than "nesting" criteria under the protocol, and despite the clear language in section 2001(k)(2), which only excludes units from the emergency legislation where a murrelet "is known to be nesting within . . . the sale unit."

: : :
: : :
: : :

III.

SUMMARY OF ARGUMENT

The district court correctly rejected federal appellants' wholesale application of the PSG protocol for making "known to be nesting" determinations. Applying the PSG protocol is inconsistent with the plain language of section 2001(k)(2) and overall intent of the statute.

Under section 2001(k)(2), a sale unit may be excluded from the emergency legislation if a marbled murrelet "is known to be nesting within the acreage that is the subject of the sale unit." Pub. L. No. 104-19, § 2001(k)(2), 109 Stat. 194, 240-47. Without resort to extrinsic aids of interpretation, the district court correctly discerned the clear and unambiguous elements of section 2001(k)(2).

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

holding is derived from the clear language of the statute and should be affirmed.

Second, although the nesting exception in section 2001(k)(2) plainly requires current nesting within the sale unit, the court noted a latent ambiguity behind the provision. Specifically, the court stated that "the plain language of section 2001(k)(2) does not specify the evidence necessary" to support the nesting exception. CR 340 at 11. Facing this latent ambiguity, the court reviewed the legislative history behind section 2001(k) and considered other extrinsic interpretive sources.

Based upon the plain language of the statute, as well as the legislative materials, the court correctly held that "section 2001(k)(2) repudiates a wholesale application of the PSG Protocol." CR 340 at 14. The PSG protocol, which looks outside of sale unit boundaries and considers behavior within or above adjacent stands, is inconsistent with section 2001(k)(2), which requires evidence of a nest located within sale unit boundaries. Consistent with the Supreme Court's decision in Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984), the court properly concluded that applying the PSG protocol and relying on evidence outside sale unit boundaries for a "known to be nesting" determination is an impermissible construction of the statute. CR 340 at 8, 9 n.3, 10, 14-16, & 20. This holding is consistent with the plain language of the statute and should be affirmed.

IV.

ARGUMENTA. Standards of Review.

This appeal presents issues of statutory construction and interpretation, which are questions of law reviewed de novo. Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131 (9th Cir. 1993), cert. denied, 114 S. Ct. 1612 (1994); Hellon & Assocs., Inc. v. Phoenix Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992); United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.), cert. denied, 469 U.S. 824 (1984). Factual determinations underlying the district court's statutory interpretation, however, are entitled to a clearly erroneous standard of review. Nevill v. Shell Oil Co., 835 F.2d 209, 211 (9th Cir. 1987).

A grant of summary judgment is also reviewed de novo. Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995); Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). De novo review of a district court judgment concerning a decision of an administrative agency means the court of appeals views the case from the same position as the district court. Nevada Land Action Ass'n v. United States Forest Service, 8 F.3d 713, 716 (9th Cir. 1993).

B. The District Court's Decision Concerning the Scope of the "known to be nesting" Exception in Section 2001(k)(2) Should be Affirmed.1. Judicial review of administrative interpretations of statutes after Chevron.

Where review of agency action under an arbitrary and capricious standard involves an agency's construction of a

statute it administers, the district court must give effect to any unambiguously expressed intent of Congress in the statute. Northwest Motorcycle Ass'n v. United States Dep't of Agric., 18 F.3d 1468, 1468 (9th Cir. 1994); 5 U.S.C. § 706(2)(A). This is the first step of the judicial review analysis under Chevron. In Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the Supreme Court stated:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron, 467 U.S. at 842-43 ("The judiciary is the final authority on issues of statutory construction and we must reject administrative constructions which are contrary to clear congressional intent.")

Only where the statute is silent or ambiguous concerning an issue in dispute must the district court reach the next question and determine whether the agency's interpretation of the statute was based on a permissible construction of the statute. Northwest Motorcycle, 18 F.3d at 1468. This is the second step of analysis under Chevron: "[If] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 842-43.

Although this approach seems to herald a diminution of the district court's role in the interpretation and construction of statutes, the Chevron decision does not give agencies limitless freedom to interpret their statutory mandates without judicial scrutiny.

For example, first and foremost, the district "court must reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9. Taken literally, this means that when a court finds a statute to be sufficiently clear regarding an issue, it must automatically overturn any agency interpretation that is inconsistent with the clear statutory meaning, without lending deference to, or even considering other factors bearing on, the soundness of the agency's chosen interpretation. See, e.g., Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989).

In deciphering congressional intent, the Supreme Court has further stated that the "starting point is the language" of the statute, but that in interpreting a statute, courts "are not guided by a single sentence or member of a sentence," but should instead "look to the provisions of the whole law, and to its objects and policy." Dole v. United Steelworkers of America, 494 U.S. 26 (1990); see also K-Mart Corp. v. Cartier, 486 U.S. 281, 291 (1988).

This test for sufficient clarity under step one of Chevron enlarges the class of agency interpretations in potential conflict with congressional intent. Courts must avoid deferring

to an agency - at all - where the "plain meaning" of the statute is contrary to the agency's view. See, e.g., MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223 (1994).

2. Federal-appellants misinterpret the district court's treatment of the ambiguity in section 2001(k)(2).

Appellants disagree among themselves about the scope, and even the existence, of an ambiguity in section 2001(k)(2). Using an extremely broad brush, federal appellants imply that Judge Hogan concluded as a matter of law that all of section 2001(k)(2) is ambiguous. See Fed. App. Br. at 31-32, 38-39. This is incorrect. Federal appellants either misinterpret Judge Hogan's order, or they are attempting to bootstrap all of section 2001(k)(2) into step two of the Chevron analysis, such that the court must completely defer to the administration's interpretation. Id. The Pilchuck appellants, on the other hand, claim that "the language and purpose of § 2001(k)(2) are clear on their face." Pilchuck Br. at 50-51.

Despite this disagreement among the appellants, appellee Scott Timber Co. is most concerned with federal appellants' characterization of the entire "known to be nesting" exception in the statute as ambiguous. See Fed. App. Br. at 31-32, 38-39. The district court did not conclude that section 2001(k)(2) is ambiguous in its entirety. Rather, the court analyzed each clause and each of the pertinent terms used in section 2001(k)(2), see CR 340 at 8-10, in an effort to give effect to Congress' intent in light of, and consistent with, the

unambiguous portions of the statute. See CR 340 at 8-20. It is well-settled that an ambiguity can exist as to only some words or a portion of a statute, and that the ambiguity does not necessarily taint the entire statute. 2A Norman J. Singer, Statutes and Statutory Construction § 45.02 at 7 n.15 (5th ed. 1992).

In its January 19, 1996 Order, the district court did not identify any ambiguity with the words chosen by Congress. Rather, the district court only identified a latent ambiguity behind the words used in section 2001(k)(2) — specifically, the statute does not specify precisely what specific evidence observed within a sale unit boundary is necessary to sustain a "known to be nesting" determination. CR 340 at 10-11, 18. The federal appellants' characterization of the entire "known to be nesting" exception as ambiguous is simply inaccurate. See Fed. App. Br. at 31-32, 38-39. The district court's analysis is much more refined, dividing the section 2001(k)(2) inquiry into several distinct parts: (1) clear terms; (2) a latent ambiguity; and (3) a legal analysis of federal defendants' application of a protocol that is inconsistent with the plain language of section 2001(k)(2) and overall intent of the statute.

3. The phrase "is known to be nesting within . . . the sale unit" is unambiguous.

Under section 2001(k)(2), a sale unit may not be released if a marbled murrelet "is known to be nesting within the acreage that is the subject of the sale unit." Pub. L. No. 104-19, § 2001(k)(2), 109 Stat. 194, 240-47. Without resort

to extrinsic aids of interpretation, the district court correctly discerned the clear and unambiguous elements of section 2001(k)(2).

First, by only permitting units to be excluded where a murrelet "is" known to be nesting, the court concluded that the administration may not withhold a sale without sufficient evidence that a murrelet is "currently" nesting. CR 340 at 8. This interpretation, under the first step of Chevron, is consistent with the plain language of the statute. Chevron, 467 U.S. at 842-43.

Second, the district court correctly noted that by using the phrase "within the acreage that is the subject of the sale unit," Congress clearly intended that the administration would not withhold a sale unless a murrelet is actually and currently nesting "within the sale unit." CR 340 at 9-10. This requirement is clear, without regard to what other murrelet behavior is noted in other adjacent stands, which is the inquiry under the PSG protocol. CR 340 at 9-10.

Third, based on the requirement that the nesting must be "within" the actual sale unit, the court concluded that the PSG protocol for determining "occupancy," which considers murrelet behavior within a quarter mile of the sale unit, "cannot be exercised consistently with the plain language of section 2001(k)(2)." CR 340 at 9. This interpretation, under the first step of Chevron, is also consistent with the plain, unambiguous statutory language. Chevron, 467 U.S. at 842-43.

Fourth, also based on the requirement that the nesting must be "within" the actual sale unit, the court concluded that to the extent the PSG protocol permits nesting determinations to be based on other evidence that is not observed within the actual "sale unit boundaries" – such as circling, calling from adjacent stands, or other evidence outside of the subject stand – this methodology is "inconsistent with the plain language of section 2001(k)(2)." CR 340 at 9-10.

Thus, by interpreting the plain language of section 2001(k)(2), the district court concluded that in order to exclude a sale based upon a murrelet "known to be nesting" determination, the agency must find that a murrelet is: (1) currently; (2) nesting; (3) within sale unit boundaries, based on the observation of evidence located sub-canopy within the actual "sale unit boundaries." CR 340 at 7-10, 20-21. This holding is derived from the clear language of the statute, regardless of whether the court believed there was a latent ambiguity behind the "known to be nesting" phrase in section 2001(k)(2).

4. The only ambiguity found by the court in section 2001(k)(2) is what specific evidence within sale unit boundaries may be used to sustain a "known to be nesting" determination.

Next, the district court sought to determine what specific types of evidence – specifically, evidence observed "within sale unit boundaries" – may be used to sustain a "known to be nesting" determination. As to this issue – and this issue only – Judge Hogan stated that "the plain language of section 2001(k)(2) does not specify the evidence necessary." CR 340 at

11; see also CR 340 at 16 ("[S]ection 2001(k)(2) . . . does not clearly state the specific standards sufficient for a 'known to be nesting' determination.").

Without retreating from its earlier analysis in the Order, see CR 340 at 8-10, the court, facing this latent ambiguity, reviewed the legislative history behind section 2001(k) and considered other extrinsic interpretive sources. At the same time, however, the court, at each juncture in its analysis, compared the administration's resolve to use the PSG protocol in an effort to determine whether the administration's construction of the statute was a reasonable and permissible construction of the ambiguity. Under step two of the Chevron analysis, the court correctly concluded that the administration's construction of this ambiguity was unreasonable and inconsistent with the plain language of the statute.

5. The court correctly rejected the administration's application of the PSG protocol as contrary to the plain language of the statute.

Reviewing the statute's legislative history, the court noted that the House of Representative's original version of the statute did not contain a "known to be nesting" exception. CR 240 at 11. Senator Gorton then sponsored a "known to be nesting" exception to the statute, which contained the exact language that was eventually enacted. CR 340 at 12. Senator Murray then introduced an alternative that would have mandated replacement volume under section 2001(k)(3) for any reason under the Endangered Species Act and not just when a bird "is known to be

nesting." CR 340 at 12-13. The Senate rejected the Murray amendment. Id.

The district court noted that Senator Gorton, Senator Hatfield, and the House Conference Report all understood the exception to only apply to specific timber sale "units" in which murrelets are "actually found" with a "known nesting site." CR 340 at 13. Moreover, in negotiating the final version of the bill before the Senate, Senator Gorton clarified that the authors fully considered and rejected any exclusion under section 2001(k)(2) based on murrelet "occupancy" in favor of a more stringent "is known to be nesting" standard. CR 340 at 14. Senator Gorton also confirmed that if the administration desired to invoke the "known to be nesting" exception, the authors intended for the administration to provide "physical evidence that the bird is 'nesting' in the unit." Id.

Based upon the plain language of the statute, as well as these legislative materials, the district court concluded that "section 2001(k)(2) repudiates a wholesale application of the PSG Protocol." Id. The PSG survey protocol, which looks outside of sale unit boundaries and considers behavior within or above adjacent stands, is inconsistent with section 2001(k)(2), which requires evidence of a nest located within sale unit boundaries. Thus, under the second step of Chevron, the court concluded that the wholesale application of the PSG protocol and reliance upon evidence outside sale unit boundaries for a "known to be nesting" determination is an impermissible construction of the statute.

CR 340 at 8, 9 n.3, 10, 14-16, 20. This decision is consistent with the plain language of the statute and should be affirmed.

Finally, in addition to the district court's reasoning in its January 19, 1996 Order, federal appellants' construction of the statute is inconsistent with its plain meaning for other reasons as well. As Judge Hogan concluded, section 2001(k)(2) requires current nesting "within the sale unit." CR 340 at 20-21. Federal appellants, however, insist that murrelet nesting can and should be detected though evidence set forth in the PSG protocol, rather than through the criteria suggested by the court. Fed. App. Br. at 33. The protocol, however, was not established to confirm "nesting." See generally CR 22a at Ex. 3.

In contrast, appellants' expert in this case, S. Kim Nelson, has already identified dozens of locations in Oregon and Washington that have confirmed, verifiable marbled murrelet nest trees or nest stands. See SER 185 at ¶ 13; SER 152 at 2-3. Further, in her second declaration at the district court level below, Nelson explained that as of September 22, 1995, there were forty five active or historic nests in thirty six trees in Oregon. Id. Fifteen of the forty five nests are active nest sites. Id. One of these active nest sites is apparently in Scott Timber's Father Oak Sale. SER 194 at Ex. A.

Given that appellants have, in fact, identified active nest sites in the Northwest, and the plain language of the exception in section 2001(k)(2) requires evidence that a murrelet is "known to be nesting within . . . the sale unit," the

administration's resolve to use a survey protocol designed to identify "occupancy" is plainly an impermissible and inconsistent construction of the statute.

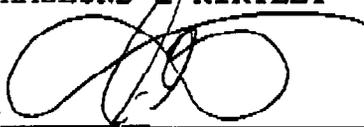
v.

CONCLUSION

For the reasons set forth above, the district court's January 19, 1996 Order granting plaintiff NFRC's motion for summary judgment as to its third and fourth claims for injunctive relief, and granting Scott Timber Co.'s motions for summary judgment in consolidated case number 95-6267, should be affirmed.

DATED this 21st day of March, 1996.

HAGLUND & KIRTLEY

By 

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

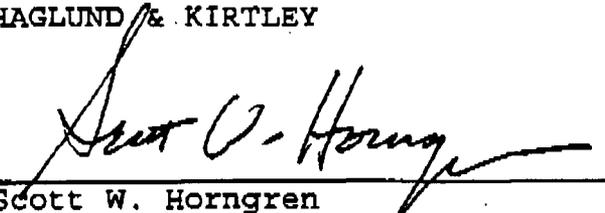
STATEMENT OF RELATED CASES

The undersigned, counsel of record for plaintiff-appellee Scott Timber Co., states the following are "related cases" pending in this Court within the meaning of Ninth Circuit Rule 28-2.6:

NFRC v. Glickman, Nos. 95-35038 and 95-36042

DATED this 21st day of March, 1996.

HAGLUND & KIRTLEY

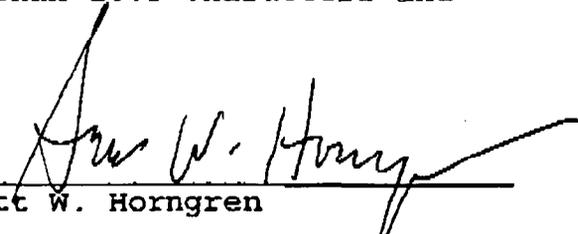
By 

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

CERTIFICATE PURSUANT TO CIRCUIT RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the foregoing brief of plaintiff-appellee Scott Timber Co. is monospaced, has a typeface of no more than 10.5 characters and contains less than 6,000 words.

March 21, 1996



Scott W. Horngren

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **BRIEF OF PLAINTIFF-APPELLEE SCOTT TIMBER CO.** on the following parties:

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

Attorneys for Plaintiffs

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

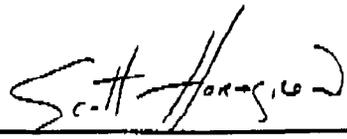
Attorney for NFRC

Mr. Albert M. Ferlo, Jr. **VIA FEDERAL EXPRESS**
U.S. Department of Justice
ENR Division
Appellant Division
9th & Pennsylvania Avenue, N.W.
Room 2336
Washington, D.C. 20530

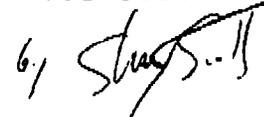
Attorneys for Defendants

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

DATED March 21st, 1996.



Scott W. Horngren
Attorneys for Scott Timber Co.



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 29 pages

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

Vaagen Bros

Challenge to
Gaterson Sale

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

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.,
Defendants-Intervenors-Appellees.

Nos. 96-35107 & 96-35132

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

v.

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

and

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

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

PLAINTIFF-INTERVENOR-APPELLEE
VAAGEN BROS. LUMBER, INC.'S BRIEF

SCOTT W. HORNGREN, OSB No. 88060
SHAY S. SCOTT, OSB NO. 93421
Haglund & Kirtley
101 SW Main, Suite 1800
Portland, Oregon 97204
Telephone: (503) 225-0777

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

CORPORATE DISCLOSURE STATEMENT
REQUIRED BY FRAP 26.1

Plaintiff-intervenor-appellee Vaagen Bros. Lumber, Inc.
has no parent company, subsidiary, or affiliate that has issued
shares to the public.

DATED this 26th day of March, 1996.

HAGLUND & KIRTLEY

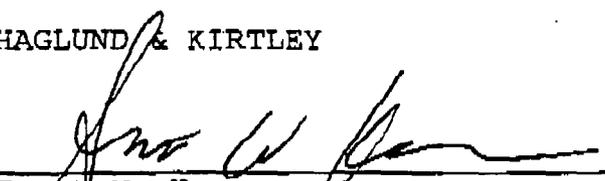
By 
Scott W. Horngren
Attorneys for Plaintiff-Intervenor-
Appellee Vaagen Bros. Lumber, Inc.

TABLE OF CONTENTS

I.	STATEMENT OF ISSUES	1
II.	STATEMENT OF THE CASE	1
	A. Jurisdiction	1
	B. Nature of the Case	1
	C. Proceedings Below	3
	D. Factual Background	5
III.	SUMMARY OF ARGUMENT	6
IV.	ARGUMENT	8
	A. Standard of Review	8
	B. The District Court's Decision Concerning the Scope of Section 2001(k) (1) Should be Affirmed, and the Suspension Imposed on Operations at the Gatorson Timber Sale Should be Removed by the Forest Service	9
	1. Section 2001(k) (1) Requires the Release of the Gatorson Timber Sale Under the Statute's Plain Meaning and the Legislative History and Purpose Behind its Enactment	9
	2. Because Section 2001(k) Creates a Clear and Unavoidable Conflict with NEPA, NEPA Must Yield	11
	3. Section 2001(k) (1) Does Not Violate the Principle of Separation of Powers	13
	a. Congress's Direction to Release Timber Sales Halted Due to Court Order Does Not Violate the Doctrine of Separation of Powers	13
	b. Section 2001(k) (1) Does Not Violate the Separation of Powers Doctrine as Applied to the Gatorson Timber Sale	20
V.	CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<u>Alaska Wilderness Recreation & Tourism Ass'n. v. Morrison,</u> 67 F.3d 723 (9th Cir. 1995)	8, 13, 14, 18, 19
<u>Flint Ridge Dev. Co. v. Scenic Rivers Ass'n. of Oklahoma,</u> 426 U.S. 776 (1976)	11, 12
<u>Hellon & Associates, Inc. v. Phoenix Resort Corp.,</u> 958 F.2d 295 (9th Cir. 1992)	8
<u>NERC v. Glickman,</u> Nos. 95-36038 and 95-36042 (D. Or.)	3
<u>NLRB v. Jones & Laughlin Steel Corp.,</u> 301 U.S. 1 (1937)	20
<u>Northwest Forest Resource Council (NERC) v. Glickman,</u> No. 95-6244-HO (D. Or.)	2, 3
<u>Plaut v. Spendthrift Farm, Inc.,</u> 115 S. Ct. 1447 (1995)	7, 14, 15, 16
<u>Portland Audubon Society et al., v. Manuel Lujan, Jr.,</u> Civil No. 87-1160-FR (D. Or.)	16
<u>Robertson v. Seattle Audubon Society,</u> 503 U.S. 429 (1992)	7, 8, 15, 16, 17, 18, 19, 20
<u>Seattle Audubon Society et al., v. F. Dale Robertson,</u> Civil No. 89-160	16
<u>Smith v. Forest Service,</u> Civ No. 93-178-JLQ (E.D. Wash. Dec. 23, 1993)	5
<u>Smith v. United States Forest Service,</u> 33 F.3d 1072, 1078 (9th Cir. 1994)	5, 6
<u>Spain v. Aetna Life Ins. Co.,</u> 11 F.3d 129 (9th Cir. 1993), <u>cert. denied,</u> 114 S. Ct. 1612 (1994)	8
<u>United States v. Klein,</u> 80 U.S. (13 Wall.) 128 (1872)	14, 15, 17
<u>United States v. Yacoubian,</u> 24 F.3d 1, 3 (9th Cir. 1994)	9

Washington Contract Loggers Assoc. et al., v. F. Dale
Robertson,
Civil No. 89-99 (order granting preliminary
injunction) 16

Westlands Water Dist. v. Nat. Res. Def. Council,
43 F.3d 457, 460 (9th Cir. 1994) 12

STATUTES

Pub. L. NO. 104-19, 109 Stat. 194, 194-254 (1995)
("Emergency Salvage Timber Sale Program") Passim

I.

STATEMENT OF ISSUES

1. Does the requirement in the Emergency Salvage Timber Sale Program, Section 2001(k) of Pub. L. No. 104-19, to release sales within forty-five days of enactment "notwithstanding any other provision of law" apply to the Gatorson Timber Sale, which was awarded to plaintiff-intervenor-appellee Vaagen Bros. ("Vaagen"), partially logged, and is still under contract to Vaagen, and which was suspended by the Forest Service when this Court held it needed to be analyzed by the Forest Service for its effect on roadless areas under the National Environmental Policy Act?

2. Does Section 2001(k)(1)'s requirement that the Gatorson Timber Sale be immediately released by the United States Forest Service to appellee Vaagen for logging violate the separation of powers doctrine?

II.

STATEMENT OF THE CASE**A. Jurisdiction.**

Appellee Vaagen concurs with federal appellants' statement of jurisdiction.

B. Nature of the Case.

In these consolidated appeals, federal defendant-appellants ("federal defendants") and a number of environmental groups ("environmental appellants") challenge two rulings of the District Court of Oregon. The first ruling, embodied in its

January 10, 1996 order, as amended (Jan. 17, 1996), enjoined federal appellants to award, release, and permit to be completed all timber sales subject to Section 2001(k)(1), the Emergency Salvage Timber Sale Program of the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Antiterrorism Initiatives, for Assistance in the Recovery From the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995. Pub. L. No. 104-19, 109 Stat. 194, 194-254 (1995) ("Emergency Salvage Timber Sale Program"). Northwest Forest Resource Council (NFERC) v. Glickman, No. 95-6244-HO (D. Or.), Excerpt of Record and Court Record (ER) 331, Court Record (CR) 338. The second ruling, embodied in the court's January 19, 1996 order, required the release of these sales unless federal defendants determined that a threatened or endangered bird species is known to be nesting in a sale unit under Section 2001(k)(2) of the same statute. ER 340. Vaagen's Brief addresses only the January 10, 1996 Order.

The environmental appellants allege that the district court erred in two respects in issuing its January 10, 1996 order. First, they assert that Congress did not intend to revive sales which had already been canceled or enjoined for one reason or another prior to the enactment of the Emergency Salvage Timber Sale Program. Second, they assert that to the extent Congress intended sales to go forward which had been stopped by a court order prior to the enactment of the Emergency Salvage Timber Sale

Program, the Act violates the doctrine of separation of powers and cannot be enforced.¹

C. Proceedings Below.

Three separate suits were brought by various plaintiffs which sought to determine the effect of Section 2001(k)(1) and 2001(k)(2) on various timber sales. All the suits were consolidated. Appellee Vaagen intervened as a plaintiff in the case Northwest Forest Resource Council v. Glickman, No. 95-6244-HO (D. Or.), to obtain a declaration that Section 2001(k)(1) applied to the Gatorson Timber Sale. Environmental appellants opposed release of the Gatorson Timber Sale. CR 244.

On January 10, 1996, the district court enjoined the federal defendants to immediately award, release, and permit to be completed all sales its Order found to be subject to Section 2001(k)(1). ER 331. The court found, inter alia, that all sales which had been offered between October 23, 1989 and July 27, 1995 (the date of enactment of the Emergency Salvage Timber Sale Program), including the Gatorson Timber Sale, were released by Section 2001(k)(1). The court held if the sale was offered within the meaning of Section 2001(k)(1), it was released even if the sale was canceled or enjoined. Id. at 24. With respect to

¹ Federal appellants have not appealed the district court's January 10, 1996 Order interpreting Section 2001(k)(1) to require the release of the Gatorson sale "notwithstanding any other provision of law." However, federal appellants disagree with the district court's October 17, 1995 (CR 178) ruling that Section 2001(k)(1) applies to timber sales on all national forests in Washington and Oregon and have appealed that Order. A decision on the appeal is pending. NFERC v. Glickman, Nos. 95-36038 and 95-36042.

sales that had been subject to an injunction in another court, the court stated that its order should operate only as a declaratory judgment.

The district court determined that Section 2001(k)(1) released sales suspended by a court's determination that the sale violated a statute, such as NEPA. ER 331 at 18-19. This interpretation was warranted due to the plain language of the statute, which provides that:

AWARD AND RELEASE REQUIRED - -
Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sales contracts offered before that date [July 27, 1995] in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 [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.

Pub. L. No. 104-19, 109 Stat. 194, 246 (July 27, 1995) (emphasis added). ER 331 at 17. The district court additionally held that the legislative history and purpose of the Emergency Salvage Timber Sale Program supported the plain meaning of the statute, and mandated its application to sales which had been canceled or enjoined under various statutes for environmental reasons.² Id.

² Federal and environmental appellants concede there is no permanent injunction against the Gatorson Timber Sale. Vaagen SER 244 at 11 n.9 (federal appellants); Vaagen SER 384 at 37 (environmental appellants).

On January 25, the district court denied appellants' motion for stay pending appeal of the January 10, 1996 order. CR 363. Significantly, the district court denied environmental appellants' oral motion to stay the January 10, 1996 order as to the Gatorson Timber Sale pending decisions from other courts. Id. This court subsequently denied appellants' motion for stay pending appeal.

D. Factual Background.

The Gatorson sale was offered for sale and purchased by Vaagen in March, 1993. Declaration of Duane Vaagen at ¶ 6, Vaagen Supplemental Excerpts of Record (Vaagen SER) 277. Vaagen was awarded the Gatorson Timber Sale contract on May 6, 1993. Vaagen SER 244. Vaagen SER 277 at ¶ 6-8. Three units of the sale were harvested in 1993, pursuant to an order on Mitchell Smith's motion for stay pending appeal in Smith v. Forest Service, Civ No. 93-178-JLQ (E.D. Wash. Dec. 23, 1993). Vaagen SER 244, Ex. E; Vaagen SER 277 at ¶ 7. The Forest Service never rescinded the sale offer and Vaagen and the Forest Service remain parties to an existing contract for the Gatorson Timber Sale. Vaagen has filed an operating plan under the contract to continue harvest of the sale. Id. at ¶ 8.

Mitchell Smith challenged the sale claiming it violated the Washington State Wilderness Act and the National Environmental Policy Act (NEPA). This Court concluded that the Gatorson Timber Sale would not cause environmental harm to fish, wildlife, watershed, and other resources. Smith v. United States

Forest Service, 33 F.3d 1072, 1078 (9th Cir. 1994). However, this Court held that the sale violated NEPA because the environmental assessment did not adequately discuss the effect of the timber sale on a roadless area. This Court declined to order the preparation of an EIS or an EA and left to the agency the decision of how best to comply with NEPA. Id. at 1079. This Court issued no injunction. Id. The mandate from this court affirmed in part, reversed in part, and remanded the case to the district court. Vaagen SER 267, Ex. 1. The district court, in turn, simply granted plaintiff judgment in accordance with the opinion of this court in Smith, supra. Judgment, Vaagen's SER 243, Ex. 14. No injunction was issued by the district court.

The Forest Supervisor suspended further logging on the Gatorson Timber Sale, presumably until it could review the impact of further sale activity on the roadless area. The environmental appellants appear to concede this point with their description of the Gatorson Timber Sale, which they note was suspended by the Forest Supervisor "after determining that the sale did not comply with the amended forest plan." Opening Brief of Plaintiffs-Appellants at p. 12, see also n.2, supra.

III.

SUMMARY OF ARGUMENT

The district court's conclusion that Section 2001(k)(1) releases all sales included in its scope should be affirmed. In enacting the Emergency Salvage Timber Sale Program, Congress intended what it said in plain language in Section 2001(k)(1):

that the affected sales be released "notwithstanding any other provision of law." The fact that the Gatorson Timber Sale was administratively suspended after this court's decision that further NEPA review must be performed on the sale is no longer relevant. NEPA is an "other provision of law" which is repealed as applied to the sales included in the Emergency Salvage Timber Sale Program. Further evidence that the Emergency Salvage Timber Sale Program was intended to release sales suspended due to NEPA is Section 2001(k)(1)'s command that the Secretaries "award, release, and permit to be completed" the affected sales within 45 days of its enactment. Under relevant caselaw, the 45-day statutory release deadline is further proof that Congress intended the statute to supplant NEPA, since compliance with NEPA within 45 days is impossible. There is simply no principled way to read the Emergency Salvage Timber Sale Program legislation in a manner which does not compel the immediate release of the Gatorson Timber Sale.

The Emergency Salvage Timber Sale Program does not offend the doctrine of separation of powers. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995), is not on point. Section 2001(k) does not command courts to reopen final judgments. It commands the Secretaries of Agriculture and Interior to award, release, and permit to be completed certain timber sales. Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), is directly on point, and precludes any finding that Section 2001(k) violates the doctrine of separation of powers by

interfering in pending cases before the federal courts. As explained in Robertson, Congress may constitutionally direct the outcome in a particular case, as long as it also amends or repeals the law underlying the litigation. In the Emergency Salvage Timber Sale Program, Congress expressly directed that "all other provisions of law" were repealed vis-a-vis the affected sales. Congress expressly stated that affected sales would be governed by the new regime laid out in Sections 2001(k)(1) and (k)(2). This court's decision in Alaska Wilderness Recreation & Tourism Association v. Morrison, 67 F.3d 723 (1995), does not apply to this statute, since Congress replaced the old law affecting these sales -- in this case, NEPA -- with new standards, including a provision that Section 2001(k)(1) does not apply if a threatened or endangered bird species is "known to be nesting" within the sale area under Section 2001(k)(2). Section 2001 does not violate the separation of powers doctrine.

IV.

ARGUMENT

A. Standard of Review.

This appeal presents an issue of statutory construction and interpretation, reviewed de novo by this court. Spain v. Aetna Life Ins. Co., 11 F.3d 129, 131 (9th Cir. 1993), cert. denied, 114 S. Ct. 1612 (1994); Hellon & Associates, Inc. v. Phoenix Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992). It further presents a constitutional question, also to be reviewed

de novo by this court. United States v. Yacoubian, 24 F.3d 1, 3 (9th Cir. 1994).

B. The District Court's Decision Concerning the Scope of Section 2001(k)(1) Should be Affirmed, and the Suspension Imposed on Operations at the Gatorson Timber Sale by the Forest Service Should be Removed.

1. Section 2001(k)(1) Requires the Release of the Gatorson Timber Sale Under the Statute's Plain Meaning and the Legislative History and Purpose Behind its Enactment.

It is unclear whether the environmental appellants are arguing that Congress did not intend Section 2001(k)(1) to release sales such as the Gatorson, which the Forest Service suspended due to an order of a court based on an environmental statute. See Sections II. A. and B. of Opening Brief of Plaintiffs-Appellants, pp. 30-39, arguing that sales which have been canceled by an agency are not subject to Section 2001(k)(1), since (appellants contend) a timber sale contract offer no longer exists. This argument, that Section 2001(k)(1) was not meant to apply to previously-canceled sales, is seemingly not made as against sales enjoined by courts for environmental reasons (or, obviously, as against sales halted by an agency due to a simple court opinion, as in the case of the Gatorson Timber Sale). In fact, plaintiffs-appellants effectively concede that Section 2001(k)(1) was meant to reopen sales halted due to environmental statutes other than section 318: "While the language 'notwithstanding any other provision of law' may eliminate the statutory basis for many environmental challenges" Opening Brief of Plaintiffs-Appellants at pp. 32-33.

To the extent plaintiffs-appellants may have meant to argue that Section 2001(k) (1) does not require the release of the Gatorson Timber Sale, their argument fails completely.³ There is no principled way in which Section 2001(k) (1) can be read to not apply to the Gatorson Timber Sale. It provides that "notwithstanding any other provision of law," the relevant agency Secretary "shall act to award, release, and permit to be completed in fiscal years 1995 and 1996 . . . all timber sale contracts offered or awarded before [the date of the section's enactment, July 27, 1995]." Since the Gatorson Timber Sale was both offered and actually awarded (and in fact actually logged) before the Rescission Act's enactment, it fits squarely within the language of the statute. The Gatorson Timber Sale was never "canceled," so the plaintiffs-appellants' rather desperate argument, unsupported by the statute and its history, that the phrase "offered or awarded" does not include offers or awards which were later "canceled" cannot apply. Operations on the Gatorson Timber Sale were suspended by the Forest Service pending its review of a roadless area under NEPA. Vaagen's bid bond was never returned to it by the Forest Service and a live contract still exists. Vaagen SER 277.

³ Although it is unclear what sales are included in which of plaintiffs-appellants' arguments, they may have been trying to argue late in their Brief that since the Gatorson sale was suspended to comply with a court order, the original "offer" was voided, and the sale could only be completed under a new "offer." See Opening Brief of Plaintiffs-Appellants at pp. 45-46.

As pointed out by the district court, the legislative history and purpose behind Section 2001(k)(1) similarly show that Congress intended sales like the Gatorson to be released.

ER 331, CR 338 at p. 17.

2. Because Section 2001(k) Creates a Clear and Unavoidable Conflict with NEPA, NEPA Must Yield.

There is no way in which Section 2001(k)(1) can be read to allow continued review of the Gatorson Timber Sale under NEPA. Section 2001(k) requires the release of qualifying timber sales within 45 days of the date of enactment. This mandatory, fixed timeline is precisely the type of statutory provision which the Supreme Court holds creates a clear and unavoidable statutory conflict that requires NEPA to yield.

In Flint Ridge Dev. Co. v. Scenic Rivers Ass'n. of Oklahoma, 426 U.S. 776 (1976), the Supreme Court concluded that Section 102 of NEPA recognizes that where a clear and unavoidable conflict in statutory authority prevents NEPA compliance, NEPA must yield. Id. at 788. The conflicting statute in Flint Ridge Development required that private real estate developers marketing unimproved subdivision tracts file disclosure statements with the Department of Housing and Urban Development (HUD) setting out information to protect prospective purchasers. Under the Disclosure Act, complete and accurate disclosure statements filed with the Secretary of HUD automatically became effective on the 30th day if not already approved by the Secretary. When HUD did not prepare an environmental impact statement before Flint Ridge Development's disclosure statement

became final, an environmental group brought suit alleging HUD's failure to prepare an EIS violated NEPA.

The Supreme Court held that Congress' unqualified requirement that accurate and complete disclosure statements be approved by HUD within 30 days of filing created a clear and unavoidable conflict with NEPA that required NEPA to yield. NEPA compliance, reasoned the Court, could not be achieved within the 30-day time limit. Any contrary reconciliation of the two statutes wrote the Supreme Court, would grant the Secretary of HUD a "power not conferred by statute" and "contravene the purpose of the 30-day provision." Id. at 790-91.

The statutory duty that the Emergency Salvage Timber Sale Program imposes on the Secretary of Agriculture--to release the Gatorson Sale within 45 days-- is the same type of mandatory duty imposed on the Secretary of HUD by the conflicting statutory provision construed in Flint Ridge Development. As was true for the Secretary of HUD in Flint Ridge Development, the Secretary of Agriculture must perform his statutory duty (release of the Gatorson Sale) regardless of whether he has complied with NEPA. The short timeline to comply with the statutory release duty makes NEPA compliance impossible for all practical purposes. This was also the case in Westlands Water Dist. v. Nat. Res. Def. Council, 43 F.3d 457, 460 (9th Cir. 1994). In Westlands, the court held that the Central Valley Project Improvement Act, which required the Secretary of Interior to deliver a specified amount of water to wetlands in the Central Valley "[u]pon

enactment of this title," created an irreconcilable conflict with NEPA. Given Section 2001(k)'s charge that the Gatorson Sale be released within 45 days of enactment, NEPA must yield to prevent what otherwise would be a clear and unavoidable conflict.

Westlands, 43 F.3d at 460 ("An irreconcilable conflict is created if a statute mandates a fixed time period for implementation and this time period is too short to allow the agency to comply with NEPA").⁴

3. Section 2001(k)(1) Does Not Violate the Principle of Separation of Powers.

Since Section 2001(k)(1) can only be read as requiring the immediate release of the Gatorson Timber Sale, the only issue preventing its immediate application to it is the separation of powers argument raised by plaintiffs-appellants. The federal appellants do not raise this issue with respect to any of the affected sales, perhaps recognizing its inapplicability to the Emergency Salvage Timber Sale Program. The argument fails completely.

a. Congress's Direction to Release Timber Sales Halted Due to Court Order Does Not Violate the Doctrine of Separation of Powers.

The environmental appellants object to the district court's ruling as applied to sales like the Gatorson, sales in which court orders prohibited the sales from proceeding in their

⁴ ONRC's reliance on Alaska Wilderness Recreation & Tourism Ass'n. v. Morrison, 67 F.3d 723 (9th Cir. 1995) is misplaced because the statute at issue there did not contain the words "notwithstanding any other provision of law." And, as importantly, did not require that the Secretary take action within a specific time period.

original form, a form that must go forward under the district court's ruling. Opening Brief of Plaintiffs-Appellants at p. 39.

In their section "Proceedings Below," environmental appellants make much of the district court's rejection of plaintiff Pilchuck Audubon's separation of powers arguments "based on one line of cases without ever addressing the recent Supreme Court case, Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995), on which Pilchuck Audubon principally relied." Opening Brief of Plaintiffs-Appellants at p. 26. Significantly, the actual Argument section of Plaintiffs-Appellants' Opening Brief refers only generally to Plaut, and indeed to its dissent in one instance. See Opening Brief of Plaintiffs-Appellants at pp. 39-41.

Environmental appellants apparently thought better of their earlier reliance on Plaut, with good reason, and revert to reliance on United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) and Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723 (9th Cir. 1995) in the body of their Brief. Opening Brief of Plaintiffs-Appellants at 43. Indeed, Plaut does not apply to the Gatorson sale or other cases like it. In Plaut, the Supreme Court held that once a case has achieved finality in the highest court in the applicable court hierarchy, through appeal or the running of the time to appeal, Congress may not declare by retroactive legislation that such a case must be reopened. 115 S. Ct. at 1457.

The environmental appellants do not cite the holding in Plaut, nor the Supreme Court's discussion which directly contravenes their argument. The fact is that the statute in Plaut required the reopening of specific cases. In Plaut, Congress had enacted a statute amending the Securities Exchange Act of 1934 to change a statute of limitations mandated by a Supreme Court case. The statute provided that securities fraud plaintiffs' cases, including those which had been dismissed as time barred under the Supreme Court's ruling, "shall be reinstated" on motion by a plaintiff. Id. at 1451. Unlike the statute at issue in Plaut, the Emergency Salvage Timber Sale Program does not require any closed cases to be reopened. Instead, it directs the Secretaries of Agriculture and Interior to do certain acts.

The only "separation of powers" doctrine remaining which could possibly apply to the Gatorson sale and the other sales is that articulated and addressed in United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) and Robertson v. Seattle Audubon Society, 503 U.S. 429, 441 (1992). Plaintiffs-appellants cite and rely on Klein, but for obvious reasons attempt to distinguish Robertson. The Supreme Court itself addressed the Klein/Robertson cases last year in Plaut, in describing a non-Plaut type restraint on Congress's power to direct the Article III courts. The Supreme Court wrote that in Klein:

[W]e refused to give effect to a statute that was said "to prescribe rules of decision to the Judicial Department of the government in cases ending before it." Id., at 146.

Whatever the precise scope of Klein, however, later decisions have made clear that its prohibition does not take hold when Congress "amends applicable law." Robertson v. Seattle Audubon Society, 503 U.S. 429, 441 (1992).

Plaut, 115 S. Ct. at 1452-1453.

Indeed, Robertson is squarely on point in this case, and precludes any finding that Section 2001(k)(1) violates the separation of powers doctrine. In Robertson, the Supreme Court addressed the constitutionality of portions of section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, also known as the Northwest Timber Compromise.

Section 318 stated in part that:

The Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

Robertson, 503 U.S. 429 at 434-435 (emphasis added). The "statutory requirements" underlying the cases mentioned by Congress were the Migratory Bird Treaty Act, the National Environmental Policy Act of 1969, the National Forest Management Act of 1976, the Federal Land Policy and Management Act of 1976, and the Oregon-California Railroad Land Grant Act. Various plaintiff environmental organizations had sued under some or all of these federal statutes and obtained injunctions against

various timber sales before the passage of section 318. Congress enacted section 318 to attempt to break the logjam in timber sales.

The Supreme Court rejected plaintiffs-appellees' claims, and this court's holding, that section 318 effected an unconstitutional usurpation of the powers of Article III courts by prescribing the results in pending cases. Significantly, the Supreme Court reversed this court's ruling that section 318 did not repeal or amend the environmental laws underlying the litigation, but impermissibly directed the court to reach a specific result. 503 U.S. 429 at 436. This Court had relied on Klein, "which it construed as prohibiting Congress from "directing] [sic] . . . a particular decision in a case, without repealing or amending the law underlying the litigation." Robertson, 503 U.S. 429 at 436.

The Supreme Court agreed with the appellants that section 318 did replace the existing environmental statutes underlying the litigation with new law, "without directing particular applications under either the old or the new standards." Id. The Court concluded: "that subsection (b)(6)(A) compelled changes in law, not findings or results under old law." Further, "[s]ection 318 did not instruct the courts whether any particular timber sales would violate [Section 318]." Id. at 439.

The Supreme Court reached this holding despite the arguments of appellees that the section seemed directed

particularly at the courts and had an "imperative tone": section 318 "determined and directed" that compliance with section 318 would constitute compliance with five existing statutes. Id. It similarly found section 318's specific listing of pending cases not significant, noting that "[t]o the extent that subsection (b)(6)(A) affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases." Id. at 440.

If section 318 passed the "separation of powers" test, than Section 2001(k)(1) cannot be even arguably violative of that doctrine. Unlike section 318, Section 2001(k)(1) expressly indicates its intent to change the law, by utilizing the phrase "notwithstanding any other provision of law." Additionally, it is not suspect for mentioning particular cases by name, as was section 318. Finally, its directive is to the executive, not the judicial, branch, in that it requires the Secretaries of Interior and Agriculture to award, release and allow to be completed the timber sales covered by the section, and requires nothing of the federal courts.

Since Klein has been reduced to virtual insignificance by the Supreme Court in Robertson, see infra p. 15, the only remaining leg environmental appellants have to attempt to stand on is Alaska Wilderness Recreation & Tourism Association v. Morrison, 67 F.3d 723. In Alaska, this court held that "while Congress unquestionably may amend substantive law affecting a pending case, and may do so in an appropriations statute," it had

not done so on the facts before it. Id. at 733. The Alaska court's holding was premised on its belief that section 503, another appropriations rider, unlike that in Robertson, offered no new statutory basis on which to analyze the matter at issue in the specific case before the court. Id. In this case, in contrast, Section 2001(k)(1) does clearly provide a "new statutory basis" on which to analyze the sales covered in it.

First, Section 2001(k)(1) clearly provides that sales shall be released "notwithstanding any other provision of law" if they meet the criteria delineated in Section 2001(k)(1), such as being "subject to Section 318." As in Robertson, the intent is "not only clear, but express" to supplant the old law -- "notwithstanding any other provision of law" with new law -- Section 2001(k)(1)'s requirements.

Second, Section 2001(k)(1) is coupled with 2001(k)(2), and together they provide a new set of substantive standards to be applied to each included sale. Instead of applying "any other provision of law," such as NEPA, these sections impose a new regime whereby one analyzes whether any threatened or endangered bird species is "known to be nesting within the acreage that is the subject of the sale unit." Section 2001(k)(2).

Finally, even if there were doubt about whether Section 2001(k)(1) prescribes new law, as required to be constitutional, this court is required to construe it in a way which would render it constitutional. As the Supreme Court stated in Robertson:

having determined that subsection (b) (6) (A) would be unconstitutional unless it modified previously existing law, the court then became obliged to impose that "saving interpretation," 914 F.2d at 1317, as long as it was a "possible" one. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act").

Robertson, 503 U.S. 429 at 441. Here, it is not only "possible" to interpret the Emergency Salvage Timber Sale Program as prescribing new law, it is impossible to construe it any other way.

b. Section 2001(k)(1) Does Not Violate the Separation of Powers Doctrine as Applied to the Gatorson Timber Sale .

The only court orders affecting the Gatorson Timber Sale required the Forest Service to re-examine the impact of the remainder of the sale on a 5,000 acre roadless area under NEPA, but did not determine that the sale would or would not violate NEPA, and did not enjoin the sale at all. The sale was suspended by the Forest Supervisor while NEPA review proceeded. Section 2001(k)(1) thus does not require any court involvement whatsoever with respect to the Gatorson Timber Sale, but simply directs the Forest Service to discontinue analysis under NEPA, and allow the sale to proceed. This direction to the executive branch by the legislative branch is not only not prohibited by the Constitution, but is what Congress exists to do. There is no separation of powers violation.

: : :

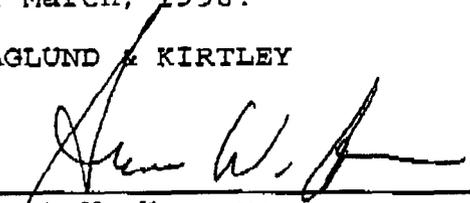
V.

CONCLUSION

The Gatorson Timber Sale meets the criteria laid out by Congress in the Emergency Salvage Timber Sale Program. The Forest Service must immediately allow appellee Vaagen to complete its contract and finish logging the sale. The district court's January 10, 1996 Order should be affirmed.

DATED this 25th day of March, 1996.

HAGLUND & KIRTLEY

By 

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

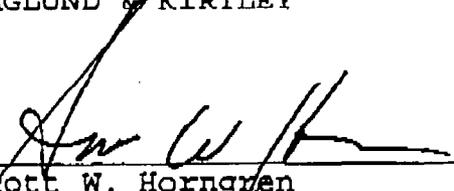
STATEMENT OF RELATED CASES

The undersigned, counsel of record for plaintiff-intervenor-appellee Vaagen Bros. Lumber, Inc., states the following are "related cases" pending in this Court within the meaning of Ninth Circuit Rule 28-2.6:

NERC v. Glickman, Nos. 95-35038 and 95-36042

DATED this 28th day of March, 1996.

HAGLUND & KIRTLEY

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

86408

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

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

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	David Gayer	
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Brian Burke	720-4732
	Peter Coppelman	514-0557
	Lois Schiffer	
	Jim Simon	
	Greg Frazier	720-5437
	Mike Gippert,	690-2730
	Jay McWhirter	
	Jim Perry	
	T.J. Glauthier	395-4639
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Tom Lee (503)	727-1117
	Karen Mouritsen	219-1792
	Kris Clark	
	Roger Nesbit (503)	231-2166
	Chris Nolan	395-4941
	Dave Shilton	514-4240
	Al Ferlo	
	Anne Almy	
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 3

DATE: March 29, 1996

FROM: Michelle Gilbert

MESSAGE: Please see attached.

Mark C. Rutzick Law Firm

A Professional Corporation

Attorneys at Law

500 Pioneer Tower

888 S.W. Fifth Avenue

Portland, Oregon 97204-2089

(503) 499-4573

Fax (503) 295-0915

MARK C. RUTZICK

Direct Dial (503) 499-4572

*Admitted to practice in
Oregon, Washington
and New York*

March 28, 1996

Michelle Gilbert
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
601 Pennsylvania Avenue N.W.
8th Floor
Washington, D.C. 20044

Re: Prong Timber Sale (Siuslaw National Forest)

Dear Michelle:

I am writing as counsel for Lone Rock Timber Co., the high bidder on the Prong timber sale on the Siuslaw National Forest in Oregon. The purpose of this letter is to seek the prompt award of this sale under section 2001(k) of Pub. L. 104-19.

The Prong sale was sold in 1990 under the provisions of section 318(b), but was never awarded. The sale has been the subject of litigation in *NFRC v. Glickman*, No. 95-6244-HO (D. Or.). NFRC sought the award and release of this sale in its third motion for summary judgment. In response to that motion the Forest Service acknowledged Prong as a section 318 sale, and asserted that while the sale is subject to section 2001(k), it would not be released based on the "known to be nesting" exemption in (k)(2). See Declaration of Jerry Hofer (September 29, 1995), ¶¶ 7, 9.

Whether the Prong sale is subject to the (k)(2) exemption, and will require replacement volume under (k)(3), is currently at issue in the Ninth Circuit appeal of Judge Hogan's January 19, 1996 order in *NFRC v. Glickman*. I am not writing to address that question.

The purpose of this letter is to seek the award of the Prong sale to Lone Rock Timber Co. Section (k)(1) unconditionally requires the award of the sales that are subject to the statute, independent of the Secretary's duty to release the sale. The (k)(2) exemption states that no exempted sale

Michelle Gilbert
March 28, 1996
Page 2

N01-9506\1RL91083.11R

unit "shall be released or completed under this subsection" It does not limit the duty in (k)(1) to award sales.

Thus, the duty to award sales subject to (k)(2) is not at issue in the current appeal of the January 19 order. To the contrary, the (k)(2) exemption can only apply to a sale if the sale is subject to section (k). Thus, the government's assertion that Prong is subject to the (k)(2) exemption is an acknowledgement that the sale is subject to (k)(1).

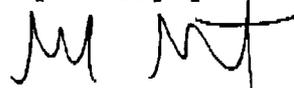
Further, (k)(3) provides that replacement volume can only be provided to a "purchaser" (not to a "high bidder," the term used in (k)(1)), which necessarily means that the sale must be awarded (so that there is a purchaser) before replacement volume can be provided. Thus, (k)(3) confirms that even when a sale may be subject to the (k)(2) exemption, it must nonetheless be awarded under (k)(1).

Section (k) requires all sales subject to the statute to have been awarded by September 10, 1995. We are well past that date. With September 30, 1996 fast approaching, Lone Rock wants to be able to move ahead with the sale, or with replacement volume, as quickly as the status of the sale is resolved. We therefore request the Forest Service promptly to issue an award letter and a contract to Lone Rock Timber Co. for the Prong timber sale.

Awarding the sale would fulfill the government's statement to Judge Hogan concerning this sale (among others) on September 29, 1995 that "the Forest Service is taking all possible action consistent with section 2001(k)." Defendants' Opposition to Plaintiff's Third Motion For Summary Judgment and in Support of Defendants' Cross Motion at 8.

Awarding this sale should not be controversial or complicated. There should be no need for court intervention on this narrow issue. However, we are confident that we could if necessary secure an order from Judge Hogan for the immediate award of this sale. I hope we will not have to do that.

Very truly yours,



Mark C. Rutzick

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION
APPELLATE SECTION
WASHINGTON, D.C. 20530

FAX NUMBER (202) 514-4240

DATE: March 29, 1996
FROM: Albert M. Ferlo, Jr.
RE: NFRC v. Glickman and Babbitt
OFFICE PHONE: (202) 514-2757
NUMBER OF PAGES: Message and 29 Pages
PLEASE DELIVER TO:

TO: Bob Baum,
Dave Gayer 208-3877
Dianh Bear 456-0753
Mike Gippert, 690-2730
Tim Obst,
Jay McWhirter (please send to Ann
Kenedy, Jeff Handy and others within the
Department of Agriculture)

Karen Mouritsen 219-1792
(Please send to Nancy Hays, Roger Nesbit
and others within the Department of
Interior)

Terry Garcia 482-4893
Elena Kagan 456-1647
Chris Nolan 395-4941

MESSAGE:

Attached is a draft reply brief addressing:

1. Known to be nesting
2. Next high bidder
3. Enjoined Sales

The brief is due to be filed on Monday, April 1, 1996.
Please forward any comments to me by 12:00 noon, on Monday.

Argument is now set for May 7, 1996.

Al Ferlo
Attorney, Appellate Section

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

NORTHWEST FOREST RESOURCE COUNCIL,
Plaintiff-Appellee

v.

DAN GLICKMAN and BRUCE BABBITT,
Defendants-Appellants

and

OREGON NATURAL RESOURCES COUNCIL,
Defendant-Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
CASE NOS. 95-6244 and 95-6384

REPLY BRIEF OF APPELLANTS, DAN GLICKMAN
AND BRUCE BABBITT
in Nos. 95-35123 and 95-35132

STATEMENT

These consolidated appeals present this Court with its third opportunity to determine the scope and effect of a short rider, Section 2001(k) of the 1995

- 2 -

Rescissions Act (the 1995 Act) to an appropriations bill enacted in July 1995.^{1/} Despite its relative brevity, the effect of Section 2001(k), as interpreted by the district court, has been to put at risk thousands of acres of old-growth forests that provide vital habitat to several threatened and endangered species. These consolidated appeals now before the court address three groups of timber sales not covered in the prior appeals: (1) sales exempt from release under Section 2001(k)(2), based on a determination by the Secretary of the Interior or the Secretary of Agriculture that a threatened bird species is "known to be nesting" in the "sale unit;" (2) sales which, otherwise subject to release under Section 2001(k)(1), were rejected by high bidders, and the Secretaries determined that, under those circumstances,^{2/} they had no further obligation to release the sales to unsuccessful bidders; and (3) sales that would be subject to release under 2001(k)(1), but for the fact that they had been previously enjoined by a different district court as violating the provisions of Section 318 of Public Law No. 101-121, 103 Stat. 745. Together these sales cover thousands of acres of

^{1/} The other cases currently pending before the Court addressing the scope of Section 2001(k) are NFRC v. Glickman, 9th Cir. Nos. 95-36038, 95-36042 (Argued January 8, 1996 before Judges Noonan, Leavy, and Hawkins), and ONRC v. Thomas, 9th Cir. No. 95-36256 (Argued March 4, 1996 before Judges Reinhardt, Kozinski, and Fernandez).

^{2/} Some of the sales included in this group will not be subject to release if this Court reverses in No. 95-36042.

- 3 -

environmentally sensitive forests, acres which scientists agree are required to ensure the continued existence of several endangered and threatened species.

1. The challenge to the implementation of Section 2001(k)(2). -- The largest group of sales at issue here involve sales which Congress, in Section 2001(k)(2), exempted from the release language of Section 2001(k)(1) if the Secretaries determined that a threatened or endangered bird species was "known to be nesting within the acreage that is the subject of the sale unit." As we described in our opening brief (pages 13-19), the Secretaries made that determination for 140 separate timber sale units based on the methodology described in the Pacific Seabird Protocol (the Protocol).^{3/} The units withheld under this determination cover over 4,000 acres of old-growth forests in coastal Oregon and Washington. As we also noted in our opening brief (page 39), the determination to withhold these sales under Section 2001(k)(2) only prevented the harvesting of the trees within the nesting areas; the contract holders maintained the ability to harvest "replacement" trees of "like kind and value" under the provisions of Section 2001(k)(3). This issue is now before this Court because NFRC and Scott Timber, rather than taking advantage of this statutory right to replacement timber in a timely fashion, chose instead to challenge the

^{3/} The district court acknowledges that the Protocol "may be best scientific method[] available to detect murrelet nesting." (ER 334 at 2).

- 4 -

Secretary's use of the Protocol in determining where the threatened birds were "known to be nesting."

In its January 19, 1996 opinion, the district court rejected both the Secretaries' and the timber industry's interpretation of the "known to be nesting" language of Section 2001(k)(2). Despite finding that the language of the statute was ambiguous, and that the legislative history did not specifically address the issue of how to determine if murrelets were "known to be nesting," the district court refused to defer to the Secretaries' interpretation and developed its own standard for the "known to be nesting" determination. That standard, which prior to the district court's decision on January 19, 1996, had never been advanced by any party to the litigation, continues to put at risk several thousand acres of forest land in which, under the Protocol, the murrelet is "known to be nesting."

On appeal, timber industry attempts to support the district court's newly announced standard with a confusing mix of portions of the legislative history of Section 2001(k)(2), post enactment statements of individual members of Congress expressing their understanding of the statute, and subsequent attempts by Congress to amend or repeal the statute. As we will demonstrate below in

- 5 -

Argument I, timber industry's arguments fail to address the real issues in this appeal.

2. The "next high bidder" issue. -- The set of issues in this appeal involve timber sales which for various reasons had been offered but never awarded prior to the enactment of Section 2001(k)(1). For each of these sales, the high bidder voluntarily elected to reject the contract and sought the return of the bid bond, or the high bidder was found to be unqualified or otherwise unable to perform the contract. For each of these sales, the Secretaries determined that 2001(k) did not require any further attempt to award these otherwise "dead" sales. In our opening brief we argued (Br. 39-51) that nothing in the "notwithstanding any other law" language contained in Section 2001(k)(1) repealed or modified the Secretaries' basic contract authorities and discretion to cancel these contracts, once the high bidder is no longer willing or able to perform. Our argument is based on the well-established principle that any implied repeal must be based on an irreconcilable conflict between laws and must operate to the minimum extent necessary. NFRC never attempts to meet this basic argument, choosing to simply reiterate the district court's error in relying on a general characterization of the purpose of Section 2001(k)(1). Indeed, NFRC fails to address the Secretaries' argument that the district court's

- 6 -

January 10, 1996 opinion, which repeals ordinary contract authorities, was not limited to the "minimum extent necessary" to serve a "clear and manifest" demonstration of legislative intent. As we discuss in Argument II of this Reply brief, NFRC's lack of any reasoned argument on this point requires reversal of the judgment.

3. The "enjoined sales" issue. -- The final issue addressed concerns that part of the district court's January 10, 1996 decision which requires the Secretaries to release four timber sales that had been initially offered under Section 318, but were found to be in violation of that authorizing statute in a series of order by the district court for the Western District of Washington in Seattle Audubon Soc'y v. Evans, No. 89-160WD (ER 243, Exhibits 2, 3, and 6). The Secretaries argued (Br. 52-56) that these sales fell outside the scope of Section 2001(k) because the offers were void ab initio, as they had been found to be in violation of the substantive requirements of the authorizing statute. Again, in response, NFRC fails to address this legal argument directly, choosing to state (NFRC Br. at 48) that Section 2001(k) "simply does not recognize this fine distinction: every sale that was "offered" is to be awarded and released." NFRC also completely fails to respond to the Secretaries' argument that these enjoined timber sales were void ab initio. Instead, NFRC

- 7 -

argues that "all" contracts means "all" contracts, notwithstanding the law that made section 318 timber contracts possible in the first place. As we demonstrate in Argument III of this Reply brief, NFRC has failed to offer any reasoned argument to support the release of these four timber sales which have been found to be in violation Section 318.

ARGUMENT

I

THE SECRETARIES PROPERLY DETERMINED THAT THE PACIFIC SEABIRD PROTOCOL WAS THE ONLY SCIENTIFICALLY VALID METHOD OF ASSESSING WHETHER MARBLED MURRELETS WERE KNOWN TO BE NESTING WITHIN A SALE UNIT

At this late stage of the litigation, it is now clear that all parties, and indeed the district court, agree on at least one point -- that the phrase "known to be nesting" as used in Section 2001(k)(2) is not susceptible to any "plain language" analysis. The district court clearly held that the language of the statute was not clear (Opinion at **). Now NFRC and Scott Timber have belatedly, but surely, come to the same conclusion. Both parties now adopt the district court's analysis of the statute. As a result, both have also adopted the district court's fundamental error, i.e., that the court's judgment should replace the knowledge painstakingly acquired through scientific research into the biology and nesting habits of the murrelet in determining whether a murrelet is

- 8 -

"known to be nesting" for the purposes of Section 2001(k)(2). Because the Secretaries' properly utilized the state of the art and scientifically sound basis for determining murrelet "nesting" in interpreting that ambiguous phrase, the district court erred in failing to accord the Secretaries' determination the proper deference.

On appeal NFRC and Scott Timber (hereinafter "timber industry") offer an interpretation of Section 2001(k)(2) that completely avoids any consideration of the data collected under the well established Pacific Seabird Protocol. Indeed, NFRC never addresses the core argument of the Secretaries' appeal, i.e., that because "known to be nesting" lacks any readily identifiable meaning, the court erred in failing to defer to the Secretaries' interpretation of the phrase. Instead, NFRC's sole defense to the district court's interpretation is a misguided argument (Br. 35-43) that the Secretaries' interpretation fails to give proper meaning to the single phrase "within the acreage that is the subject of the sale unit." The only other argument offered by NFRC on this issue consists of a bare assertion that the Secretaries failed to follow the intent of Congress in interpreting Section 2001(k)(2), because use of the Protocol data resulted in the release of none of the sale units previously withheld because of the presence of marbled murrelets. (NFRC Br. at ***). Neither argument overcomes the

- 9 -

district court's fundamental flaw in rejecting the Secretaries' interpretation of this ambiguous statute.

1. The words of the statute, when analyzed as a whole, support the Secretaries' determination not to release the sale units based on a finding that murrelets were "known to be nesting". -- NFRC and Scott Timber's interpretation of Section 2001(k)(2), as is the district court's interpretation, is premised on analyzing various phrases of the Section without reference to the language of the section as a whole. The words of the statute, however must be read, understood, and applied as they relate to each other and to the statute as a whole. "[I]t is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" Reno v. Koray, 115 S. Ct. 2021, 2025 (1995) (quoting Deal v. United States, 113 S. Ct. 1993, 1996 (1993)). Here, the key to understanding and properly interpreting the words of Section 2001(k)(2) is to realize that the intent of Section 2001(k)(2) is to protect areas in which murrelets are "nesting", not necessarily to protect individual, hard to identify nests.

First, The language of Section 2001(k)(2) makes clear that this subsection is designed to protect nesting habitat - not to harvest it. The statute states: "no

- 10 -

sale unit shall be released or completed * * * if any threatened * * * bird species is known to be nesting," establishes an absolute bar to the release of any sale unit in which murrelets are "known to be nesting." The statute, then, eliminates any discretion ("no sale unit shall be released") upon a determination that a threatened or endangered bird is "known to be nesting." Second, Congress explicitly eschewed using the word "nest" in Section 2001(k)(2), in favor of the broader, more inclusive activity represented by "nesting". The narrower interpretation adopted by the district court and promoted by NFRC fails to give full effect to the clear choice made by Congress. That choice, as explained by Senator Gorton, was "to protect that individual sale unit in which the bird resides." 141 Cong. Rec. S10464 (daily ed. July 21, 1995) (SER 32, Exhibit 14). NFRC's and the district court's rejection of the use of the scientifically sound and proven Protocol to determine where the murrelet "resides" or, in other words, are "known to be nesting," is therefore directly contrary to the stated intent behind the inclusion of Section 2001(k)(2) in the statute.

Second, the protection of the broader activity of "nesting" is also evidenced by the protection of not simply a "nest," but of all trees in the "acreage that is the subject of the sale unit." Again, the language of the statute

- 11 -

undercuts the crabbed interpretation adopted by the district court and now, for the first time on appeal, supported by NRFC and Scott Timber. The Protocol identifies tree stands in which, based on observation of specific murrelet activity over the course of two years, murrelets are engaged in "nesting" behavior.^{4/} Where a sale unit falls within a tree stand determined to contain "nesting" murrelets, Section 2001(k)(2) allows that sale unit to be excluded from harvesting otherwise required under Section 2001(k)(1). Indeed, as we noted in our opening brief (Br. at ***), the "in the sale unit" language ensures that an entire timber sale will not be withheld because of murrelet nesting in one sale unit. In this way, Congress formalized an agency practice which, until weeks before passage of the Rescissions Act, had kept entire sales off the market because of the presence of murrelet nesting in one unit. NFRC's

^{4/} NFRC attempts to discredit the Secretaries interpretation by noting (Br. 21) that the protocol distinguishes between a "nest stand" and an "occupied stand." (NFRC Br. at 21) NFRC implies that if the Protocol is to be used to interpret "known to be nesting" then only a "nest stand" is relevant. This implication is wrong and does not give meaning to the precise words of the statute. Congress intended to protect "nesting" areas on a sale unit basis - not specific individual nests. Indeed, the district court rejected NFRC's reliance on the definition of "nest stand" as requiring fecal ring or eggshell fragments around a tree containing a murrelet nest. (ER opinion at **). The term "nesting" is the key word in the statute. It is the word chosen by Congress to give the Secretaries the flexibility to protect "nesting" murrelets, not simply murrelet "nests."

- 12 -

acknowledgment (NFRC Br. at **) of Congressional awareness of this problem simply confirms the Secretaries interpretation of the statute.

Third, in providing the original contract holders the opportunity to obtain replacement timber under Section 2001(k)(3), Congress attempted to account for timber which would be withheld in order to protect "nesting" under Section 2001(k)(2). In essence, by requiring replacement timber under Section 2001(k)(3), Congress ensured, not only that the murrelet nesting areas could be protected, but that the millions of board feet of timber previously held-up over the murrelet nesting issue would become available for harvest. The timber would be available either in the form of the original sales -- upon a finding that murrelets were not "known to be nesting" in the sale unit -- or in the form of "replacement" timber of like kind and value for units where "nesting" was discovered. For reasons never articulated, NFRC has chosen to forgo, for the time being, its members' rights to replacement timber under Section 2001(k)(3), in order to litigate the Secretaries' interpretation of the ambiguous phrase "known to be nesting." The option of receiving replacement timber for any sale unit withheld under Section 2001(k)(2) has been in the statute since it became law on July 27, 1995. NFRC has simply elected to litigate rather than harvest timber.

- 13 -

2. The Secretaries' interpretation is consistent with the Congressional intent behind Section 2001(k)(2). -- NFRC's argument (Br. **) that the Secretaries interpretation results in the release of none of the occupied murrelet sale units is specious. As discussed above, Congress provided an adequate remedy in Section 2001(k)(3) for the decision by the Secretaries not to release timber otherwise subject to Section 2001(k). NFRC fails to recognize that the intent of Section 2001(k)(2) is not to allow trees to be harvested. That is accomplished by Section 2001(k)(1). Section 2001(k)(2) is designed to protect endangered and threatened bird species, specifically here the marbled murrelet, from the effects of harvesting otherwise required under Section 2001(k)(1). For units withheld and protected by Section 2001(k)(2), Congress ensured that the contract holders would not suffer from the decision to protect the murrelet by requiring replacement timber of "like kind and value" under Section 2001(k)(3).^{5/} By choosing to give the the Secretaries the flexibility inherent in the term "known to be nesting," while ensuring in (k)(3) that the contract

^{5/} Section 2001(k)(3) states

If for any reason a sale cannot be released and completed under the terms of this subsection * * * 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 * * *.

- 14 -

holders would not lose the opportunity to harvest timber of "like kind and value," Congress established a means to satisfy obviously competing concerns in the release of this important habitat. Thus, NFRC's repeated statements (NFRC Br. at ***) that the Secretaries' interpretation frustrates the goal of releasing trees for harvesting is specious. Under (k)(2) murrelet "nesting" areas will be protected, under (k)(3) contract holders will be given the opportunity to harvest trees of "like kind and value." The broad and virtually unreviewable discretion granted to the Secretary to provide replacement timber "for any reason" is the best indication of the flexibility to protect murrelets Congress intended to provide to the Secretaries under Section 2001(k)(2). NFRC's attempt to narrowly construe the language to force the harvesting of vital and irreplaceable murrelet nesting areas makes no sense in the face of the plain remedy afforded by Section 2001(k)(3).

Also, NFRC's claim (Br. 31-32) that the Secretaries' August 23, 1995, Memo announcing the government's interpretation of the protections afforded by Section (k)(2) is entitled to no deference is without basis. NFRC claims that because the memo is an informal interpretation which was never subject to the procedural requirements of the APA, it is entitled to lesser deference than a rule formally promulgated by the agency. NFRC's argument lacks merit.

- 15 -

First, Section 2001(h) states that the "Secretary concerned is not required to issue formal rules under section 553 of title 5, United States Code, to implement this section or carry out the authorities provided by this section." Thus, Congress clearly contemplated that the Secretaries would issue informal interpretative rules designed to implement the various provisions of Section 2001. Thus, the fact that the August 23 memorandum never was subject to the requirements of the APA is of no consequence here. Indeed, given the requirement to release sales within 45 days, the argument that the agency was required to engage in formal rulemaking to obtain traditional deference by reviewing courts is specious.

Second, even informal rulemaking is entitled to some deference. The Supreme Court has stated:

[the] internal agency guideline, which is akin to an interpretive rule that does not require notice-and-comment, is still entitled to some deference, since it is a permissible construction of the statute.

Reno v. Koray, 115 S. Ct. 2021, 2027 (1995) (internal citations and quotation marks omitted). As we have demonstrated above, the use of the Protocol here is an entirely permissible construction of the requirement to withhold sale units in which murrelets are "known to be nesting." No other interpretation can

- 16 -

claim the scientific basis for preserving the very habitat that Congress expressly protected from harvesting.

Moreover, the legislative history, upon which NFRC so heavily relies, is itself is ambiguous. In a passage relied upon by NFRC, Senator Gorton explained that Section 2001(k)(2) was intended to reach "places in which endangered species are actually found" (NFRC br. at 25). The Protocol is the only accepted method which would allow the Secretaries to follow the express intent of Congress not to release any sale unit in which murrelets are "known to be nesting."

Nor does the district court's, and now apparently NFRC's interpretation, (NFRC Br. at **) of "currently" as used in Section 2001(k)(2) make sense, given Congress' intent to protect murrelet nesting areas. Murrelet "nesting" is an activity which takes place over a very limited time during the year. Indeed, most of the bird's life is spent on the ocean. (ER -Ralph declaration) At the time Section 2001 became law and, later when the forty-day time period for release of sales covered by Section 2001(k)(1) had passed, murrelet nesting was essentially over for the year, and birds were preparing to resume their primary residence in the ocean. Under NFRC's interpretation of "currently," there would be no "current" nesting once the murrelets' departed for their ocean

- 17 -

home. The trees could be cut, and the murrelet "nesting" habitat would be gone. This interpretation suggests that Congress' inclusion of the protections afforded by Section 2001(k)(2) were simply a semantic game. There is no evidence that Section 2001(k)(2) was intended to do anything other than protect murrelet "nesting" in a way that would allow, as Senator Gorton stated, the Secretaries the "flexibility" needed to account for unique nesting habits of these small and secretive seabirds.

Finally, NFRC's heavy reliance on events which occurred after the enactment of Section 2001 is misplaced. We briefly address below the legal effect of these several post-enactment events.

a. The post-enactment letter. -- NFRC's continued reliance (Br. 28-29) on the post-enactment letter written by six members of Congress is puzzling. First, the district court itself discounted the value of the letter in determining Congressional intent. (ER at ****). Second, the statements are contrary to the language used in the floor debates and committee reports. Indeed, if, as these individual members who signed the letter assert, Congress' intent was to protect individual nests, then Congress as a whole could have used language in the statute to allow such limited, and in this situation illusory, protection.^{6/}

^{6/} We maintain that the protection would be illusory, because there is no dispute that murrelets do not build "nests" in the usual sense.

- 18 -

As these members were the very legislators who were largely responsible for much of the legislative history in the first place, the reluctance of the members to place their unique interpretation before the entire Congress requires rejection of any reliance on those words by this Court. As the Supreme Court has noted:

"[The Congressman] made his statement not during the legislative process, but after the statute became law. It therefore is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of one informed person on an issue about which others may (or may not) have thought differently."

Heintz v. Jenkins, 115 S. Ct. 1489, 1492 (1995).

b. Subsequent attempts to amend 2001(k). -- NFRC also relies (Br. **) on the rejection of an amendment offered by Senator Murray as evidence that Congress specifically rejected the Secretaries' interpretation of Section 2001(k)(2). This reliance is misplaced. The Supreme Court has cautioned against drawing any inferences from the failure of Congress to amend or repeal the statutory provision under review. The Court stated:

[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' * * * "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including

- 19 -

the inference that the existing legislation already incorporated the offered change."

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1453 (1994), quoting Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (additional internal quotation omitted). The Court noted arguments addressing later attempts to amend a statute "deserve little weight in the interpretive process". Id.

That admonition is particularly apt in this case. The amendment proposed by Senator Murray would have allowed a much broader exemption than that allowed under any interpretation of the existing Section 2001(k)(2). The Murray amendment would have allowed the Secretaries to withhold an entire sale upon a finding that murrelet nesting existed in any single unit of the sale. Also, in opposing the amendment, Senator Gorton again did not refer to Section 2001(k)(2) as protecting individual nests. Rather the Senator stated that Section 2001(k)(2) was to reach "places in which endangered species are actually found." (***) A "place" where an endangered species is "actually found" is a broader category than simply a murrelet nest. Indeed, it is undisputed that, for the purposes of murrelet nesting, an onshore place where this particular species is found is the place where the birds are "known to be nesting."

- 20 -

The more recent Congressional activity which NFRC claims (Br. **) as support for its interpretation suffers from the same infirmities. Indeed, if anything, these recent attempts to amend the statute demonstrate the underlying ambiguity in the current version of the statute. For example, the Committee Report issued on March 6, 1996, states that the committee agrees with the district court's January 19, 1996, interpretation of Section 2001(k)(2). This agreement, however, is at total odds with the post-enactment letter, sent by members of that same committee, which stated that the only way to determine if a murrelet was "known to be nesting" was by evidence of "eggshells and fecal rings" below the "nest tree." Even the district court rejected this supposedly "clear and unambiguous language." This Congressional volte face on the "clear meaning" of Section 2001(k)(2) demonstrates the wisdom of the Supreme Court's warning to give such post-enactment expressions no "persuasive significance."

II

NFRC HAS NOT SHOWN THAT 2001(k) REQUIRES RELEASE OF PREVIOUSLY OFFERED TIMBER SALES TO ANYONE OTHER THAN THE HIGH BIDDER ON THE ORIGINAL SALE

The Secretaries appeal the district court's January 10 order because it violated a fundamental rule of statutory construction: that repeals by implication

- 21 -

must be based on irreconcilable conflicts between laws and operate to the minimum extent necessary. Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976); Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); In re Glacier Bay, 944 F.2d 577, 581-82 (9th Cir. 1991). Specifically, the district court broadly construed the Rescissions Act's "objectives" as a grounds for overriding the Secretaries' authority to not reoffer a timber sale that has been rejected by its high bidder or for which the bidder was unqualified. On all of these timber sales, the Secretaries have complied with section 2001(k)(1)'s mandate to "act to award, release, and permit to be completed" the timber sales, either before or after the section's enactment.^{2/} As explained in our opening brief, there is no "irreconcilable conflict" between the Section 2001(k)(1) and ordinary contract authorities that permit the Forest Service and BLM to take no further action where the high bidder has not accepted the award of a contract.

In response, NFRC simply reiterates the district court's error in relying on a general characterization of the purpose of Section 2001(k)(1), without even arguing that the court's repeal of ordinary contract authorities was limited to the "minimum extent necessary" to serve a "clear and manifest" demonstration of

^{2/} NFRC does not contest that 2001(k) does not require the Secretaries to award contracts to unqualified bidders.

- 22 -

legislative intent, as required. Radzanower v. Touche Ross & Co., 426 U.S. at 154; In re Glacier Bay, 944 F.2d at 582 (9th Cir. 1991). NFRC responds that section 2001(k) "does not contain an implied exemption" for these timber sales, NFRC Resp. at 56, and that "core purpose" of 2001(k) requires the Secretaries to search for new purchasers to take these timber sales, Id. at 57. This line of argument, that the Secretaries must do more than 2001(k) explicitly commands to satisfy plaintiff's view of the statute's "purpose," is contrary to law. The Secretaries are not required to show that language in 2001(k) "exempts" them from having to take further action, because 2001(k) does not require them to act further if the high bidder is unable or unwilling to accept award of the timber contract.

NFRC fails to show that the "clear and manifest" intent of section 2001(k) is to require the award of contracts that lack a qualified high bidder. As explained in our opening brief, Congress enacted Section 2001(k) to release timber sales that had willing high bidders or purchasers, to eliminate both delay and potential government liability. Br. at 45-46. Both the House and Senate reports explain that section 2001(k) applies to timber sales "that have already been sold" and that "[r]elease of these sales will remove tens of millions of dollars of liability from the Government for contract cancellation." Senate

- 23 -

Rept. 104-17 at 123; House Rept. 104-71 at (15?). NFRC fails to show where Section 2001(k) or its legislative history indicates that the Secretaries are required to make extraordinary efforts to award timber sales that have no lawful claimant, and therefore, no liability for damages.

Instead, NFRC attempts to turn the implied repeal doctrine on its head by arguing that, because the Forest Service and BLM "may" reoffer rejected timber sales in accordance with their contracting regulations, under section 2001(k) this authority is converted into a mandate to offer timber sales to a party other than the "high bidder" referred to in section 2001(k)(1). NFRC at 56. The only basis for this argument is that the "basic purpose" of 2001(k) is "to deny the Secretaries the discretion to refuse to move forward with the sales." NFRC at 58 (emphasis in original). This argument misrepresents Forest Service and BLM regulations and completely ignores the question of whether section 2001(k) explicitly applies to the sales under these circumstances. The law of implied repeal is quite clear on this question: the ordinary principles of contract law apply to the extent that they do not present a manifest conflict with 2001(k). In re. Glacier Bay, supra. The Secretaries' contract authority is not overridden by NFRC's construction of the "basic purpose" of the statute. As shown in our opening brief, it is entirely consistent

- 24 -

with the purpose and language of 2001(k) not to act further on timber sales that have no valid high bidder, because 2001(k) was designed to resolve legal claims.

In our opening brief, we noted (Br. at 46-51) that for timber sales that were canceled prior to enactment of 2001(k), the scope of 2001(k)(1) is further defined by a provision that "[t]he return of the bid bond shall not alter the responsibility of the Secretary concerned to comply with this paragraph." Congress included this provision to require the Forest Service and BLM to "act to award, release, and permit to be completed" timber sales where the agency had rejected all bids and returned the willing purchaser's bid bond. This "return of the bid bond" provision has meaning only if Section 2001(k)(1) is read to generally exclude cancelled or withdrawn sales, except for those covered by the provision, because the Secretary has unilaterally returned the bid bond of the willing purchaser. The "return of the bid bond" provision provides an exception that confirms the agencies' construction of the scope of Section 2001(k).

Plaintiff's argue that the "return of the bid bond" provision only "reinforces" the first sentence of section 2001, Resp. at 60, and that it's "only meaning is that a sale must be released even if bids were previously rejected and the sale

- 25 -

was canceled." Resp. at 49. This construction gives the provision no meaning at all, in violation of the cannon of statutory construction that 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). Our opening brief established that every reference to this provision in the legislative history indicates that it applies only to sales for which the Forest Service or BLM rejected all bids and returned the bid bond of the high bidder. Brf. at 48-49. NFRC makes no showing that Congress intended to include timber contracts that were void because the purchaser reneged or voluntarily relinquished any rights to the sale. The Secretaries' construction is entirely consistent with the purpose of section 2001(k) -- to release timber contracts to purchasers who had been waiting for them.

This construction is not contradicted by a BLM regulation, cited by NFRC, that, inter alia, allows bid bonds to be returned upon a bidder's request. Resp. at 59. Certainly, bid bonds may be returned at the bidder's request or because of a decision by the Secretary. The second sentence of 2001(k)(1) only addresses those cases where the Secretary acted unilaterally. NFRC's claim that a bid bond is returned to a high bidder "only when bids on a sale are rejected and a sale is cancelled" is also in error. Resp. at 50. The sales at

- 26 -

issue before this Court are ones where bids were withdrawn by the high bidder, not rejected by the Secretaries. Finally, NFRC indicates that two timber sales are no longer at issue because BLM has awarded them to comply with the district court's injunction. NFRC at 57 n.16. BLM's compliance with an injunction does not render this issue moot, as this Court can, and should, reverse the district court's order and allow BLM to manage these contracts under ordinary contract authorities.

III

NFRC FAILS TO SHOW THAT THE RESCISSIONS ACT RELEASES TIMBER SALES THAT VIOLATED THEIR AUTHORIZING STATUTE.

Finally, we argued (Br. 52-56) that Section 2001(k) does not apply to four timber sales that were enjoined for violation of Section 318 because they were never offered in accordance with the statute from which the Forest Service this authorizing statute. These sales never satisfied the initial requirement of "offering" a valid "contract." United States v. Amdahl Corp., 786 F.2d 387, 391 (Fed. Cir. 1986); Ab-Tech Construction, Inc. v. United States, 31 Fed. Cl. 429 (Cl. Cl. 1994); cf Croman Corp. v. United States, 31 Fed. Cl. 741, 746 (Cl. Cl. 1994). Their fundamental defect were not corrected before their authorizing statute, Section 318, expired. See Subsection 318(k); Robertson v.

- 27 -

Seattle Audubon Soc'y, 503 U.S. 429, 433 (1992). These timber contracts were, and remain, void ab initio.

NFRC does not address this legal argument directly, but blithely responds (NFRC Br. at 48) that Section 2001(k) "simply does not recognize this fine distinction: every sale that was "offered" is to be awarded and released." NFRC completely fails to respond to the Secretaries argument regarding timber sales that are void ab initio. Instead, NFRC argues that "all" contracts means "all" contracts, notwithstanding the law that made section 318 timber contracts possible in the first place.

But, as shown above, the scope of section 2001(k) and the law applicable to its repeal of contract requirements make clear that "all" contracts are not affected. Moreover, the district court correctly rejected NFRC's claim that section 2001(k) applies to timber contracts that no longer physically exist. (ER 331 at 20?). NFRC has not appealed that ruling, apparently accepting that 2001(k) does not apply to "all" contracts. NFRC cannot casually dismiss the legal principle that contracts that are void ab initio are not contracts, and the logical argument that such contracts do not fall within the scope of section 2001(k).

- 28 -

NFRC also relies on its construction of section 2001(k)'s "return of the bid bond" sentence as mandating the release of enjoined timber sales. Again, NFRC's construction of this sentence renders it superfluous to the first sentence of section 2001(k). Moreover, NFRC augments its position with a misrepresentations that "a bid bond is returned to a high bidder only when bids on a sale are rejected and the sale is cancelled" and that "[t]here is no other circumstance in which a bid bond is returned to a high bidder." NFRC at 50. As explained above, bid bonds are also returned at the request of the high bidder. The only reading of the "return of the bid bond" provision that makes sense is the one that is reflected in legislative history -- that it applies 2001(k) where the Secretary cancelled the contract and returned the bid bond, not where the purchaser requested return. This provision is inapplicable to the four timber sales that were void ab initio and enjoined as a violation of section 318. Unlike sales canceled for other reasons, these were never included within the law's release of timber sale contracts.

- 29 -

CONCLUSION

For the foregoing reasons and the reasons contained in the Secretaries' opening brief, the district court's January 10, 1996 and January 19, 1996 orders and injunctions should be reversed. The case should be remanded with instructions to adopt the government's interpretation of the statute and immediately halt all timber harvesting activities on sales releases pursuant to the two orders.

Respectfully,

OF COUNSEL:

KAREN MOURITSEN
Office of the Solicitor
Department of the Interior
Washington, D.C.

JAY MCWHIRTER
Office of the General Counsel U.S.
Department of
Agriculture
Washington, D.C.

April 1996
90-1-1-2928

LOIS J. SCHIFFER
Assistant Attorney General

JEAN WILLIAMS
MICHELLE L. GILBERT
EDWARD A. BOLING
ANNE S. ALMY
ALBERT M. FERLO, JR.
Attorneys
Environment and Natural Resources
Division
Department of Justice
Post Office Box 23795
L'Enfant Plaza Station
Washington, D.C. 20026
(202) 514-2757

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

FAX NUMBER 305-0275, -0274
 CONFIRMATION NUMBER (202) 305-0210

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Brian Burke	720-4732
	Mark Gaede	
	Jim Lyons	
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Al Ferlo	514-4240
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Garry Jackson	208-6916
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Jason Patlis (301)	713-0658
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: //

DATE: March 27, 1996

FROM: Jean Williams, (202) 305-0228
 Ellen Kohler, (202) 305-0213

MESSAGE: NFRC v. Glickman: PLEASE READ attached note to reviewers re: the attached draft response brief due tomorrow, March 28, in D. Oregon. Please provide comments to Jean Williams or Ellen Kohler by 12 PM March 28. Comments written on the draft and FAXed are preferred.



U.S. Department of Justice

Environment and Natural Resources Division

Wildlife and Marine Resources Section

Washington, D.C. 20530

March 27, 1996

TO: The Forest Group

Re: NFRC v. Glickman, et al.,
Civil # 95- 6244/67-HO

Attached is our draft response to plaintiffs' submission pursuant to the Court's March 22, 1996, Order. PLEASE NOTE two items. At time of distribution we had not received further word from the Forest Service regarding a position on replacement timber and so have set forth at Argument C. the position agreed to in meetings Tuesday March 19. ALSO, there is a draft section set forth at Argument B. which is additional to that discussed this past Tuesday. This concerns 22 sale units requested by plaintiffs but identified by Forest Service biologists as reflecting nesting in the sale units though NOT meeting a strict interpretation of J. Hogan's Order. These were discussed at previous meetings, and we recommend the draft position on them, since the Court has asked for our position on each sale requested for immediate release by plaintiffs.

Sincerely,

A handwritten signature in cursive script that reads "Jean E. Williams".

Jean E. Williams
Assistant Chief

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

DRAFT

5 LOIS J. SCHIFFER
 Assistant Attorney General
 6 MICHELLE L. GILBERT
 EDWARD A. BOLING
 7 JEAN E. WILLIAMS
 ELLEN J. KOHLER
 8 U.S. Department of Justice
 Environment and Natural Resources Division
 9 General Litigation Section
 P.O. Box 663
 10 Washington, D.C. 20044-0663
 Telephone: (202) 305-0228/0460
 11

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

14 NORTHWEST FOREST RESOURCE COUNCIL,)

15 Plaintiff,)

16 v.)

Civil No. 95-6244-HO
 (lead case)
 Civil No. 95-6267-HO
 (consolidated case)

17)
 18 DAN GLICKMAN, in his capacity)
 as Secretary of Agriculture,)
 19 BRUCE BABBITT, in his capacity)
 as Secretary of the Interior,)

DEFENDANTS' RESPONSE
 PURSUANT TO COURT'S
 MARCH 22, 1996, ORDER

20 Defendants,)

21)
 22 OREGON NAT. RES. COUNCIL, et al.,)
 Defendants-Intervenors)

23 **I. INTRODUCTION**

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

27 DEFS' RESPONSE PURSUANT TO
 28 COURT'S MARCH 22 ORDER - 1 -

1 withheld from release under Section 2001(k)(2) of the Rescissions
2 Act. On March 22, 1996, this Court held oral argument on the
3 motion for extension. Following argument, the Court ordered
4 plaintiffs to submit a list of sale units for which plaintiffs
5 contend they must commence harvest by April 1, 1996, in order to
6 complete the sales by September 30, 1996. The Court further
7 ordered the Secretaries to advise the Court regarding whether the
8 sale units identified by plaintiffs are subject to release under
9 the standards for application of Section 2001(k)(2) articulated
10 in the Court's January 19, 1996, Order.

11 This memorandum sets forth the Secretaries response to
12 plaintiffs' submission. Plaintiff NFRC has also submitted
13 additional argument regarding the merits of the motion for
14 extension of stay, and this memorandum will briefly address that
15 argument.

16 **II. STATEMENT**

17 Plaintiffs have now specified those sale units which they
18 contend must be released by April 1, 1996, in order to complete
19 operations by September 30, 1996. Scott Timber Company has
20 identified 11 sale units in five sales for which it seeks
21 immediate release. NFRC has submitted a list of 29 sales with 64
22 sale units for which it contends it has been advised by its
23 members immediate release is necessary, for a total between
24 plaintiffs of 75 sale units.

25 On March 22, 1996, the Secretaries filed summaries of the
26 results of their review regarding the applicability of this

1 Court's January 19, 1996, Order, to the sale units previously
2 withheld under Section 2001(k)(2). These summaries reflect that,
3 of the 148 sale units previously withheld under Section
4 2001(k)(2) by the Secretaries, 48 units fall within the
5 2001(k)(2) standard articulated by this Court, and 100 units are
6 subject to release, including the 75 units for which plaintiffs
7 seek immediate release. See, Exhibits 1 and 2 to March 21, 1996,
8 Declaration of Jean E. Williams.¹

9 However, filed with this response are memoranda documenting
10 the determinations regarding applicability of this Court's Order
11 for 22 sale units. See, March 27, 1996, Declaration of Jean E.
12 Williams, with attached exhibits. These units were determined to
13 be subject to release under a strict interpretation of this
14 Court's Order, but have nesting detections closely associated
15 with the sale unit. On 13 of the sale units, the detections
16 included circling behavior directly over the sale unit. These
17 are Units 2 and 3 on Fivemile Flume; Unit 5 on Grass Hula; Unit 1
18 on Indian Hook; Units 1, 2, 3, and 4 on Mr. Rogers; Unit 2 on
19 Randall Salado; Unit 6 on South Paxton; Unit 1 on Upper McLeod;
20 Unit 1 on Wheelock 403; and Unit 14 on Winriver. 9 other sale
21 units had nesting detections very near the boundaries of the sale
22

23 ¹ As is indicated on the Forest Service's summary, Unit 13
24 of the Winriver Timber Sale does not meet the criteria for
25 Section 2001(k)(2) articulated by this Court for the murrelet.
26 However, there is a northern spotted owl activity center in Unit
27 13, and it will continue to be withheld from release under
28 Section 2001(k)(2) for that reason.

1 units. These are Units A-261 and A-346 on Wynoochee Resale; Unit
2 2 on Canal 606; Unit 3 on Franklin Ridge; Units 1 and 2 on Ryan
3 Wapiti; Unit 2 on South Paxton; Unit 3 on Square Clare; and Unit
4 3 on Wapiti 305.

5 The Secretaries have sought an extension of the stay now in
6 place, pending the Court of Appeals' ruling on the Secretaries'
7 appeal of this Court's Order. In the alternative, if the Court
8 declines to extend the stay for those sales as to which
9 plaintiffs seek immediate release, the Secretaries contend that
10 the stay should be extended for these 22 sale units, as well as
11 for the 25 sale units not identified by plaintiffs as requiring
12 immediate release, and for the 48 sale units withheld as
13 consistent with this Court's Order by the Secretaries.

14 III. ARGUMENT

15 A. An extension of the stay is warranted for all sale
16 units.

17 The Secretaries contend that an extension of the stay now in
18 place is warranted. The balance of harm weighs heavily with the
19 Secretaries, since it is undisputed that harvest of any
20 significant number of murrelet nesting sites would irreparably
21 harm the species. Plaintiffs on the other hand will not be
22 irreparably harmed, since upon disposition by the Court of
23 Appeals they will either be offered alternative timber or be able
24 to proceed in accordance with their contracts as set forth in the
25 Secretaries' reply brief in support of the motion for extension
26 of stay.

1 In its submission pursuant to this Court's March 22, 1996,
2 Order, NFRC argues that the Secretaries are unlikely to prevail
3 on the merits of their appeal, citing a recent Senate Report on
4 legislation that has not been enacted into law. NFRC Second
5 Supplemental Memorandum, pp. 3-5. NFRC contends that the cited
6 report reflects Congressional approval of this Court's January
7 19, 1996, Order.

8 The Secretaries responded to this contention during the oral
9 argument on the motion for extension. The Secretaries pointed
10 out that other statements in legislative materials, specifically,
11 statements made by Senator Hatfield, show that there has not been
12 uniform agreement with or acquiescence in this Court's Order:

13 Now, when it is said that Senator Gorton and I found
14 that it was not the best rider or the best effort we
15 could have made, or whatever, it was the intervening
16 interpretation by a Federal District judge that caused
17 anybody and everybody who understood what the rider was
18 and that it had gone too far.

19 142 Cong. Rec. S2009 (daily ed. March 14, 1996), copy attached.

20 NFRC also contends that the Court should recognize the
21 senate report as post-enactment evidence of legislative intent.
22 However, this Court has held that post-enactment statements are
23 not meaningful indicators of legislative intent and did not rely
24 on such statements in issuing the January 19, 1996, Order. See,
25 September 13, 1995, Order, p. 10. The Court should likewise
26 disregard the senate report submitted by NFRC.

27 **B. In the alternative the Court should extend the stay for**
28 **sale units which likely are within the meaning of this**
Court's Order, as well as for those as to which
plaintiffs do not seek release.

1 Should this Court hold that a continued stay is not
2 generally warranted for all sale units, the Secretaries contend
3 in the alternative that there are particular sale units for which
4 a stay is warranted because they likely are within the meaning of
5 this Court's Order. These include 13 sale units where circling
6 behavior was detected over the sale unit, and 9 units where
7 detections of subcanopy behavior were made extremely close to the
8 sale unit. The Secretaries are not, at this time, seeking an
9 amendment of the Court's Order regarding these sales, since this
10 matter is now on appeal and jurisdiction in the Court of Appeals.
11 However, because the Secretaries believe that the specific
12 circumstances of these sales reflect that nesting is likely to be
13 occurring in the sale units in question, a stay of this Court's
14 Order regarding those units is appropriate.

15 In the January 19, 1996, Order, this Court held that Section
16 2001(k)(2) is "inconsistent with the protocol's circling
17 standard." Under the protocol, a stand may be classified as
18 occupied if circling behavior is detected over the stand. [cite
19 to protocol] This Court held that because "there is no evidence
20 in the record that the observer can 'know' that the circling
21 murrelet's nest is within sale unit boundaries," the Court
22 rejected circling as evidence of nesting within sale units under
23 2001(k)(2).

24 However, because the protocol only refers to circling over
25 entire stands (the stand being the focus of the protocol's
26 inquiry), the Court did not have before it the situation

1 presented in 13 sale units. In these units, circling was
2 detected directly over the sale units. The Secretaries submit
3 that, upon examination by the Court, evidence of circling
4 directly over the sale unit will indicate nesting within sale
5 unit boundaries. Though, as noted, the Secretaries have not
6 sought an amendment of this Court's Order because this matter is
7 on appeal, the Secretaries urge the Court to continue the stay
8 for these 13 units, where there is arguably a high likelihood
9 that nesting is occurring in the sale units.

10 Similarly, the Secretaries seek a continuation of the stay
11 for 9 sale units where subcanopy behavior was detected within 100
12 meters of the sale unit. The Secretaries submit that detection
13 of a murrelet, subcanopy, at a location very near the sale unit,
14 may also indicate nesting in the sale unit. As has been pointed
15 out previously in this litigation, a murrelet can fly at speeds
16 up to 60 miles/hour. [CITE] In literally the blink of an eye, a
17 murrelet could traverse the distance of 100 meters. Thus, a
18 detection of a flying murrelet in such close proximity to the
19 unit indicates a high likelihood that it would be appropriate to
20 include these units within the protections of Section 2001(k)(2).

21 At a minimum, then, and in the alternative if the Court does
22 not continue the stay of its January 19, 1996, Order, the
23 Secretaries request that the Court extend the stay for the 22
24 units described above, as well as for the 25 units for which
25 plaintiffs do not seek immediate release, and for the 48 units
26

1 withheld by the Secretaries in accordance with this Court's
2 Order, pending the ruling of the Court of Appeals.²

3 Finally, if the Court does not grant a stay as to all units,
4 the Secretaries re-urge their previous request that the Court
5 grant a temporary five-day stay to permit the Secretaries the
6 opportunity to seek a stay pending appeal from the Court of
7 Appeals.

8 C. The Court should not require identification of
9 replacement timber at this time.

10 Plaintiff Scott Timber Company requests that the Court order
11 the Forest Service to identify replacement volume for those of
12 its sale units that remain stayed. Defendants contend that,
13 until the Court of Appeals rules, Defendants should not be
14 required to proceed with the award of replacement timber. The
15 amount of volume required, and indeed the existence of any
16 obligation to offer alternative volume, cannot be determined
17 until the Court of Appeals rules. Therefore the Court should
18 deny Scott Timber's request to require identification of
19 replacement volume.

20 IV. CONCLUSION

21 For the above reasons, and those set forth in the original
22 motion for stay, and in the motion for extension of the stay, the
23 Secretaries respectfully contend that the stay of this Court's

24 ² Certain of the sale units for which plaintiffs do not
25 seek immediate release have either circling over the sale unit,
26 or detections of subcanopy behavior close to the unit. However,
because plaintiffs apparently do not oppose a stay as to units
for which they do not need immediate release, these units have
not been included in the above discussion.

1 January 19, 1996, Order, should be extended until the Court of
2 Appeals rules on the Secretaries' appeal.

3 Dated: March ____, 1996

4 Respectfully submitted,

5 KRISTINE OLSON
6 United States Attorney

7 LOIS J. SCHIFFER
8 Assistant Attorney General

9
10 JEAN WILLIAMS
11 MICHELLE L. GILBERT
12 EILEEN SOBECK
13 U.S. Department of Justice
14 Environment and Natural
15 Resources Division
16 Wildlife and Marine Resources
17 Section
18 P.O. Box 7369
19 Washington, D.C. 20044-7369
20 (202) 305-0228/0460

21 Attorneys for Defendants

22 OF COUNSEL:

23 JAY MCWHIRTER
24 Office of the General Counsel
25 U.S. Dept. of Agriculture

26 KAREN MOURITSEN
27 Office of the Solicitor
28 U.S. Dept. of the Interior



U.S. Department of Justice

Environment and Natural Resources Division

Wildlife and Marine Resources Section

Washington, D.C. 20530

March 22, 1996

TO: The Forest Group

Re: NFRC v. Glickman, et al.,
Civil # 95- 6244/67-HO

Today we appeared at telephonic oral argument on Defendants' motion to extend the stay pending appeal of the Court's January 19, 1996, Order interpreting Section 2001(k)(2). The Court heard arguments but did not rule. Instead, the Court has asked NFRC to specifically identify, as has Scott Timber, the sale units on which NFRC contends 1) operations must start now in order to be able to complete by September 30, 1996, and 2) which NFRC contends do not meet the criteria set for Section 2001(k)(2) by the Court's Order. NFRC has agreed to submit this information by this coming Monday, March 25, 1996. The Court then ordered that the Defendants will have three days, until March 28, 1996, to respond, in writing, as to whether the Defendant agree that the specified units do not meet the Court's criteria. The Court then extended the stay until April 3, 1996, at which time the Court will enter an Order on the motion.

Sincerely,

Jean Williams
Jean E. Williams
Assistant Chief

*Eleva -
what's
this
about?
-Jend C*

58 50

RECEIVED
JAN 10 1996

01/10/96 14:24

U.S. ATTORNEY
EUGENE OREGON

U.S. ATTORNEY
EUGENE ORE.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,
an Oregon Corporation,

Plaintiff,

and

SCOTT TIMBER CO., VARGEN BROS.
LUMBER INC., and WESTERN TIMBER
CO.,

Plaintiff-Intervenor

Case No. 95-6244
Lead Case

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

ORDER

vs.

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

Defendants,

and

OREGON NATURAL RESOURCE COUNCIL,
et al.

Defendant-intervenor

INTRODUCTION

The 1995 Emergency Supplemental Appropriations and Rescissions Act (the Rescissions Act) was signed into law by the President on July 27, 1995. Pub. L. No. 104-19, 109 Stat. 240 (July 27, 1995). The "Emergency Salvage Timber Sale Program" was included as section 2001 of the Rescissions Act. Section 2001(k) (1) mandates the release, "notwithstanding any other provision of law," of "all timber sale contracts offered" before the Rescission Act's July 27, 1995 enactment date. At issue here is whether this provision applies to 23 timber sales offered before July 27, 1995.

FACTS

These 23 timber sales can be divided into four categories: (1) one pre-318 sale; (2) 11 sales canceled prior to July 27, 1995 as a result of legal challenges; (3) eight sales canceled because of the high bidder's inability or unwillingness to proceed with the sale; and (4) three remarked sales. |?

1. Pre-318 sales

The first category consists of sales offered prior to the October 23, 1989 enactment of section 318 of the Department of Interior and Related Agencies Appropriation Act of 1989. Pub. L. No. 101-121, 103 Stat. 701 (1989). Although the government has identified 40 sales offered before October 23, 1989, which remain unawarded, the Malt sale is the only pre-318 sale whose

release is sought in this proceeding.

The Malt sale was offered on February 22, 1989, and Western Timber was the high bidder. However, the sale was enjoined by Judge Dwyer of the United States District Court for the Western District of Washington. The Malt sale was considered but rejected for release pursuant to section 318 negotiations.

Western Timber has filed a motion seeking the release of the Malt sale under section 2001(k)(1). Western Timber's Motion to Clarify (#225). Defendants made an oral motion to dismiss Western Timber's claim at the December 13, 1995 hearing. Defendant-intervenors oppose Western Timber's motion and seek a permanent injunction against the award of all pre-318 sales and a declaration that section 2001(k)(1) does not apply to pre-318 sales. Pilchuck Audubon's Complaint (#1 in consolidated case 95-6384).

2. Sales canceled because of litigation

The Forest Service and BLM canceled a combined 11 sales during legal proceedings prior to July 27, 1995. Seven of these sales were canceled subsequent to court injunctions. Four were canceled incident to the stipulated dismissal of court proceedings.

The Cowboy, Nita, South Nita, and Garden sales¹ were

¹ The Cowboy, Nita, South Nita, and Garden sale units are located in the Umpqua National Forest. Plaintiff-intervenor Scott Timber was the high bidder on these sales.

enjoined by Judge Dwyer of the United States District Court for the Western District of Washington for violating section 318(b)(1).² Judge Coughenour, also of the Western District of Washington, enjoined two sales, the Tip and Tip Top,³ for non-compliance with the National Environmental Policy Act (NEPA). Finally, the Gaterson sale⁴ was enjoined by Judge Quackenbush of the Eastern District of Washington for violating NEPA. ~~NFRC seeks the release of all seven enjoined sales.~~ NFRC's Motion for Summary Judgment or Clarification (#64). Defendant-intervenors seek a preliminary injunction against the award and release of these sales. Motion for Preliminary Injunction (#18 in consolidated case 95-6384). Defendants oppose the release of the four sales enjoined by Judge Dwyer for violating section 318.⁵

The four sales canceled pursuant to stipulated dismissals are the First, Last, Boulder Krab, and Elk Fork sales. The

² Section 318(b)(1) required the agencies to minimize the fragmentation of old growth in section 318 sales.

³ The Tip and Tip Top sales are located in the Wenatchee National Forest. NFRC represents the high bidders on each sale.

⁴ The Gaterson sale is located in the Colville National Forest. Plaintiff-intervenor Vaagen Bros. was the high bidder on the Gaterson sale.

⁵ Defendants have appealed this court's October 13, 1995 order declaring that section 2001(k)(1) is not limited to section 318 sales offered during fiscal year 1990. Defendants preserve this position for appeal but concede for purposes of this dispute ~~that section 2001(k)(1) applies to sales offered after fiscal year 1990.~~

First and Last sales⁶ were canceled after Judge Dwyer issued injunctions on the Cowboy, Nita, South Nita, and Garden sales. The Boulder Krab and Elk Fork sales⁷ were canceled during NEPA-related litigation before Judge Panner of this district. NERC seeks the release of all four sales. Motion for Summary Judgment or Clarification (#64). Defendant-intervenors seek to preliminarily enjoin these sales. Motion for Preliminary Injunction (#18 in consolidated case 95-6384). Defendants are not opposed to releasing these sales. But see note 5.

3. Sales on which high bidder is unable or unwilling to proceed

The government contends eight sales need not be released either because the relevant agency determined that the high bidder was unqualified to proceed with the contract or the high bidder declined to proceed with the contract.

Four of the eight sales involve an allegedly unqualified high bidder. Kinzua Corporation was the high bidder on the Horn Salvage sale.⁸ Plaintiff and defendants agree that Kinzua is insolvent and unable to proceed with the sale. The high bidder on the three other sales- the Eagle Ridge Houselog

⁶ The First and Last sales are located in the Umpqua National Forest.

⁷ The Boulder Krab and Elk Fork sales are located in the Siskiyou National Forest. Scott Timber was the high bidder on these sales.

⁸ The Horn Salvage sale is located in the Wallowa-Whitman National Forest.

JAN 10 '96 14:26 FROM US ATTY EUGENE ORE

PAGE.006

sale, the Allen sale, and the Prong Salvage sale⁹- was Rogge Wood Products, Inc. (Rogge). On October 11, 1995, Rogge's general manager sent the Forest Service a letter stating that Rogge was insolvent and unable to proceed with the contract but requesting the Forest Service's permission to assign its contract rights to a third party. Ex. D to Tenth Declaration of Jerry L. Hofer (#303). The Forest Service determined Rogge was unqualified to proceed as principal or assignor under agency regulations. NFRC seeks the release of these four sales either to Rogge or to successive bidders at the terms initially agreed on by the unqualified high bidder. Defendants oppose the release of these sales.

Four sales were canceled because the high bidder, prior to July 27, 1995, conveyed its unwillingness to proceed with the contract. These sales are the Hiack Thin, Ollala Wildcat, Twin Horse, and Holdaway II sales. As with the unqualified bidder sales, NFRC argues that defendants must award these sales to other bidders (at the terms agreed on by the repudiating high bidder.) Defendants contend section 2001(k)(1) does not apply to these sales because there was no viable offer at the time of section 2001(k)(1)'s enactment. Defendant-intervenors join this argument and move to preliminarily enjoin the award and release of all sales

⁹ The Allen and Prong Salvage sales are located in the Wallowa-Whitman National Forest. The Eagle Ridge Houseleg sale is located in the Umatilla National Forest. The high bidder, Rogge Wood Products, is represented by NFRC.

canceled prior to July 27, 1995. Motion for Preliminary Injunction (#18 in consolidated case 95-6384).

4. Remarked sales

- plus individual responsibility

Three sales were offered between October 23, 1995, and July 27, 1995, but allegedly cannot be awarded on their originally advertised terms due to boundary and individual tree remarkings. These sales are the Stage Coach, Bald, and Bugout sales.¹⁰

According to a declaration filed by Jerry L. Hofer, section head for Contracts and Contract Administration for the Pacific Northwest Region of the United States Forest Service, the plastic-covered signs originally stapled to individual trees to delineate sale unit boundaries have been removed. Defendants stated at oral argument December 13, 1995, that none of the three sales were planned to be clear cut and that, therefore, individual trees were marked within sale unit boundaries. Transcript of December 13, 1995 Proceedings (#329) at 34.

Mr. Hofer describes the Bugout sale markings in his declaration. Mr. Hofer states the Forest Service marked individual trees on Bugout sale units which were not to be cut with the letters "LTM." Tenth Hofer Declaration, attached to Defendants' Reply to NERC's Reply Memorandum in Support of

¹⁰ The Stage Coach and Bald sales are located in the Umatilla National Forest. The Bugout sale is in the Wallowa-Whitman National Forest.

JAN 10 '96 14:27 FROM US ATTY EUGENE ORE

PAGE.008

Summary Judgment (#303) at 6-7. After canceling the Bugout sale, however, the Forest Service prepared another sale, which encompasses a portion of the timber originally included in the Bugout sale. Id. The Forest Service removed the "LTM" markings from trees that were not to be cut under the Bugout sale and remarked the letters "ITM" on the trees that are to be cut in the new sale. Id.

Mr. Hofer states that it would be impossible to locate the original sale boundaries on any of the remarked sales and, therefore, impossible to identify the amount of originally advertised timber. Id. at 4. While conceding that defendants cannot be compelled to do the impossible, NERC argues that the sales can be remarked to approximate the timber included in the Stage Coach, Bald, and Bugout sales.

DISCUSSION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court views the facts in the light most favorable to the non-moving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

Preliminary injunctive relief is warranted if the moving party demonstrates "either (1) a combination of probable

success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 752 (9th Cir. 1991). "These are not separate tests, but the outer reaches of a single continuum." Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980) (quoting Benda v. Grand Lodge of Int'l Ass'n of Machinists, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979)).

The issues presented in this dispute revolve around section 2001(k)(1) of the Rescissions Act. Section 2001(k)(1) provides:

AWARD AND RELEASE REQUIRED-- Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered before that date [July 27, 1995] in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (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.

Pub. L. No. 104-19, 109 Stat. 240 (July 27, 1995).

I. Pre-318 sales

The first rule of statutory interpretation is that a statute is interpreted according to its plain meaning. Chevron, U.S.A., Inc. v. Natural Resources Defense Council,

JAN 10 '96 14:28 FROM US ATTY EUGENE ORE

PAGE 010

Inc., 467 U.S. 837, 843 (1984). A particular provision's meaning should be considered in the context of the entire statute. Rufener Const., Inc. v. Robertson, 53 F.3d 1064, 1066 (9th Cir. 1994). Absent clearly expressed congressional intent to the contrary, a court must apply a statute's plain meaning. United States v. Ron Pair Enter., Inc., 489 U.S. 235, 243 (1989).

Western Timber argues that the plain language of section 2001(k)(1) mandates the release of all sales offered prior to July 27, 1995, with no initial start date. Western Timber relies in part on this court's earlier declaratory judgment that the phrase "subject to section 318" defines the geographical, rather than substantive, scope of section 2001(k)(1). Western Timber asserts that the phrase "subject to section 318" places no temporal limitation on subject sales. In the alternative, Western Timber argues that section 2001(k)(1) applies to sales whose release was considered under section 318 in fiscal year 1990, even if the sale was rejected for release.

Defendants and defendant-intervenors take a different view of section 2001(k)(1)'s plain language. They argue the phrase "subject to section 318" places not only a geographic limit, but a temporal limit, on section 2001(k)(1). This view is premised on the notion that there were no units or districts subject to section 318 before section 318 was enacted.

Defendants and defendant-intervenors also maintain that an infinitely retroactive application of section 2001(k)(1) would lead to absurd results. Interpreted to be infinitely retroactive, section 2001(k)(1) could require the release of century-old sales. Moreover, because section 2001(k)(1) requires the sales to be awarded on their originally advertised terms, such sales could create large industry windfalls and government losses, a result inconsistent with the Rescission Act's budget-cutting purpose. Finally, because section 2001(k)(1) applies "notwithstanding any other law," such an interpretation could require the release of timber on national parks and monuments.

The phrase "subject to section 318" is not clear regarding the presence or absence of a temporal limit. While this court has held that the phrase sets a geographic limit on section 2001(k)(1) and not a substantive limit, the phrase could be interpreted to reflect congressional intent to limit section 2001(k)(1) to sales offered or awarded after the enactment of section 318. In addition, "legislative enactments should never be construed as establishing statutory schemes that are (illogical, unjust, or capricious.)" Bechtel Constr., Inc. v. United Bd. of Carpenters, 812 F.2d 1220, 1225 (9th Cir. 1987). Because the meaning urged by Western Timber is (not clear on the face of the statute and could lead to absurd results,) the court refers to legislative history to elicit congressional intent. See United States v.

Aguilar, 21 F.3d 1475, 1480 (9th Cir. 1994) rev'd on other grounds, ___ U.S. ___, 115 S.Ct. 2357 (1995); United States v. Geyler, 932 F.2d 1330, 1335 (9th Cir. 1991).

In the hierarchy of legislative history, a congressional conference report is generally recognized as the most reliable evidence of congressional intent, because it "represents the final statement of the terms agreed to by both houses." Dep't. of Health and Welfare v. Block, 784 F.2d 995, 901 (9th Cir. 1986). The May 16, 1995 conference report on the Rescissions Act included a section entitled "Released Timber Sales." 141 Cong. Rec. H5013-03, H5050 (May 16, 1995). The first sentence of that section provides:

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

Id. (emphasis added)

This statement strongly suggests that Congress referred to section 318 in order to place temporal as well as geographic limitations on section 2001(k)(1).

The only other legislative history that denotes the temporal scope of section 2001(k) is a statement by Representative Charles Taylor of North Carolina, a co-author of section 2001(k)(1) and a member of the Interior Appropriations Subcommittee. The remarks of a bill's sponsor are "particularly valuable in determining the meaning of [the bill]." Rice v. Rehner, 463 U.S. 728, 731 (1983).

Representative Taylor explained on the House floor that the bill covered sales offered under section 318 "or more recently." 141 Cong.Rec. H3227-03, H3233 (Mar. 15, 1995). Western Timber has cited no legislative history indicating an intent to apply section 2001(k)(1) to pre-318 sales.

Section 2001(k)(1)'s legislative history indicates Congress's intent to limit the application of section 2001(k)(1) to sales offered after section 318's enactment. Accordingly, the court holds that section 2001(k)(1) does not apply to sales offered prior to the October 23, 1989 enactment of section 318. Moreover, the Conference Report clearly states that only sales "offered" during or after fiscal year 1990 are included in section 2001(k)(1). Thus, the fact that a sale was considered, but rejected, for release under section 318 does not bring the sale into section 2001(k)(1)'s temporal scope.

2. Sales canceled because of litigation

Defendant-intervenors take the position that section 2001(k)(1) only applies to timber sales for which a viable offer was outstanding at the time of section 2001(k)(1)'s enactment. In other words, they argue section 2001(k)(1) does not "resurrect" canceled sales:

Defendant-intervenors contend this interpretation is supported by the plain language of section 2001(k)(1). They note that section 2001(k)(1) does not require the Secretary to "offer" sales. Rather, it requires the Secretary concerned to

"award, release, and permit [offered sales] to be completed. . . ." This language, they maintain, assumes the existence of a viable offer.

Defendant-intervenors also argue that section 2001(k)(1)'s legislative history supports a viable offer requirement. They point to the Rescission Act's purpose of avoiding government liability and releasing timber sales whose harvest was assumed under the President's Northwest Timber Plan. They assert that the resurrection of canceled sales is inconsistent with these purposes.

With regard to sales enjoined or withdrawn during litigation, defendant-intervenors argue that the viable offer requirement is necessary to avoid a Constitutional violation. Specifically, defendant-intervenors contend that section 2001(k)(1) would violate the doctrine of separation of powers if interpreted to require the release of timber sales that have been enjoined or voluntarily withdrawn during litigation.

Section 2001(k)(1)'s application to enjoined sales poses no Constitutional problem. In Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992), the Supreme Court unanimously upheld the Constitutionality of section 318, reasoning that Congress can require the release of specific timber sales which a federal court has preliminarily enjoined so long as Congress changes the substantive law underlying the prior injunction. *Id.* at 440-41. Under section 318, the subject sales were specified by case name; under section 2001(k)(1),

they are specified as sales "offered" between October 23, 1989 and July 27, 1989. Neither section 318 nor section 2001(k)(1) directs the judiciary to adjudicate past sales to comply with past law; rather, both direct the administration to proceed with certain timber sales under changed legal standards. The fact that an injunction has become final does not alter this analysis. See Pennsylvania v. Wheeling and Belmont Bridge, 59 U.S. 421 (1855).

In determining the scope of a statute, the court must look first to its language. United States v. Turkette, 452 U.S. 576, 579 (1981). A provision's plain meaning should be understood in the context of the entire statute. Rufener Constr., Inc. v. Robertson, 53 F.3d 1064, 1066 (9th Cir. 1994). Absent clearly expressed congressional intent to the contrary, a court must apply a statute's plain meaning. United States v. Ron Pair Enter., Inc., 489 U.S. 235, 243 (1989).

Section 2001(k)(1) governs all timber sale contracts "offered" between October 23, 1989, and July 27, 1995. The 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. See Defendants' Reply to NFR's Reply Memorandum in Support of Summary Judgment (#303) at 5 ("the stage at which a timber sale is 'offered' is the point at which the Forest Service opens the bids of parties responding to the advertisement"). 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.

The second sentence of section 2001(k)(1) also supports this plain meaning of "offered." The second sentence provides that "[t]he return of the bid bond of the high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph." The BLM and Forest Service may cancel sales for various reasons, including a determination that it is not in the government's interest to award the contract. See id., Declaration of Lyndon A. Werner at 3. In the event of cancellation, the agency generally returns the high bidder's bid bond. Id. Thus, section 2001(k)(1) requires the release of offered sales, even if they were canceled prior to section 2001(k)(1)'s enactment.

Section 2001(k)(1) includes one express exception for sale units in which a threatened or endangered species is known to be nesting. A statute's enumeration of an express exception "indicates that other exceptions should not be implied." In re Garver, 898 F.2d 730, 732 (9th Cir. 1990). 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 canceled 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.

This plain language interpretation is consistent with the Rescission Act's legislative history. Senator Mark Hatfield stated in the Senate Report that section 2001(k)(1) includes "all sales offered, awarded, or unawarded, whether or not bids have subsequently been rejected by the offering agency." S.Rep. 14-17 at 123 (March 24, 1995). Senator Taylor remarked that many timber 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 [2001(k)(1)] frees up all these sales. . . . It directs the award of all unawarded sales as originally advertised, whether or not bids on a sale were previously rejected. . . .

141 Cong. Rec. H3233 (daily ed. March 15, 1995).

The release of canceled sales is also consistent with the Rescission Act's purposes of getting timber to northwest mills and reducing government liability on canceled contracts. See 141 Cong. Rec. H3227-03, 3237 (March 15, 1995); 141 Cong. Rec. S4868-01, 4882 (March 30, 1995); and 141 Cong. Rec. H6594-03, H6598 (June 29, 1995). Defendant-intervenors' argument that section 2001(k)(1) excludes all canceled sales is not persuasive in light of the statute's plain language, legislative history, and purpose.

Defendants argue section 2001(k)(1) excludes sales enjoined for violating section 318 not because these sales were canceled, but because, constructively, they were never

offered." Defendants concede that these sales were "offered" when the relevant agency opened the bids at auction. However, they contend that these offers are void *ab initio* since the court held that the sales did not comply with section 318(b)(1)'s old growth fragmentation requirements."

As suggested above, this interpretation conflicts with the plain meaning of the term "offered." Plaintiff and defendants agree that the agency offers a sale when it opens the bids at auction. See Defendants' Reply to NFRC's Reply Memorandum in Support of Summary Judgment (#303) at 5. The fact that section 2001(k)(1) explicitly abrogates all other provisions of law indicates that the word "offered" was not intended to carry a meaning laden with implied legal requirements.

Although defendants limit their argument to the four sales enjoined for violating section 318, their premise is that sales which violate their authorizing statute were never "offered." Logically, defendants' argument does not require a court injunction based on section 318. Rather, any sale which violated a law formerly governing its offering, such as NEPA or the National Forest Management Act (NFMA), would arguably be void *ab initio* and, thus, excluded from section 2001(k)(1). This interpretation runs counter to section

These are the Cowboy, Nita, South Nita, and Garden sales.

Defendants only apply this argument to the four sales enjoined under section 318 and not to sales voluntarily dismissed or enjoined under other environmental laws.

2001(k)(1)'s "notwithstanding any other provision of law" language as well as the clear legislative intent to provide timber to northwest mills and mitigate government contract liability by eliminating "dilatory legal challenges." H.R. Conf. Rep., 104-124 at 136, reprinted at 141 Cong. Rec. H5013 (May 16, 1995).

The word "offered" is unambiguous when read in the context of section 2001(k). As defendants concede, an "offered" sale is a sale for which the relevant agency opened bids.

3. Sales on which high bidder is unable or unwilling to proceed

Defendants argue that their agencies comply with section 2001(k)(1) by acting to award the sale to the high bidder after July 27, 1995; thus, if the high bidder is unqualified to perform the contract, the agency has no further obligations under section 2001(k)(1). In support of this position, defendants argue that the language "notwithstanding any other provision of law" leaves agency regulations intact, since the words "offered," "award," and "release" imply that agency regulations are to be applied in implementing section 2001(k)(1). Defendants cite In re Glacier Bay, 944 F.2d 577 (9th Cir. 1991), for the proposition that the words "notwithstanding any other provision of law" do not necessarily pre-empt all law when the statute references other applicable law.

The words "notwithstanding any other provision of law" do,

*just bid
repeal of
"regs"*

however, pre-empt regulations that obstruct the subsequent statute's objectives. Id. at 581. When two laws are in conflict, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work." Id. at 582 (quoting Silver v. New York Stock Exch., 373 U.S. 341, 351 (1963)). Section 2001(k)(1)'s objectives are the award, release, and completion of timber sales in the section 318 region that were offered between October 23, 1989, and July 27, 1995, and in which no threatened or endangered birds are known to be nesting.

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. The reduction of government liability and the supplying of timber to northwest mills do not depend on the performance of a particular bidder. Rather, section 2001(k)(1) expressly states that the return of the high bidder's bid bond shall not alter the Secretary's responsibility to award offered timber sales. 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.

¹³ Forest Service regulations provide that "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 Timber Sale Procedures Handbook states that "[w]hen the successful bidder fails to sign and return the contract, and any required bond and

Agency regulations which operate consistently with section 2001(k)(1), however, remain in effect. Thus, the Forest Service may look to applicable regulations in determining whether a high bidder is qualified to perform a contract or assign its contractual rights to a third party.

Plaintiff has raised no genuine issue of fact indicating that the Forest Service incorrectly applied its regulations or abused its discretion in finding Rogge Wood Products unqualified to receive assignable rights to the Eagle Ridge Houselog, Allen, and Prong Salvage sales. Rogge's declaration of insolvency and its earlier default on a timber sale contract may be sufficient to make Rogge an unqualified bidder under 36 C.F.R. § 223.101.¹⁴ Under Forest Service policy, only

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). Though the Rescissions Act makes the award of subject timber sales to other qualified bidders mandatory, agency regulations and policies regarding bidder qualification remain applicable.

¹⁴ 36 C.F.R. § 223.101 requires the agency to make an affirmative finding that a bidder is responsible before awarding the contract. Section 223.101 further provides in relevant part:

To determine a purchaser to be responsible, a Contracting Officer must find that:

- (1) The purchaser has adequate financial resources to perform the contract or the ability to obtain them;
- (2) The purchaser is able to perform the contract within the contract term taking into consideration all existing commercial and governmental business commitments;
- (3) The purchaser has a satisfactory performance record on timber sale contracts. A prospective purchaser that is or recently has been seriously deficient in contract performance shall be presumed not to be responsible, unless the Contracting Officer determines that the circumstances were beyond the purchaser's control and

responsible bidders who have already entered into a contract with regard to a subject sale may assign those rights to a third party. Tenth Hofer Declaration (#303) at 10. Therefore, the Forest Service need not necessarily release these three sales to Rogge. As noted above, however, section 2001(k)(1) requires the Forest Service to attempt to award these sales to other qualified bidders at the terms agreed to by Rogge.

Defendants argue that section 2001(k)(1) does not apply to sales canceled because the high bidder repudiated the contract prior to July 27, 1995. This argument is not well taken since it rests on the existence of the implied "viable offer" requirement that was considered and rejected above. Because these sales were offered between October 23, 1989, and July 27, 1995, the Secretary concerned is obligated to award and release these sales. If the high bidder is not willing to proceed under the contract, the Secretary must award the sale to other qualified bidders at the terms agreed to by the repudiating high bidder.

4. Remarketed sales

Section 2001(k)(1) requires sales to be released "with no change in their originally advertised terms, volumes, and bid

were not created through improper actions by the purchaser or affiliate, or that the purchaser has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably under a contract is strong evidence that a purchaser is not a responsible contractor.

prices." Defendants argue that section 2001(k)(1) does not apply to remarked sales because it would be impossible to release these sales in their originally advertised form. Plaintiff contends that even if remarked sales cannot be released in their originally advertised form, section 2001(k)(1) requires the agencies to release the sales in a form approximating that originally advertised.

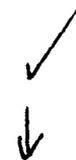
Requiring an agency to perform the impossible qualifies as a result that Congress presumably would not have intended. See United States v. Chevron, U.S.A., Inc., ___ F.3d ___, 1995 WL 733959, *5 (9th Cir. 1995) (declining to adopt interpretation of jurisdictional statute which would be impossible for federal courts to implement). The court interprets section 2001(k)(1) to exclude sales that are impossible to award and release on their originally advertised terms.

Defendants have submitted an unchallenged declaration from their head contract administrator Jerry Hofer stating that it would be impossible to reformulate the Stage Coach, Bald, and Bugout sales on their originally advertised terms. At oral argument, defendants stated that individual tree markings were removed or painted over on each of these sales and that it would be impossible to determine the precise amount of timber originally included. With regard to the Bugout sale, Mr. Hofer's declaration goes into considerable detail in describing the removal of individual tree markings

and their replacement with new sale markings. The court finds on the record before it that reformulation of these sales according to their "originally advertised terms, volumes, and bid prices" is impossible. Accordingly, section 2001(k)(1) does not apply to these three sales.

CONCLUSION

Section 2001(k) requires the Secretary concerned to award, release and permit to be completed all contracts for the sale of timber on land within the section 318 geographic region for which the relevant agency opened bids between October 23, 1989, and July 27, 1995, unless there is a threatened or endangered bird known to be nesting within the sale unit. Section 2001(k)(1) applies to sales canceled or enjoined before July 27, 1995, and section 2001(k)(1) requires the agency concerned to attempt to award and release offered sales to other qualified bidders in the event the original high bidder is unqualified or has rejected the contract. Section 2001(k)(1) does not apply to sales offered before October 23, 1989, nor to sales that are impossible to award on their originally advertised terms, volumes, and bid prices.



Defendants are enjoined to immediately award, release, and permit to be completed all sales subject to section 2001(k)(1) as declared in this order. However, with respect to offered sales subject to a preceding injunction issued by another court, this order shall operate only as a declaratory judgment under Federal Rule of Civil Procedure 57 and 28

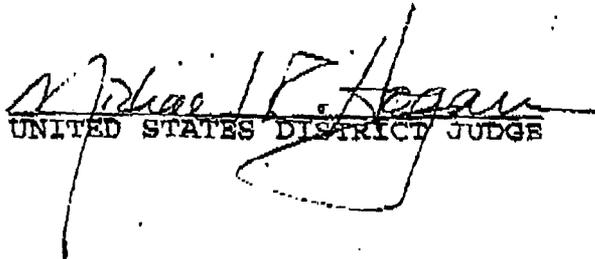
24 - ORDER



U.S.C. § 2201. Plaintiffs may seek relief in the court that issued the preceding injunction or in this court subsequent to the issuing court's modification or vacation of the preceding injunction.

Defendants' oral motion to dismiss Western Timber's claim is granted. Western Timber's motion to clarify (#225) is denied and its claim is dismissed. Defendant-intervenors' motion for preliminary and permanent injunctions with respect to pre-318 sales (#18 in consolidated case 95-6384) is denied as moot. Plaintiff's motion for summary judgment (#64) and motion to clarify (#209) are granted in part and denied in part as indicated in this order. Defendants' motion for summary judgment (#112) is denied. Scott Timber Company's motion for summary judgment (#0-1) is granted in part and denied in part as indicated in this order. Defendant-intervenors' motion for a preliminary injunction against the release of all sales canceled before July 27, 1995 (#18 in consolidated case 95-6384) is denied and defendant-intervenors' complaint (#1 in consolidated case 95-6384) is dismissed.

DATED this 10th day of January, 1996.


UNITED STATES DISTRICT JUDGE



U.S. Department of Justice

Environment and Natural Resources Division

Wildlife and Marine Resources Section

Washington, D.C. 20530

March 22, 1996

TO: The Forest Group

Re: NFRC v. Glickman, et al.,
Civil # 95- 6244/67-HO

Today we appeared at telephonic oral argument on Defendants' motion to extend the stay pending appeal of the Court's January 19, 1996, Order interpreting Section 2001(k)(2). The Court heard arguments but did not rule. Instead, the Court has asked NFRC to specifically identify, as has Scott Timber, the sale units on which NFRC contends 1) operations must start now in order to be able to complete by September 30, 1996, and 2) which NFRC contends do not meet the criteria set for Section 2001(k)(2) by the Court's Order. NFRC has agreed to submit this information by this coming Monday, March 25, 1996. The Court then ordered that the Defendants will have three days, until March 28, 1996, to respond, in writing, as to whether the Defendant agree that the specified units do not meet the Court's criteria. The Court then extended the stay until April 3, 1996, at which time the Court will enter an Order on the motion.

Sincerely,

Jean E. Williams
Assistant Chief

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

FAX NUMBER 305-0506, -0267, -0429
 CONFIRMATION NUMBER (202) 305-0504

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Brian Burke	720-4732
	Mark Gaede	
	Jim Lyons	
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Al Ferlo	514-4240
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Garry Jackson	208-6916
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Jason Patlis (301)	713-0658
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 9

DATE: March 22, 1996

FROM: Jean Williams, (202) 305-0228

MESSAGE: NERC v. Glickman: attached are our reply brief in support of the motion to extend the stay filed on March 21, 1996, and our letter re: the hearing today on the motion.

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

5 LOIS J. SCHIFFER
 Assistant Attorney General
 6 MICHELLE L. GILBERT
 EDWARD A. BOLING
 7 JEAN E. WILLIAMS
 ELLEN J. KOHLER
 8 U.S. Department of Justice
 Environment and Natural Resources Division
 9 General Litigation Section
 P.O. Box 663
 10 Washington, D.C. 20044-0663
 Telephone: (202) 305-0228/0460

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

14 NORTHWEST FOREST RESOURCE COUNCIL,)
)
 15 Plaintiff,)
)
 16 v.)
)
 17)
)
 18 DAN GLICKMAN, in his capacity)
 as Secretary of Agriculture,)
 19 BRUCE BABBITT, in his capacity)
 as Secretary of the Interior,)
 20)
 Defendants,)
 21)
 22 OREGON NAT. RES. COUNCIL, et al.,)
 Defendants-Intervenors)

Civil No. 95-6244-HO
 (lead case)
 Civil No. 95-6267-HO
 (consolidated case)
 DEFENDANTS' REPLY
 MEMORANDUM IN SUPPORT
 OF MOTION FOR EXTENSION
 OF JANUARY 25, 1996 STAY

23 I. INTRODUCTION

24 The Secretaries of Agriculture and the Interior (the
 25 Secretaries) urge this Court to continue the stay of the Court's
 26 January 19, 1996, Order pending disposition of the Secretaries'

1 appeal of that ruling. The Court of Appeals has expedited the
2 Secretaries' appeal, and oral argument is set for the week of May
3 6, 1996. Continuation of the stay is warranted because the
4 continued existence of the marbled murrelet will be irreparably
5 harmed if the sale units which are subject to release under this
6 Court's Order are harvested. Conversely, the plaintiffs will not
7 be harmed by a continuation of the stay, since upon disposition
8 by the Court of Appeals they will either be offered alternative
9 timber or be able to proceed in accordance with their contracts
10 as explained below.

11 II. STATEMENT AND ARGUMENT

12 This Court's January 19, 1996, Order articulated a new
13 biological standard for the Secretaries to utilize in making
14 "nesting" determinations under Section 2001(k)(2) of the
15 Rescissions Act. The Secretaries have now completed their review
16 of this Court's January 19, 1996, Order, and have determined
17 which sale units are subject to release under that ruling.
18 Submitted with this reply are summaries of the results of this
19 review from the Forest Service and from the Bureau of Land
20 Management (BLM). See, Declaration of Jean E. Williams in
21 Support of Motion for Extension of Stay, Exhibits 1 and 2. Of
22 the 137 sale units withheld from release by the Forest Service,¹

23
24 ¹ The Forest Service had originally withheld 139 units from
25 harvest under Section 2001(k)(2). As set forth in the Amended
26 Declaration of A. Grant Gunderson filed on March 9, 1996, the
27 Forest Service subsequently determined that two of these units --
28 Unit 3 on the West Boundary timber sale on the Olympic National
Forest and Unit 4 on the Boulder Krab timber sale on the Siskiyou
(continued...)

1 97 sale units are subject to release; 40 sale units meet the
2 criteria for exemption from release set by this Court. For the
3 BLM, 3 of 11 sale units are subject to release; 8 sale units meet
4 the criteria for exemption from release.

5 Thus, in the absence of a stay, the majority of the sale
6 units which the Secretaries had determined to contain nesting
7 murrelets will be harvested and the nesting habitat destroyed.
8 In originally seeking a stay from this Court, the Secretaries
9 submitted the Declarations of Michael Spear, Regional Director of
10 the U.S. Fish and Wildlife Service; Dr. C. John Ralph, Research
11 Wildlife Biologist with the Forest Service's Pacific Southwest
12 Forest and Range Experiment Station; and Sarah J. Madsen, Siuslaw
13 National Forest Threatened and Endangered Species Coordinator.
14 These experts' declarations demonstrate that any significant loss
15 of occupied murrelet nesting habitat will result in severe
16 biological harm to this threatened species by further fragmenting
17 the remaining murrelet nesting habitat, thus setting back
18 recovery by increasing the risk of predation on a species highly
19 subject to this danger and by increasing the rate of the species
20 decline. See, Spear Declaration, parags. 6, 10, 12, 19, 20;
21 Ralph Declaration, parag. 12, 13; Madsen Declaration, parag. 9
22 (referencing Marbled Murrelet Recovery Plan).

23 Because release of the sale units in accordance with this
24 Court's Order will result in the loss of the majority of these

25 _____
26 ¹(...continued)

27 National Forest -- were not excepted from release under the
28 Secretaries' view of Section 2001(k)(2).

29 DEFS' REP IN SUPP OF MOT FOR
EXTENSION OF STAY - 3 -

1 nesting sites, it cannot be seriously disputed that severe harm
2 will be visited upon this already tenuous species. Harvesting
3 units ordered to be released under this Court's Order will be
4 especially harmful in that, as previously described,
5 approximately 2,700 acres of occupied nesting habitat currently
6 withheld from harvest under Section 2001(k)(2) are on the Siuslaw
7 National Forest, which is a "biological stronghold" for the
8 species. Madsen Declaration, parag. 11; Spear Declaration,
9 parag. 14. There are 81 sale units currently withheld from
10 harvest that comprise this acreage; of these only 27 remain
11 protected under this Court's Order. Thus, approximately 2,100
12 acres of this occupied nesting habitat would be harvested.

13 As was described in the declarations previously submitted,
14 the current Siuslaw population could serve as a long-term source
15 of dispersing murrelets as nesting habitat conditions improve
16 elsewhere in the range of the species. Spear Declaration, parag.
17 14. The occupied nesting habitat on the Siuslaw is of the
18 highest quality -- the stands are located close to the coast --
19 and the trees exhibit the characteristics preferred by the
20 species with the large, moss-covered limbs used for nesting.
21 Ralph Declaration, parag. 11; Madsen Declaration, parag.11; Spear
22 Declaration, parag. 14-15. According to FWS Regional Director
23 Spear, many of these forest stands are believed to be the most
24 productive breeding sites for murrelets in Oregon and Washington
25 and probably support multiple nesting pairs. Id.

1 Obviously, harvest of the 54 sale units subject to release under
2 the Court's Order would have an extremely detrimental effect on
3 the contribution this population can make to the species
4 recovery. Ralph Declaration, parag. 11; Spear Declaration,
5 parag. 14.

6 The Secretaries submit that this severe environmental damage
7 far outweighs any harm plaintiffs may suffer as a result of
8 extending the stay pending resolution of the appeal. Plaintiffs
9 contend that continuing the stay will prevent them from
10 harvesting the sale units subject to release under this Court's
11 Order because the Rescissions Act expires on September 30, 1996.
12 The contracts which have been awarded or released under Section
13 2001(k)(1) do not expire on September 30, 1996. However,
14 plaintiffs are correct that the exemption from application of the
15 environmental laws which currently governs these contracts will
16 expire on September 30, 1996. After that time, the environmental
17 laws will apply to them. Further, the Secretaries' authority to
18 award alternative timber under Section 2001(k)(3) for rights
19 which accrue during the statutory period will continue beyond
20 September 30, 1996.

21 Thus, regardless of the ultimate disposition of the appeal,
22 plaintiffs will not be harmed by continuing the stay to permit
23 the Court of Appeals a meaningful opportunity for review. If the
24 Secretaries prevail, the plaintiffs will have the right to
25 receive alternative timber as provided under Section 2001(k)(3).
26 Because the authority to award alternative timber under

1 2001(k) (3) does not expire on September 30, the short additional
2 delay required to allow for appellate review will not seriously
3 prejudice this process. This is particularly true since under
4 Section 2001(k) (3), which does not contain an exemption from the
5 environmental laws, alternative timber will be processed through
6 environmental standards and guidelines and procedures in the
7 normal course. The short additional deferral of this process to
8 permit full appellate review would not significantly change the
9 timeframe for award of alternative timber.

10 If the Court of Appeals affirms this Court, plaintiffs could
11 then operate the sale. Operations conducted prior to September
12 30 would be conducted without application of the environmental
13 laws. Operations under the contracts after that time would have
14 to be consistent with environmental laws and other original
15 contract terms. While this would likely result in a need for
16 modification or other contract remedies, the contracts do not
17 expire on September 30 and plaintiffs' rights and obligations
18 under those contracts continue.

19 Plaintiffs contend that a further stay would frustrate the
20 legislative purpose underlying the Rescissions Act. However,
21 lifting the stay would undermine the explicit protections of the
22 Rescissions Act in an irreparable and more significant manner.
23 In 2001(k) (2), Congress created "provisions prohibiting
24 activities in timber sale units which contain any nesting
25 threatened or endangered species." Remarks of Sen. Hatfield, 141
26 Cong. Rec. S 4881 (March 30, 1995). Lifting the stay now, while

1 significant issues of interpretation remain, would fundamentally
2 undermine the protections for threatened and endangered bird
3 species provided in the law.

4 The short delay to permit appellate review cannot be charged
5 with frustrating the legislative purpose. Though the process of
6 awarding timber under 2001(k)(3) would not occur within the
7 expedited timeframe of 2001(k)(1), Congress did not exempt timber
8 sales under 2001(k)(3) from application of the environmental
9 laws. Further, though Congress specifically limited judicial
10 review of sales under subsections (b) and (d) by prohibiting the
11 issuance of any injunctions pending appeal, Congress did not
12 include subsection (k) in this provision. See, Section
13 2001(f)(3). Balancing the tension between these statutory
14 directives in the context of this motion for stay mandates
15 granting the stay. Timber sales will proceed or be replaced upon
16 resolution of the appeal, but with consideration of the
17 imperative need to protect this fragile species. Continuation of
18 the stay is therefore warranted.

19 **III. CONCLUSION**

20 This matter has been expedited for review by the Court of
21 Appeals and is set for hearing the week of May 6. If this Court
22 does not grant a continuation of the stay, the sale units which
23 are subject to release under this Court's Order will likely be
24 harvested. The practical effect of releasing the sale units is
25 that review by the Court of Appeals may well become meaningless
26 in the legal context as well as to the murrelet, since once this

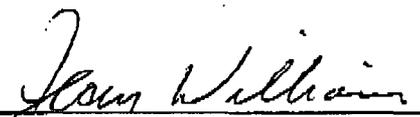
1 old growth forest is cut, it cannot be readily replaced. Under
 2 these circumstances, the Secretaries respectfully urge the Court
 3 to continue the stay. In the alternative, should the Court deny
 4 this motion, the Secretaries request the Court to enter a
 5 temporary, five-day stay to enable the Secretaries to seek a stay
 6 from the Court of Appeals.

7 Dated: March 21, 1996

8 Respectfully submitted,

9 KRISTINE OLSON
 10 United States Attorney

11 LOIS J. SCHIFFER
 12 Assistant Attorney General

13 
 14 JEAN WILLIAMS
 15 MICHELLE L. GILBERT
 16 EILEEN SOBECK
 17 U.S. Department of Justice
 18 Environment and Natural
 19 Resources Division
 20 Wildlife and Marine Resources
 21 Section
 22 P.O. Box 7369
 23 Washington, D.C. 20044-7369
 24 (202) 305-0228/0460

25 Attorneys for Defendants

26 OF COUNSEL:

27 JAY MCWHIRTER
 28 Office of the General Counsel
 U.S. Dept. of Agriculture

KAREN MOURITSEN
 Office of the Solicitor
 U.S. Dept. of the Interior