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NFRC v. Glickman II [7]

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
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FROM: Jean Williams (202) 305-0228

MESSAGE: NFRC v. Glickman. Attached are the oppositions from industry to the motion to extend the stay on the 1/19/96 Order - the K2 decision on murrelet nesting.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, Plaintiff, v. DANIEL R. GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of Interior, Defendants.	No. 95-6244-HO (Lead) No. 95-6267-HO (Consolidated) No. 95-6384-HO (Consolidated) PLAINTIFF SCOTT TIMBER CO.'s OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO EXTEND STAY

I. INTRODUCTION.

Scott Timber Co. ("Scott Timber") opposes a blanket extension of the January 25, 1996 sixty-day stay that prohibits harvest of timber sales "occupied" by the marbled murrelet under the Pacific Seabird Group Protocol. Extension of the stay until the Ninth Circuit rules on defendants' pending appeal would leave Scott Timber too little time to complete the sales as Congress clearly provided for in the Rescissions Act. Pub. L. No. 104-19. The appeal is scheduled for argument the week of May 6, 1996, and

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certainly more time will elapse[1] after oral argument before a decision is rendered.

Scott Timber opposes extension of the stay on all its sales. At a minimum, a stay should be denied for units on five of its 13 timber sales where the marbled murrelet is clearly not "known to be nesting" under the Rescissions Act as interpreted in this Court's January 19, 1995 Order. The Declaration of Peter Quast in Opposition to Motion to Extend Stay ("Quast Dec.") attached as Exhibit A to the Declaration of Scott Horngren, explains that Scott Timber has reviewed its operating plans and Forest Service marbled murrelet survey forms for its timber sales. Given a Ninth Circuit hearing on the appeal the week of May 6, 1996, Scott Timber assumed that if this Court granted an extension of the stay, the stay would last for at least 60 more days. Scott Timber has identified units on five out of 13 sales that it wants released to operate during the next 60 days.

II. AN EXTENSION OF THE STAY UNTIL THE NINTH CIRCUIT RULES WOULD DEFEAT THE LEGISLATIVE MANDATE OF CONGRESS.

The prolonged judicial proceedings challenging release of the Section 2000(k) timber sales have already eliminated eight of the 14 months in which these sales can be operated under the Recision Act. Only about six months remain before the Recision

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[1] The appeal of this Court's order interpreting Section 2001(k)(1) was argued on January 8, 1996, and two months have passed without a decision. If the same time elapses with the Section 2001(k)(2) appeals before a favorable decision affirming the district court's order, then at most there will be only eight weeks to log the sales if this Court grants defendants' motion to extend the stay until a ruling from the Ninth Circuit.

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1 Act expires on September 30, 1996. Scott Timber simply cannot
2 complete its 13 timber sales in only a few months. Quast Dec.
3 ¶ 2. A central purpose of the Recision Act — to provide
4 emergency relief for timber purchasers through immediate release
5 of sales delayed nearly five years by protracted consultations
6 with the Fish and Wildlife Service — would be defeated by a
7 protracted judicial stay. Giving effect to the January 19, 1996
8 Order to compel the Secretaries to release the sales would avoid
9 frustrating the legislative purpose and is entirely consistent
10 with judicial precedent.
11 For example, in Albano v. Schering-Plough Corporation,
12 912 F.2d 384, 389 (9th Cir. 1990) cert. denied 498 U.S. 1085
13 (1991), the Ninth Circuit set aside a court order that would
14 preclude a claimant from filing a claim under the Age
15 Discrimination Claims Assistance Act of 1988 because "[i]t would
16 frustrate the will of Congress, in its attempt to remedy the
17 harsh effects of the EEOC's inaction, by permitting further
18 inaction by the EEOC to negate the provisions of the remedial
19 act." Here, the further inaction of defendants will negate the
20 provisions of the Recision Act by failing to provide needed
21 timber to the mills from sales where no marbled murrelets are
22 known to be nesting. Extending the stay of the timber sales
23 prevents an act of Congress from being enforced and frustrates
24 the will of Congress which was to have the sales immediately
25 released to be harvested in fiscal years 1995 and 1996. See,
26 e.g., McLeod v. Local 239 International Brotherhood of Teamsters,

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330 F.2d 108, 111 (2nd Cir. 1964) (upholding making a temporary injunction effective when to do otherwise "would frustrate the clear objective of Congress").

There is now only six months to harvest approximately 63 million board feet (MMBF) in Scott Timber's remaining 13 sales. Quast Dec. ¶ 3. This represents about 10 MMBF per month, which will require approximately 150 people per month full time for the next six months to complete the sales. Quast Dec. ¶ 3. If the Ninth Circuit does not rule for an additional 60 days, only four months would remain to finish the sales, and Scott Timber would need to employ 225 per month to finish the sales. Id. There are not enough qualified logging contractors available to finish the work in just four months if there is an additional 60-day stay. Id.

III. UNITS ON AT LEAST FIVE OF SCOTT TIMBER'S 13 SALES SHOULD BE RELEASED.

To accommodate the concerns of defendants, Scott Timber has evaluated its sales to identify sales in which it must start work immediately to complete the sales by September 30, 1996, and where the marbled murrelet is not known to be nesting in a sale unit. The Declaration of Peter Quast explains that Scott Timber wants to begin logging the Beamer 712, Wapati 305, Indian Hook, and the Skywalker timber sales. In addition, the company wishes to begin road construction on the Fivemile Flume sale and falling of trees in units 3 and 5. Quast Dec. ¶ 9-14.

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1 Unit 1 of the Beamer 712 sale was determined occupied
2 by a survey five years ago of the Keller 605 timber sale. A road
3 and young plantation occur between Unit 1 and the Keller 605
4 survey station well away from Unit 1 of the Beamer 712 sale.
5 Quast Dec. ¶ 10. Unit 2 of the Beamer 712 sale was classified as
6 occupied based on murrelet detections outside the unit to the
7 west. None of the detections for Unit 1 or Unit 2 were below
8 canopy behavior. Id.
9 Scott Timber seeks release of Unit 3 and 5 on the
10 Wapati 305 sale. The murrelet occupied behavior for Unit 3 was
11 on the other side of the ridge and outside of the unit. Quast
12 Dec. ¶ 11. Unit 5 is further downslope from Unit 3 and was
13 classified as occupied by the same behavior. Id. The unit is
14 classified occupied through guilt by association because it is in
15 the contiguous stand within one-quarter mile of the occupied
16 behavior associated with Unit 3. Unit 5 has six of 26 acres of
17 timber that is already felled and bucked, and is deteriorating.
18 Id. The balance of Unit 5 is younger timber with small limbs
19 that provide no suitable nesting sites. See photographs attached
20 to Quast Dec. ¶ 11.
21 The Indian Hook sale has several units that are stayed.
22 Scott Timber seeks release of Units 1, 2, and 3. Unit 1 is
23 classified as occupied based on one observation of above canopy
24 behavior. Quast Dec. ¶ 12. The only other observation from the
25 survey unit were birds heard outside the unit boundary. Unit 2
26 was determined occupied by the same detections because it was

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contiguous habitat to Unit 1. Unit 3 had no above or below canopy murrelet behavior within the unit boundaries and was classified occupied based on behavior in Unit 4. Id.

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

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

IV. THE DEFENDANTS SHOULD BE ORDERED TO IDENTIFY REPLACEMENT VOLUME IN 30 DAYS.

Scott Timber requests that the defendants be ordered to identify replacement volume for any sale that remains stayed. The requirement to identify replacement volume was an integral part of the Recision Act. Section 2001(k)(3). However, the agency is content to continue stay of the original sales without identifying replacement volume. Although Scott Timber has worked with the Forest Service to identify replacement volume on a few

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1 units where the agency contends murrelets are known to be
2 nesting, for most stayed sales they are not identifying
3 replacement volume. In order to complete harvest of replacement
4 volume before expiration of the Recision Act, Scott Timber
5 respectfully requests that this Court order defendants to
6 identify replacement volume in 30 days for any sales that remain
7 stayed.

8 V. CONCLUSION.

9 In conclusion, Scott Timber requests that the
10 defendants' motion to extend the stay be denied. The Court
11 should order the release of the Beamer 712 timber sale units 1
12 and 2, the Wapati 305 timber sale units 3 and 6, the Indian Hook
13 timber sale units 1 and 2, and the Skywalker timber sale units 3
14 and 5. Scott Timber should also be permitted to begin road
15 construction and falling for units 2 and 3 of the Fivemile Flume
16 sale. Finally, the court should order defendants to identify
17 replacement volume within 30 days for any sales that remain
18 stayed.

19 Dated this 15th day of March, 1996.

20 HAGLUND & KIRTLEY

21

22 By _____

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NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, Plaintiff, v. DANIEL R. GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of Interior, Defendants.	No. 95-6244-HO (Lead) No. 95-6267-HO (Consolidated) No. 95-6384-HO (Consolidated) DECLARATION OF SCOTT W. HORNGREN RE: FAXED DECLARATION OF PETE QUAST

I, SCOTT W. HORNGREN, declare and state:

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

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

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

Dated this 15th day of March, 1996.

Scott W. Horngren

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NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, Plaintiff, v. DANIEL R. GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of Interior, Defendants.	No. 95-6244-HO (Lead) No. 95-6267-HO (Consolidated) No. 95-6384-HO (Consolidated) DECLARATION OF PETER QUAST IN OPPOSITION TO MOTION TO EXTEND STAY

I, Peter Quast, declare and state as follows:

1. Scott Timber is the contract holder of 13 timber sales containing approximately 33 units totaling approximately 63 million board feet (MMBF) that the government has classified as occupied by the marbled murrelet under the Pacific Seabird Group protocol.

2. If we are unable to start work on these sales when the sixty day stay expires on March, 25, we simply cannot complete the sales by September 30, 1996 when the protections of

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1 the Rescissions Act expire. In fact, even if we started harvest
2 today, I am not confident we could complete the sales by
3 September 30, 1996.
4 3. Given the delay in release of these sales, we only
5 have six months to harvest 63 MMBF. This is a little over
6 10 MMBF per month. The 10 million per month represents about ten
7 logging sides. A logging side typically has eight people with a
8 yarder and loader. This does not include the cutting crews and
9 truckers which would mean a minimum of fifteen people per side.
10 Therefore, it will take at least 150 people per month full time
11 for the next six months to complete the sales. Another two month
12 delay will just increase the number of logging sites and people
13 we will need to finish the sales. With an additional sixty day
14 stay, only four months would remain to finish the sales and we
15 would need fifteen sides and 225 people per month. There are not
16 enough qualified logging contractors available to finish the work
17 in just four months if there is an additional 60 day stay.
18 Because of the need to move forward, we have entered into
19 contracts for fallers to begin cutting the end of March (example
20 attached as Exhibit 1 to my declaration).
21 4. An additional two month stay will also make
22 completing the sales difficult because there is usually a four
23 week lag between the release of a sale, prework meetings,
24 wildlife tree marking, and initial falling before log removal can
25 start. Also it is not uncommon in August and September to lose
26 operating time because of fire weather restrictions.

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1 5. We have notified the Forest Service that we intend
2 to begin logging on many of the sales when the stay expires the
3 end of March. Attached as Exhibit 2 to my declaration are copies
4 of the letters Scott Timber has sent to the Forest Service
5 describing our anticipated operating schedule.
6 6. On January 22, 1996 following the court's ruling
7 on the marbled murrelet sales, we resubmitted cash deposits for
8 the Beamer, Wapati, Skywalker, Formader 103, and Berry Bushel
9 Timber Sales which unquestionably had no murrelet occupancy or
10 activity within these sale units we want released. See letters
11 attached as Exhibit 2. The Forest Service returned the cash
12 deposits and stated we could not harvest the units.
13 7. We are requesting that the court deny the
14 government's request to extend the stay so that we can begin to
15 make progress toward completing the sales. Scott Timber wants
16 permission to begin logging on all of our 13 delayed sales.
17 However, we have prioritized the sales and identified four of the
18 13 sales that we seek permission to begin logging immediately at
19 the expiration of the stay. All four sales require cable
20 yarding. We also want to begin falling and road construction on
21 a fifth sale which is the only sale of the 13 that has specified
22 road construction remaining. The released volume on the four
23 sales is approximately 22 MMBF which is about one third the total
24 remaining volume on all the stayed sales. Although we cannot
25 complete these selected sales in sixty days if the government's
26

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motion to extend the stay were denied, we could make substantial progress toward completing the sales.

8. We have reviewed all of our sale units and the Forest Service marbled murrelet survey forms to identify those units where marbled murrelets are clearly absent and are not within the unit as defined under Judge Hogan's January 19, 1996 Order.

9. The four sales we want to start logging are the Beamer 712, Wapati 305, Indian Hook, and Skywalker. The Beamer 712 and Indian Hook sales have the largest volumes of our sales and we have chosen these sales because they require the most work and must be started by April 1, 1996 if we are to complete the sales by September 30, 1996. In addition, the Forest Service murrelet surveys show no subcanopy behavior observed within the sale unit boundaries. I describe the particular situations for the five sales below.

10. The Beamer 712 sale has two units. Survey information is attached to my declaration as Exhibit 3. Unit 1 was determined occupied by a survey in 1991 of the Keller 605 Timber Sale and the behavior is supposedly .25 mile southeast of the unit. There is a road and a young plantation between Unit 1 and the Keller 605 survey station. There have been no further surveys since 1991. Unit 2 was classified as occupied in 1993 by detections of murrelets to the west of the unit. All of the observations indicating occupancy for the sale were outside the unit boundary. None of the observations were below canopy

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behavior in any part of the survey. The two units have approximately 7.4 MMBF requiring cable skyline yarding.

11. The Wapati 305 sale has two stayed units. Survey information is attached to my declaration as Exhibit 4. Unit 3 was determined occupied at site 1, station 6 with two birds flying below canopy on the other side of the ridge outside of Unit 3. Unit 5 was determined occupied by these same birds and is further downslope from Unit 3. However, because Unit 5 is located in the contiguous stand and within 1/4 mile of the occupied behavior associated with Unit 3, it was classified as occupied. Unit 3 is 1.3 MMBF of skyline cable. Unit 5 has about 6 of 26 acres that is already felled and bucked and is continuing to deteriorate. The remaining standing timber in Unit 5 is a dense stand of timber with small limbs that provide no suitable habitat. See photographs attached to my declaration as Exhibit 5.

12. The Indian Hook sale has several units. Survey information is attached to my declaration as Exhibit 6. Unit 1 was classified as occupied in 1993 based entirely on above canopy behavior. One observation was a 1/4 circle, 1.5 canopy height above the inside corner of the unit. The only other detections were birds heard outside the unit boundary. Unit 2 was determined occupied by these same detections because it was contiguous habitat to Unit 1. Unit 3 has no above or below canopy murrelet behavior within the unit boundaries. It was classified occupied based on contiguous habitat to Unit 4 in which subcanopy behavior was observed. Harvest of Unit 4 is

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apparently precluded by the Court's January 19, 1996 Order. Unit 1 is 3.3 MMBF of skyline yarding. Unit 2 is 4 MMBF of cable yarding. Unit 3 is 3.4 MMBF of cable yarding. This totals 10.7 MMBF.

13. The Skywalker sale has 3 stayed units, two of which we want released. Survey information is attached to my declaration as Exhibit 7. Unit 3 was originally determined to be occupied in 1993 by above-canopy circling outside the unit. Unit 3 was redetermined occupied at site 1, station 3 in a July 25, 1995 survey with twelve auditory detections and one above canopy detection. All detections were near the bottom of Walker Creek well downslope of Unit 3. Unit 5 was determined occupied by one observation of a bird at 1.2 times the canopy height and at .9 of the canopy height. This behavior was observed 500 to 700 feet <u>outside</u> the unit boundary. These units total 2.0 MMBF of cable yarding.

14. We want to begin road construction on the Five Mile Flume sale to Units 2 and 3 and falling in those units. Survey information is attatched as exhibit 8. In 1993, Unit 3 was determined to be occupied by overhead circling four times higher than the canopy. The 1994 survey determined occupancy by a murrelet flight over the ridge. The survey form notes "the pair of murrelets at 0640 were flying over the ridge to the west, where they did not fly over the trees on the ridge, but rather flew through the tips of the trees." This observation was outside of the unit boundary. Although there were auditory

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detections of birds in Unit 2, there was no subcanopy behavior observed. Occupancy of Unit 2 was based on its location within 1/4 mile of contiguous habitat to the observed behavior in Unit 3. Scott Timber believes a design change should be considered for construction of road 4811-020 to reduce its standard or length. The option of helicopter yarding all or the western portion of Unit 3 should be discussed as a possibility. If we start engineering for road construction April 1, we may not have it completed until mid-July and we could not start yarding or hauling the logs before then.

15. Finally, it is vitally important that the Forest Service identify substitute timber for units that they will not let us harvest. This substitute timber should be identified within 45 days so that Scott Timber can make progress in harvesting the substitute volume before the Recision Act protection expires September 30, 1996.

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

Dated this 15th day of March, 1996.

Peter Quast

Peter Quast

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FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, Plaintiff, and SCOTT TIMBER CO., VAAGEN BROS. LUMBER INC., and WESTERN TIMBER CO., Plaintiff-intervenors, vs. DAN GLICKMAN, in his capacity as Secretary of Agriculture; BRUCE BABBITT, in his capacity as Secretary of the Interior, Defendants, and OREGON NATURAL RESOURCE COUNCIL, et al., Defendant-intervenors.	Civil No. 95-6244-HO Lead Case Civil No. 95-6267-HO Civil No. 95-6384-HO Consolidated Cases NFRC'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR EXTENSION OF JANUARY 25, 1996 STAY

Plaintiff Northwest Forest Resource Council ("NFRC") submits this supplemental opposition to defendants' motion for a blanket

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extension of the 60-day stay entered January 25, 1996.

NFRC has conducted a survey of the companies that hold all of the timber sales with units currently withheld under section 2001(k)(2) of the 1995 Rescissions Act. The companies have reported that they must begin operations on the following timber sales by April 1, 1996 (or, in a few cases, by the other dates indicated below) to be able to complete the sales by September 30, 1996:

Boise Cascade Co.: Green Apple; Randall Salado

Bugaboo Timber Co.: Benner Bunch; Grass Hula

CLR Timber Holdings Co.: Spur Trigger; Winriver; Deep Creek

Freres Lumber Co.: Ryan Wapiti (April 15)

Hampton Tree Farms: Canal 606; Gordy Bluff; Wheelock 403

Hull-Oakes Lumber Company: 90 Roman Dunn (May 1)

LB&R Logging: Median Buyback

Mayr Brothers Logging Co., Inc.: Camel; Stevens; West Boundary (all April 15); Wynochee Resale

Miller Shingle: Scraps; Stalwart (May 1)

Seneca Sawmill Co.: Mr. Rogers; Upper McLeod

Summit Timber Co.: Old Grade

Willamette Industries: Condon Carriage; Franklin Ridge; Green Horn; South Paxton; Square Clare; Sugar Maple; Uncle Condon.

Second Declaration of Christopher I. West, ¶¶ 2-3 (filed herewith).

All the companies have reported that they are depending on these sales to provide timber for their mill or mills for

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operations in 1996. *Id.*, ¶ 4.

The defendants have not yet reported to the court as to the results of their review of all of the sale units under the terms of the court's order of January 19, 1996. Thus, NFRC does not yet know which units of these sales are subject to release under the terms of that order. NFRC asks the court to order the defendants to submit their report to the court immediately so the court and the parties are aware of the actual impact of the January 19 order.

NFRC opposes an extension of the stay for all the units of the above-named timber sales that the defendants have determined are subject to release under the terms of the January 19 order. NFRC seeks the immediate release of all such units so that the units can be operated to completion by September 30, 1996 as Congress intended.[1]

In section 2001(k)(1) Congress gave the contract holders the absolute right "notwithstanding any other provision of law" to complete these sales by September 30, 1996. Any further stay of the court's January 19 order will defeat the intent of Congress by making it impossible for the contract holders to complete operations by September 30.

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[1] NFRC has not yet received from the government the documents that were the subject of its recent motion to compel. Once those documents are received, NFRC may wish to contest the defendants' determinations on specific sale units. However, for the purpose of the current stay motion, NFRC is limiting its opposition to those sale units that the government has determined should be released under the January 19 order.

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N01-9506\1RP91050.1MT

Conclusion

For these reasons, NFRC opposes an extension of the 60-day stay for all the units of the above-named timber sales that the defendants have determined are subject to release under the terms of the January 19 order, and requests the court to order the defendants to submit their report on all the sale units to the court promptly.

Dated this 15th day of March, 1996.

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A Professional Corporation

By: _____
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N01-9506\IRP91051.1HU

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, Plaintiff, and SCOTT TIMBER CO., VAAGEN BROS. LUMBER INC., and WESTERN TIMBER CO., Plaintiff-intervenors, vs. DAN GLICKMAN, in his capacity as Secretary of Agriculture; BRUCE BABBITT, in his capacity as Secretary of the Interior, Defendants, and OREGON NATURAL RESOURCE COUNCIL, et al., Defendant-intervenors.	Civil No. 95-6244-HO Lead Case Civil No. 95-6267-HO Civil No. 95-6384-HO Consolidated Cases SECOND DECLARATION OF CHRISTOPHER I. WEST

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N01-9506\1RP91051.1HU

Christopher I. West, with full knowledge of the penalty of perjury, declares as follows:

1. My name is Christopher I. West. I am the Vice President of the Northwest Forestry Association ("NFA"), a trade association of 80 lumber and plywood manufacturing companies in Washington and Oregon. NFA is located in Portland, Oregon. NFA is a member of the Northwest Forest Resource Council ("NFRC"), the plaintiff in this case. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. Within the past week I have contacted each of the companies that owns one or more of the timber sales that currently have units withheld by the defendant Secretaries under section 2001(k)(2) of the 1995 Rescissions Act (except Scott Timber Co.). I asked each company to advise me of the last date on which they could start work on their sale and be able to complete work on the sale by September 30, 1996.

3. The companies have advised me that work on the following timber sales must start by April 1, 1996 (or other dates as noted below) to be able to complete the sales by September 30, 1996:

Boise Cascade Co.: Green Apple; Randall Salado

Bugaboo Timber Co.: Benner Bunch; Grass Hula

CLR Timber Holdings Co.: Spur Trigger; Winriver; Deep Creek

Freres Lumber Co.: Ryan Wapiti (April 15)

Hampton Tree Farms: Canal 606; Gordy Bluff; Wheelock 403

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N01-9506\1RP91051.1HU

Hull-Oakes Lumber Company: 90 Roman Dunn (May 1)

LB&R Logging: Median Buyback

Mayr Brothers Logging Co., Inc.: Camel; Stevens; West Boundary (all April 15); Wynochee Resale

Miller Shingle: Scraps; Stalwart (May 1)

Seneca Sawmill Co.: Mr. Rogers; Upper McLeod

Summit Timber Co.: Old Grade

Willamette Industries: Condon Carriage; Franklin Ridge; Green Horn; South Paxton; Square Clare; Sugar Maple; Uncle Condon.

4. I also asked each company if it is depending on the timber from these sales to provide timber for their mill or mills for operations in 1996. Every company stated to me that it is depending on all of the above-named sales for 1996 operations.

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

Executed on March 15, 1996.

Christopher I. West

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NUMBER OF PAGES: 13

DATE: March 19, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman. Attached is Federal Defendants' March 15, 1996 Compliance Report.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, Plaintiff, v. GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of Interior Defendants.	Civil No. 95-6244-HO (lead case) Civil No. 95-6267-HO (consolidated case) FEDERAL DEFENDANTS' MARCH 15, 1996 COMPLIANCE REPORT

Pursuant to this Court's October 17, 1995 Order, federal defendants hereby file a ninth progress report describing actions taken by the U.S. Forest Service and Bureau of Land Management to award and release timber sales that were offered or awarded between October 1, 1990 and July 27, 1995 and within the scope of this Court's September 13, 1995 Order.

Attached is the Fourteenth Declaration of William L. Bradley and the Seventeenth Declaration of Jerry Hofer updating the Court on the actions of the Bureau of Land Management and Forest Service as to these timber sales.

Dated this 15th day of March, 1996.

Respectfully submitted,

KRISTINE OLSON
United States Attorney

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

NORTHWEST FOREST RESOURCE COUNCIL, Plaintiff, v. DAN GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of the Interior Defendants.	Civil No. 95-6244-HO SEVENTEENTH DECLARATION OF JERRY L. HOFER

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

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

2. On February 29, 1996, my Sixteenth Declaration included a report describing the status of 33 timber sales which are subject to the Court's Order of October 17, 1995.

3. As required by the Court's October 17, 1995, Order, I am

updating the February 29, 1996, status report with the following changes.

4. My Sixteenth Declaration erroneously stated that no "responsible bidders" wanted the Banty sale, and that a letter of interest had been sent to other bidders for the Prong Salvage sale. This is corrected in this Declaration by reporting that Banty sale was awarded to Idaho Timber and no "responsible bidders" wanted Prong Salvage sale.

5. Of the sales that had not been awarded to the high bidder as of the Court's order on January 10, 1996, the Forest Service awarded the following sales since the last Declaration:

Sale Name	Forest
Eagle Ridge HL	Malheur
Banty Salvage	Wallowa-Whitman
Allen	Wallowa-Whitman
Horn Salvage	Wallowa-Whitman
John Lodgepole	Winema

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

Executed at Portland, Oregon, on March 14, 1996.

JERRY L. HOFER

NFRC v. GLICKMAN
95-6244HO
95-6267HO
DISTRICT OF OREGON

R6 REPORT: ACTIONS TAKEN TO AWARD OR RELEASE SALES OFFERED OR AWARDED BETWEEN OCTOBER 1, 1990 AND JULY 27, 1995

I. NOTICE OF INTENT TO AWARD SALE IN ONRC v. LOWE, 92-1121AS (D.Or)

	SALE	NF	VOLUME	HIGH BIDDER	ACTION
1.	JOHN	WIN	1,800 MBF	HUFFMAN/WRIGHT	AWARDED 11/14/95
2.	JOHN LODGEPOLE	WIN	2,200 MBF	WESTERN TIMB.	AWARDED 03/12/96
3.	YOSS	WIN	7,100 MBF	BOISE CASCADE	AWARDED 11/14/95
4.	WILLY	WIN	4,400 MBF	BOISE CASCADE	AWARDED 11/14/95
5.	NELSON	WIN	7,400 MBF	DAW	HIGH BIDDER DECLINED AWARD LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
6.	BILL	WIN	5,800 MBF	HUFFMAN/WRIGHT	AWARDED 11/14/95
7.	CINDER	WIN	5,300	SCOTT	AWARDED 11/14/95

II. AWARDED SALES ENJOINED OR SUSPENDED AS A RESULT OF COURT ACTION

	SALE	NF	VOLUME	HIGH BIDDER	ACTION
8.	GATORSON	COL	11,860 MBF	VAAGEN BRO	SALE AWARDED 5/6/93; SALI SUSPENDED 5/20/93; USF! AWAITING DETERMINATION O LEGAL COURSE OF ACTIO UNDER SMITH v. USFS 93-0178-JLQ (E.D.Wa) REPORTED IN 33 F3D 107 (9TH CIR. 1994) PURCHASER HAS SUBMITTED A OPERATING SCHEDULI REQUESTED RELEASE OF PAYMENT UNITS, A ALLOCATED PAYMENT BOND THIS SALE.
9.	TIP	WEN	751 MBF	LONGVIEW FIBER	SALE AWARDED 9/9/9 ENJOINED 3/3/95. US AWAITING DETERMINATION

					LEGAL COURSE OF ACTION UNDER LEAF et al v. FERRARO, 94-1025 (W.D. WA)
10.	TIPTOP	WEN	2,200 MBF	ST. JOE LUMBER	SALE AWARDED 2/16/94; ENJOINED 3/3/95. USFS AWAITING DETERMINATION OF LEGAL COURSE OF ACTION UNDER LEAF et al v. FERRARO, 94-1025 (W.D. WA)

III. SALE NO LONGER EXISTS AS OFFERED

SALES WILL NOT BE AWARDED AS PER JANUARY 10, 1996 ORDER NFRC V. GLICKMAN

	SALE	NF	VOLUME	HIGH BIDDER	ACTION
11.	STAGE-COACH	UMA	200 MBF	BOISE CASCADE	NONE REQUIRED
12.	BALD	UMA	2,900 MBF	BOISE CASCADE	NONE REQUIRED
13.	BUGOUT SLV	WAW	5,400 MBF	DODGE LOGGING	NONE REQUIRED
14.	TOWER SLV	WAW	1,010 MBF	BOISE CASCADE	NONE REQUIRED

IV. NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER

	SALE	NF	VOLUME	HIGH BIDDER	ACTION
15.	BLUE FORD	FRE	6,500 MBF	BOISE-CASCADE	AWARDED 11/30/95
16.	BANTY SLV	WAW	610 MBF	IDAHO TIMBER	AWARDED 03/14/96
17.	JOHNSON SLV	WAW	3,600 MBF	ROSBORO LUMBER	NOT AWARDED, NO "RESPONSIBLE BIDDER WANTED SALE
18.	PARK HFR	WAW	700 MBF	BOISE CASCADE	AWARDED 11/13/95
19.	RD SLV	WAW	3,300 MBF	DODGE LOGGING	AWARDED 11/14/95
20.	HILTON	WAW	5,300 MBF	MALHEUR LUMBER	NOT AWARDED, NO "RESPONSIBLE BIDDER WANTED SALE
21.	SWEET PEA	WAW	1,280 MBF	ELLINGSON LUM	NOT AWARDED, NO "RESPONSIBLE BIDDER WANTED SALE

22.	TANHORSE	WAW	1,340 MBF	BOISE CASCADE	AWARDED 11/15/95
23.	TANYA	WAW	585 MBF	BOISE CASCADE	AWARDED 11/15/95
24.	LOCUST	MAL	1,000 MBF	SMERSKI LOG.	AWARDED 11/22/95
25.	NICHOLSON SLVG I	OKA	890 MBF	VAAGAN BRO.	AWARDED 11/03/95

V. SALES CANNOT BE AWARDED TO HIGH BIDDER

	SALE	NF	VOLUME	HIGH BIDDER	ACTION
26.	FORKS	MAL	5,000 MBF	SNOW MTN. PINE	NOT AWARDED, NO "RESPONSIBLE BIDDER WANTED SALE
27.	OFF BROADWAY	OCH	12,300 MBF	KINZUA CORP.	LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
28.	HIACK THIN	SIU	1,600 MBF	HAMPTON	NO INTERESTED RESPONSIBLE PURCHASERS. SALE WILL NOT BE AWARDED.
29.	EAGLE RIDGE HOUSELOG	UMA	170 MBF	TUCKER LOG.	AWARDED 03/13/96
30.	ALLEN	WAW	3,800 MBF	ROSBORO LMBR	AWARDED 03/11/96
31.	CANTREL SPRG	WAW	610 MBF	ROGGE WOOD	NOT AWARDED, NO "RESPONSIBLE BIDDER WANTED SALE
32.	HORN SLV	WAW	1,340 MBF	BOISE CASCADE	AWARDED 03/13/96
33.	PRONG SLV	WAW	3,800 MBF	ROGGE WOOD	NOT AWARDED, NO "RESPONSIBLE BIDDER WANTED SALE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, Plaintiff, v. DAN GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of Interior Defendants.	Civil No. 95-6244-HO (lead case) Civil No. 95-6267-HO (consolidated case) FEDERAL DEFENDANTS' MARCH 14, 1996 COMPLIANCE REPORT

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

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

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

3. In its February 29, 1996, compliance report, the BLM provided two tables showing the status of its sales which are covered under Section 2001(k).

4. This compliance report is being filed to update the court on the status of these sales. As in our February 29, 1996, compliance report, I have attached Table 1 which shows the status of sales covered by Judge Hogan's October 17, 1995, order and Table 2 which shows the status of Section 318 sales which were subject to Section 2001(k) of Public Law No. 104-19.

5. As stated in our previous compliance report, the Olalla Wildcat sale (with the exception of unit No. 5 which has a nesting northern spotted owl) was awarded to Lone Rock Timber on February 26, 1996. The contract has now been fully executed.

6. On March 4, 1996, the Twin Horse sale was awarded to Douglas County Lumber Co. The purchaser has not yet returned the signed contract to the district office.

7. As stated in our previous compliance report, the BLM is continuing its review of the survey information on the 11 units which were not awarded because they were determined to be occupied by marbled murrelets. This review is being conducted to determine whether or not the occupancy determinations are consistent with the court's interpretation of section 2001(k)(2).

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

Executed at Portland, Oregon, on March 14, 1996.

William L. Bradley

William L. Bradley

MARCH 14, 1996

TABLE 1

NINTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL. (MBF)	ORIG. ACRES	SEE #1 BELOW T & E BIRDS NESTING STATUS	SEE #2 BELOW AFFECTED VOL. (MBF)	SEE #3 BELOW REMAINING VOL. (MBF)	SEE #4 BELOW STATUS
91 LOWER DUDLEY'S SUMMIT	BOISE CASCADE	2340	71			2340	Executed
91 MILLERS VIEW	DR JOHNSON	3863	53			3863	Executed
ANOTHER FAIRVIEW	DOUGLAS CO. FP	4589	53			4589	Executed
BATTLE AXE	RESERVATION RANCH	1205	44			1205	Executed
BIRDSEYE ROGUE	CROMAN	3876	671			3876	Executed
CAMP	TIMBER PRODUCTS	7127	548			7127	Executed
CAT TRACKS	SENECA	472	45			472	Executed
CHERRY TREE PLUM	HULL-OAKES	1038	10			1038	Executed
CORNER SOCK	LONE ROCK	1721	52			1721	Executed
CRAZY 8'S	CLR	3957	140			3957	Executed
DAFFI DORA	SCOTT	4654	87			4654	Executed
DEAD MIDDLEMAN	DR JOHNSON	7154	197			7154	Executed
DEEP CREEK	CLR	3120	130	MM OCC. - #1,2	3120	0	Sale will not be awarded
GOLDEN SUCKER	ROUGH & READY	4367	160			4367	Executed
JEFFERS REVENGE	LONE ROCK	3914	74			3914	Executed
LICK II	WESTERN TIMBER	811	218			811	Executed
LOBSTER HILL	SCOTT	8471	211			8471	Executed
LOST SOCK	LONE ROCK	3596	47	MM OCC. - #4	1060	2536	Executed
MARTEN POWER	ROSBORO	9668	127			9668	Executed
NORTH FORK CHETCO	CLR	7372	267	MM OCC. - #1	1070	6302	Executed
PARK RIDGE BASIN	HULL-OAKES	2710	34			2710	Executed
POND VIEW	DR JOHNSON	4777	84			4777	Executed
PP&J	BOISE CASCADE	6387	269			6387	Executed
ROCKY ROAD	THOMAS CREEK	1574	23			1574	Executed
SHADY	TIMBER PRODUCTS	7635	588			7635	Executed
TOBE WEST	HULL-OAKES	4807	78			4807	Executed
UGLY ECKLEY	LONE ROCK	5815	217			5815	Executed
WREN 'N DOUBT	SCOTT	8803	163	MM OCC. - #2,3,5,7	4937	3866	Executed
TOTALS		125823	4661		10187	115636	

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

MARCH 14, 1996

TABLE 2

NINTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

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

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

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NUMBER OF PAGES: 25 + COVER

DATE: January 22, 1996

FROM: Michelle Gilbert (202) 305-0460

MESSAGE: NFRC v. Glickman, 95-6244

Please see Amended Order of January 10, 1996.

FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon Corporation, Plaintiff, and SCOTT TIMBER CO., VAAGEN BROS. LUMBER INC., and WESTERN TIMBER CO., Plaintiff-intervenors vs. DAN GLICKMAN, in his capacity as Secretary of Agriculture; BRUCE BABBITT, in his capacity as Secretary of the Interior, Defendants, and OREGON NATURAL RESOURCE COUNCIL, et al. Defendant-intervenors	Case No. 95-6244 Lead Case Case No. 95-6267 Case No. 95-6384 Consolidated cases AMENDED ORDER

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 sales[1] were

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[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 sale[4] 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

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[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 sales[6] were canceled after Judge Dwyer issued injunctions on the Cowboy, Nita, South Nita, and Garden sales. The Boulder Krab and Elk Fork sales[7] were canceled during NEPA-related litigation before Judge Panner of this district. NFRC 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

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[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.

sale, the Allen sale, and the Prong Salvage sale[9] - 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

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[9] The Allen and Prong Salvage sales are located in the Wallowa-Whitman National Forest. The Eagle Ridge Houselog 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*

Three sales were offered between October 23, 1989, 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 NFRC's Reply Memorandum in Support of

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

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, NFRC 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).

1. *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,

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 capricous." 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 895, 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 NFRC'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 Gerwer, 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.[11] 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.[12]

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

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[11] These are the Cowboy, Nita, South Nita, and Garden sales.

[12] 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,

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]

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[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

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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. *Remarked sales*

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

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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

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 17th day of January, 1996.

Michael R. Hogan
UNITED STATES DISTRICT JUDGE

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
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DATE: April 4, 1996

FROM: Al Ferlo

MESSAGE: NFRC v. Glickman, Ninth Circuit

Due to an oversight, you were sent the wrong draft for comment in the above-mentioned case. Sorry for the mixup. Please fax comments to me at (202) 514-4240. Thanks, Al

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 95-35132

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee

v.

DAN GLICKMAN and BRUCE BABBITT,

Defendants-Appellants

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

EMERGENCY MOTION UNDER RULE 27-3

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

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I. STATEMENT OF JURISDICTION

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

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

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

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

order denying the Secretaries' requested relief in favor of a much more limited stay of only a few sales. Of the 137 sale units which the Secretaries determined fell within the exemption of Section 2001(k)(2), the district court ordered that 52 units must be released for harvesting by April 8, 1996. An additional 22 sale units which the Secretaries noted had direct evidence of murrelets circling above the sale unit -- a behavior which the Protocol states indicates that murrelets are likely to be nesting in the area -- must be released by April 17, 1996. The district court gave no reason for the two week limitation of the stay on these sales. The court extended the stay for an additional 60 days for the 25 sale units which the plaintiffs did not claim a necessity to begin harvesting immediately. The court finally noted that the sales which had been found to fall within the court's definition of nesting -- a total of only 48 units -- there was no need for any stay, because the plaintiffs were not challenging the nesting determinations at this time.

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

II. STATEMENT OF THE ISSUE

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

III. STATEMENT OF THE CASE

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

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

REASONS FOR GRANTING THE STAY

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

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

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

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

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

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

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

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

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

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

Thus, regardless of the ultimate disposition of the appeal, plaintiffs will not be harmed by continuing the stay to permit this Court a meaningful opportunity for review. If the Secretaries prevail, the plaintiffs will have the right to receive alternative timber as provided under Section 2001(k)(3). Because the authority to award alternative timber under 2001(k)(3) does not expire on September 30, the short additional delay required to allow for appellate review will not seriously prejudice this process. This is particularly true since under Section 2001(k)(3), which does not contain an exemption from the environmental laws, alternative timber will be processed through environmental standards and guidelines and procedures in the normal course. The short additional deferral of this process to permit full appellate review would not significantly change the timeframe for award of alternative timber.

If this Court affirms the district court, plaintiffs could then operate the sale. Operations conducted prior to September 30 would be conducted without application of the environmental laws. Operations under the contracts after that time would have to be consistent with environmental laws and other original

contract terms. While this would likely result in a need for modification or other contract remedies, the contracts do not expire on September 30, and plaintiffs' rights and obligations under those contracts continue. Thus it is clear that the plaintiffs simply cannot make a valid claim that failure to harvest these sales prior to a final judicial determination of the issues now on appeal will cause them irreparable harm.

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

Plaintiffs and the district court (April 3, 1996 order at 4) contend that a further stay would frustrate the legislative purpose underlying the Rescissions Act. However, failure to stay harvesting on all the units found by the Secretaries to be within the scope of the exemption provided by Section 2001(k)(2) stay would undermine the ~~explicit~~ protections of the Rescissions Act in an irreparable and more significant manner. In 2001(k)(2),

Just like cancellation of a statute is to effect or give them rights under the K.

Congress created "provisions prohibiting activities in timber sale units which contain any nesting threatened or endangered species." Remarks of Sen. Hatfield, 141 Cong. Rec. S 4881 (March 30, 1995). Lifting the stay now, while significant issues of interpretation remain, would fundamentally undermine the protections for threatened and endangered bird species provided in the law.

The short delay needed to permit appellate review cannot be charged with frustrating the legislative purpose. Though the process of awarding timber under 2001(k)(3) would not occur within the expedited timeframe of 2001(k)(1), Congress did not exempt timber sales under 2001(k)(3) from application of the environmental laws. Further, though Congress specifically limited judicial review of sales under subsections (b) and (d) by prohibiting the issuance of any injunctions pending appeal, Congress did not include subsection (k) in this provision. See, Section 2001(f)(3). Balancing the tension between these statutory directives in the context of this motion for stay mandates granting the stay. Timber sales will proceed or be replaced upon resolution of the appeal, but with consideration of the imperative need to protect this fragile species. A stay for all units subject to the January 19, 1996 order is therefore warranted.

IV. CONCLUSION

Granting a continuance of the stay pending appeal initially granted by the district court will preserve the status quo

pending appeal and not pose any increased risk of harm to the appellees here. For the forgoing reasons, the Court should grant a stay pending appeal of the Order.

Respectfully submitted,

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Dated April 4, 1996

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

04-Apr-1996 10:30am

TO: (See Below)

FROM: Dinah Bear
Council on Environmental Quality

SUBJECT: murrelet sales stay order from Judge Hogan

Yesterday, Judge Hogan issued his order on our request for an extension of the stay from his earlier injunction to release all timber sale units on national forests and BLM units in Oregon and Washington for which the government's "known to be nesting" determinations for marbled murrelets did not meet the criteria set out in his decision in his January decision. You will recall that Judge Hogan granted a 60 day stay upon issuance of his injunction, and that those 60 days ran out on March 25th. Argument on the case before the 9th Circuit Court of Appeals is scheduled for May 7th. We asked that the stay of his injunction be extended until such time as the 9th Circuit Court of Appeals issues it decision, and, in the event that the court did not extend the stay, that Judge Hogan grant a 5 day stay so that we may seek a stay with the Court of Appeals.

We also suggested that if Judge Hogan refused to grant our first request, he reconsider his determination regarding 22 particular sale units for which the court's "known to be nesting" standards were almost, but not quite met.

During the 60 day stay period, Judge Hogan had asked industry plaintiffs to submit a list of those sale units which the government had determined would not meet the "Hogan protocol" for "known to be nesting" AND that the industry claimed had to be harvested immediately in order to meet the Rescission Act's Sept. 30 deadline.

Of 100 sale units that the government had conceded would not meet Hogan's protocol for "known to be nesting", industry plaintiffs listed 75 sale units on which they contend they must commence harvesting immediately to meet the Sept. 30th deadline.

In yesterday's decision, Judge Hogan acknowledged both his concern that the judicial process will "trump the intent of Congress" as well as his recongition that "irreparable harm . . . may result from the harvesting of actual and potential marbled murrelet habitat." He also conceded that the 9th Circuit might modify the

standards he set out in his order, although expressing skepticism that they will overturn it completely.

Based on his balancing of these equities, he ordered as follows:

o as to the 25 sale units that the industry is not claiming immediate need to harvest, the stay is extended another 60 days;

o with regards to the 22 "close to meeting Hogan's standard" sales, he has extended the stay for 14 days (presumably to allow the agencies the opportunity to resurvey. Unfortunately, murrelets are just now beginning to return to these units and it may be very difficult to meet his standards. The full population isn't expected until May.)

o as to the 52 remaining sale units for which plaintiffs claim an immediate need to commence harvest, the stay is extended for 5 days (to let us get to the 9th Circuit.)

o no stay is necessary for the 48 sale units that Hogan has determined include "known to be nesting" murrelets, as the industry has not challenged that determination.

DOJ will begin preparing the appeal.

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TO: Jennifer M. O'Connor
TO: Elena Kagan
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CC: Brian J. Johnson

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NUMBER OF PAGES:

DATE: 3 April 1996

FROM: Jean Williams and Ellen Kohler

MESSAGE: Court's Order on Extension of Stay for (k)(2) sales

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon Corporation, Plaintiff, and SCOTT TIMBER CO., VAAGEN BROS. LUMBER INC., and WESTERN TIMBER CO., Plaintiff-intervenors vs. DAN GLICKMAN, in his capacity as Secretary of Agriculture; BRUCE BABBITT, in his capacity as Secretary of the Interior, Defendants, and OREGON NATURAL RESOURCE COUNCIL, et al. Defendant-intervenors	Case No. 95-6244 Lead Case Case No. 95-6267 Case No. 95-6384 Consolidated cases ORDER

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

January 25, 1996 stay of its January 19, 1996 order until such time as the Ninth Circuit Court of Appeals issues its decision on appeal of the January 19, 1996 order. After hearing oral argument on March 22, 1996, this court extended the stay until April 3, 1996, in order to facilitate further briefing regarding which sales do not meet the court's "known to be nesting" standards and as to which harvesting must commence immediately in order to meet the September 30, 1996 expiration of the Rescissions Act.

In response to the March 22, 1996 hearing, NFRC submitted a memorandum listing 63 sales with regard to which the government has determined no threatened or endangered bird species are "known to be nesting" under the standards articulated in this court's January 19, 1996 order.[1] NFRC's Second Supplemental Memorandum in Opposition to Defendants' Motion for Extension of January 25, 1996 Stay (#416) at 2-3. Scott Timber Company submitted a memorandum listing 11 sale units which should be released "[a]t a minimum." Scott Timber Co.'s Response Following March 22, 1996 Hearing (#417) at 2. In all, plaintiffs have listed 74 sale units with respect to which they contend harvesting must commence by April 1, 1996, in order to meet the Rescission Act's September 30, 1996 deadline.

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

The government concedes that, under the "standard articulated by this Court, . . . 100 units are subject to release, including the 75 units for which plaintiffs seek immediate release. . . ." Defendants' Response Pursuant to Court's March 22, 1996 Order (#419) at 3. Nevertheless, the government urges the court to extend the stay as to all 100 sale units, arguing that the balance of harms is in its favor given the potential damage to marbled murrelets. In the event the court does not extend the stay, the government urges a five-day stay so that it may seek a stay with the Ninth Circuit Court of Appeals.[2]

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

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

boundaries.

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

With these principles in mind, the court decides as follows. With regard to the 25 sale units as to which plaintiffs do not claim a necessity to commence immediate harvest in order to meet the September 30, 1996 deadline and as to which the defendants have determined no threatened or endangered bird species is "known to be nesting" under the standards articulated by this court, the January 26, 1996 stay is extended 60 days.

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

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

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

As to the 48 sale units as to which the relevant government agency determined threatened or endangered bird species are "known to be nesting" under the standards articulated in the January 19, 1996 order, there is not a sufficient controversy before the court insofar as plaintiffs have not challenged the government's "known to be nesting" determinations and do not at this time seek the release of these sale units. Furthermore, the sale unit of the Winriver sale within which spotted owls are known to be nesting need not be released.

DATED this 3rd day of April, 1996.

Michael R. Hogan
UNITED STATES DISTRICT JUDGE

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NUMBER OF PAGES: 9

DATE: April 3, 1996

FROM: Paula Clinedinst, Paralegal, (202) 305-0431

MESSAGE: NFRC v. Glickman.

Attached is Plaintiff Scott Timber Co's Surreply to Defendants' Response to Court's 3/22/96 Order.

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Attorneys for Plaintiff Scott Timber Co. (No. 95-6267-HO)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, Plaintiff, v. DANIEL R. GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of Interior, Defendants.	No. 95-6244-HO (Lead) No. 95-6267-HO (Consolidated) No. 95-6384-HO (Consolidated) PLAINTIFF SCOTT TIMBER CO.'S SURREPLY TO DEFENDANTS' RESPONSE PURSUANT TO COURT'S MARCH 22, 1996 ORDER

In Defendants' Response Pursuant to Court's March 22, 1996 Order, defendants seek an extension of this Court's order staying release of timber sales under Section 2001(k)(2) of the Rescissions Act, wishing it to continue in effect for all sale units. Defendants cite to "new evidence" in their Response, necessitating this surreply.

Plaintiff Scott Timber Co. ("Scott Timber"), pursuant to this Court's order, submitted a list of eleven sale units in

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1 five sales which must be released immediately in order for it to
2 complete operations on the sales by September 30, 1996.
3 In their Response, defendants present what they assert
4 is new material, not previously before the Court, regarding
5 alleged "nesting behavior" in twenty two units. This evidence is
6 not new. Scott Timber previously submitted specific factual
7 evidence on all of the sales it wishes released immediately. See
8 Declaration of Pete Quast and attached exhibits. Scott Timber
9 submitted this evidence so the Court could determine for itself
10 the extent and nature of any evidence regarding murrelets.
11 None of the evidence, even if assumed to be correct,
12 meets the criteria in this Court's order for meeting
13 Section 2001(k)(2)'s "known to be nesting" standard. In fact,
14 defendants' Response seems to be requesting this court to
15 reconsider and revise its earlier Order of January 19, 1996
16 ("Order"), interpreting 2001(k)(2). Two types of "new evidence"
17 are addressed by defendants: 1) nesting detections near, but
18 outside, of sale units, and 2) circling above units. Such
19 evidence cannot establish "nesting" under the statute or this
20 court's order.
21 For nine sale units, defendants merely allege "nesting
22 detections along the edge or extremely near the boundaries of the
23 sale units." Defendants' Response at p. 4. Nesting outside a
24 unit, regardless of how close it is to a unit, simply does not
25 meet the statute's criteria for exemption, requiring that a
26

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threatened or endangered bird species is known to be nesting "in the sale unit." See this Court's order at pp. 9, 16-17. This Court wrote "the plain language and legislative history of Section 2001 (k)(2) require evidence of a nest located within sale unit boundaries." Order at p. 16. The Court further noted:

> A "known to be nesting" determination may not be based only on behavioral observations of a murrelet located outside sale unit boundaries. This requirement precludes nesting determinations based solely on the sighting of a murrelet outside sale unit boundaries (including circling), or any evidence not located within sale unit boundaries.

Id. See analogous prohibition of the creation of buffer zones or perimeters around land declared to be wilderness, Northwest Motorcycle Association v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1480 (9th Cir. 1994).

Indeed, this court specifically addressed a hypothetical situation in which harvesting would expose a nest "just inches outside" a unit. Order at p. 9, n. 3. This court found it impossible to read 2001(k)(2) as allowing a sale to be stopped due to nesting activity outside the unit, regardless of how close, and regardless of the harm to a bird species which might result from the harvest. Id. This court wrote:

> No matter how broadly "nesting" is defined, the nesting activity must be known to be "within the acreage that is the subject of the sale unit." Invoking the 2001(k)(2) exception when no nesting activity is known to be occurring within sale unit boundaries is inconsistent with this plain language.

Id.

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The closest of the nesting detections near Scott's units was approximately 85 meters from the boundary of Unit 3 on Wapiti 305. Exhibit 24 to Declaration of Jean E. Williams. Since this court's own Order already rejected the idea that nesting activity "just inches" from a unit could prevent its release, it obviously will not bar release based on nesting which is, at the closest, 85 meters from a unit.

Three of Scott Timber's units are argued to have evidence of "circling behavior directly over the sale unit" -- Units 2 and 3 on Fivemile Flume and Unit 1 on Indian Hook. Defendants' Memorandum at p. 4. Again, evidence of circling over a unit is not relevant to a determination that birds are "known to be nesting" within that unit. This court wrote:

> Section 2001(k)(2) requires not only that a murrelet be known to be nesting, but also that the nesting be known to be occurring within the sale unit. Assuming that observation of a circling murrelet permits an observer to "know" a murrelet is nesting, there is no evidence in the record that the observer can "know" that the circling murrelet's nest is within sale unit boundaries.

Order at p. 10.

Indeed, the circling which was observed over Scott's units shows that circling over a unit cannot prove nesting in that unit. The observation of circling above the Indian Hook sale, for example, involved a bird flying from outside the unit

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over the northeast corner of the unit and out again. Its flight involved crossing over another unit before it crossed over the Indian Hook unit. Declaration of Peter Quast, Exhibit 6. Obviously, the bird did not have a nest site in each area it crossed over. This court Order specifically concluded that nesting determinations may not be based on circling. Order at p. 10. See also Conclusion, Order at pp. 20-21, wherein this court wrote that evidence of current nesting within sale unit boundaries must be based on the observation of evidence located sub-canopy within sale unit boundaries. Circling above a unit, at anywhere from above canopy height to four canopy heights, as was observed for the Scott sales at issue, simply does not meet 2001(k)(2)'s standards.

Defendants' attempt to revive its failed arguments concerning the evidence which may be utilized in making a "known to be nesting" determination must fail. Scott Timber's earlier submission of detailed evidence regarding each of the units it wants released now should be responsive to any questions the Court might still have on the nature of any evidence of murrelet

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nesting near a unit or circling over a unit. The stay should be allowed to expire, and Scott should be allowed to begin harvest of the units it must begin on in order to complete activity by September 30.

Dated this 2nd day of April, 1996.

HAGLUND & KIRTLEY

By

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Shay S. Scott, OSB 93421
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1 CERTIFICATE OF SERVICE

2 I hereby certify that I served the foregoing **PLAINTIFF**
3 **SCOTT TIMBER CO.'S SURREPLY TO DEFENDANTS' RESPONSE PURSUANT TO**
4 **COURT'S MARCH 22, 1996 ORDER** on the following parties:

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

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

DATED April, 2nd, 1996.

Scott W. Horngren, OSB 88060
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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON

BY_____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCES COUNCIL,	)	
Plaintiff,	)	Civil No. 95-6244-HO
v.	)	ORDER
DAN GLICKMAN, et al.,	)	
Defendants	)	

This is an action for declaratory and injunctive relief to compel defendants to award and release all timber sales offered prior to the date of the enactment of the Emergency Salvage Timber Sale Program in all national forests in Oregon and Washington and all Bureau of Land Management ("BLM") districts in Western Oregon, in which no endangered bird species is known to be nesting.

Facts:

On July 27, 1995, President Clinton signed into law Pub. L. 104-19, the Rescissions Act of 1995. Section 2001 of this law contains a series of provisions establishing an "Emergency Salvage Timber Sale Program." Subsection (k)(1) directs the award and release of certain previously offered timber sales as follows:

> (1) Award and release required -- Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745). The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph.

Section 318 of Pub. L. 101-121 (103 Stat. 745) mandated timber sales in specified volumes in fiscal year 1990 in Oregon and Washington.

Plaintiff alleges that the units of the National Forest System or district[s] of the BLM subject to section 318 of Public Law 101-121 referred to in section 2001(k)(1) are "the national forests of Oregon and Washington and the BLM administrative districts in Western Oregon." Complaint, p. 5.

Defendants disagree with plaintiff's interpretation of the language "subject to section 318."

On August 22 and August 23, 1995, the agencies' interpretation of section 2001(k) were issued by the administration. The August 22 agencies' interpretation relates to the "subject to section 318" language in section 2001(k)(1).

The August 22, 1995 agencies' interpretation provides, in relevant part:

> The language of section 2001(k) is clear on its face, and applies only to the remaining section 318

timber sales.

...

> The interpretation of section 2001(k) as applying to timber sales throughout Washington and Oregon, and to timber sales that were not developed subject to the ecological and procedural criteria provided in section 318(b)-(j), is wholly inconsistent with the history of the section 318 sales issue.

...

> For these reasons, any ambiguities in the language of section 2001(k) or its legislative history must be resolved in favor of an interpretation that § 2001(k) is intended to apply only to those remaining timber sales developed and offered subject to section 318(b)-(j) of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act, as directly addressed in section 2001(k)(1).

In a July 27, 1995 letter from Committee on Energy and Natural Resources Chairman Frank Murkowski to Secretary of Agriculture Dan Glickman and Secretary of Interior Bruce Babbitt, Senator Murkowski stated:

> We want to make it clear that subsection (k) of the salvage legislation applies within the geographic area of National Forest units and BLM districts that were subject to Section 318 of the Department of Interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. 101-121, and within that geographic area requires the release of all previously offered or awarded timber sales, including Section 318 sales as well as all sales offered or awarded in other years (such as Fiscal Years 1991-1995) that are not subject to Section 318. The reference to Section 318 in subsection (k)(1) defines the geographic area that is subject to subsection (k).
>
> See, Plaintiff's Memorandum (#32), Exhibit 4.

This letter was also signed by Senators Don Young, Larry Craig, Charles Taylor, Slade Gordon, and Pat Roberts (the chairs of the relevant committees and sponsors of the

legislation).

This case involves a single issue of statutory construction. The first rule of statutory interpretation is that a statute is interpreted and applied according to its plain meaning. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). If a statute is ambiguous, a court may refer to legislative history. United States v Aguilar, 21 F.3d 1475, 1480 (9th Cir. 1994), aff'd in part, rev'd in part and remanded, __ U.S. __, 115 S. Ct. 2357 (1995). If Congress has not "directly spoken to the precise question at issue" and the statute is silent or ambiguous, a court may turn to the agency charged with administering the statute's interpretation. Chevron U.S.A., supra, p. 842-843. The agency's interpretation is entitled to considerable deference and need not be the only permissible construction which the agency might have adopted. Id., at 844; Chemical Mfrs. Ass'n v Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985). However, if the statute and legislative history clearly reveal Congress' intent, an administrative agency's interpretation of the statute is entitled to no weight. Chevron U.S.A., supra, 467 U.S. at 843 n. 9.

The parties argue that the meaning of section 2001(k)(1) is clear on its face and does not require interpretation. Both parties further argue that if interpretation is necessary, rules of statutory construction favor their position. Both parties further argue that if resort to

legislative history is necessary, the legislative history of section 2001(k)(1) supports their respective interpretation. Defendants argue that any ambiguity in the legislative history should be resolved in defendants' favor based on the agencies' interpretation issued August 22, 1995.

Section 2001(k)(1) requires the Secretaries within 45 days of the date of enactment to award, release and permit completion of "all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318."

Plaintiff contends the phrase "subject to section 318" modifies the phrase "any unit to the National Forest system . . . . ," and defines the geographic range of section 2001(k). Plaintiff's Memorandum (#32), p. 9.

Defendants argue that "[c]ontrary to plaintiff's theory, Congress did not use the phrase 'subject to section 318' as a short-hand geographic description of the states of Washington and Oregon." Defendants' Memorandum (#25), pp. 10-11.

Statutory construction:

The defendants' interpretation of section 2001(k)(1) is not the common sense grammatical reading of the provision and violates several rules of statutory construction.

1. The defendants' reading violates the rule of statutory construction that "a modifying phrase applies only to its immediate antecedent." Huffman v. C.I.R., 978 F.2d 1139, 1145

(9th Cir. 1992). Under the defendants' proposed construction, the phrase "subject to section 318" does not modify the phrase it follows (i.e., any unit of the National Forest System), but instead modifies the earlier phrase "all sales contracts."

2. The defendants' reading also violates the rule that a statute must be interpreted to give significance to all of its parts. See, Boise Cascade Corp. v. U.S.E.P.A., 942 F.2d 1427, 1432 (9th Cir. 1991). The phrase "offered or awarded before that date" only makes sense if the statute has ongoing application to sales after fiscal year 1990 because the phrase serves to exclude sales offered after July 27, 1995.

The phrase "in any unit of the National Forest System or district of the Bureau of Land Management" is meaningless and unnecessary if the statute is limited to "all timber contracts . . . subject to section 318" because all of the section 318 sales would be released even if that phrase were absent. Thus, the phrase would add nothing to the law.[1]

3. The defendants' reading also violates the rule that Congress is not deemed to have silently adopted a position it previously rejected. See, INS v. Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) (deletion of language from a bill in Congress strongly militates against a judgment that Congress

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[1] Under the defendant's proposed interpretation of the statute, a normal grammatical statement of the statute would be "and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded subject to section 318 ..."

intended a result that it expressly declined to enact.)

Senator Murray offered an amendment to the salvage timber bill, which have limited the release of previously offered sales to "each timber sale awarded pursuant to section 318." 141 Cong. Rec. S4870 (daily ed. March 30, 1995). Plaintiff's Memorandum (#32), Exhibit 7. The Senate rejected the Murray amendment on a vote of 48-46. Id.

Defendants argue that plaintiff's interpretation violates the rule of statutory construction that when Congress uses a particular phrase in one section of a statute and omits it in another, the difference in language is presumed to be intentional. See, Debarry v. Sherman Hosp. Ass'n, 769 F. Supp. 1030 (N.D. Ill. 1991) (citing Russel v. United States, 464 U.S. 16, 21 (1993)).

In defining the scope of application of subsection 2001(b) (addressing salvage timber sales) and 2001(d) (directing expedited implementation of the Pacific Northwest Forest Plan), the phrase "as described in" is used to refer to the relevant geographic area.[2] "Described by" is also used in section 2001(g)(2).

Defendants argue "Congress departed from its practice of using the term 'described in' in subsection 2001(k)(1), and instead chose to use the phrase 'subject to section 318.' Plaintiff's interpretation does not attribute any meaning to

[2] In subsection(d), the phrase "LANDS COVERED BY OPTION 9" is also used.

this change, and violates established rules of statutory construction . . . To give meaning to Congress's (sic) change in word choice, it is necessary to recognise that section 318 is something more than a geographic description." Defendants' Opposition (#41), p. 11.

However, where "described in" is used in sections 2001(b), (d) and (g)(2), it refers to lands specifically described in the referenced section. There is no "description" of federal lands set forth in section 318. One set of National Forest Units and another set of BLM Districts are "subject to" section 318. See, Plaintiff's Memorandum (#32), Exhibit 5.

Legislative history:

In the hierarchy of legislative history, a congressional conference report is universally recognized as the most reliable evidence of congressional intent, because it "represents the final statement of the terms agreed to by both houses." Department of Health and Welfare v. Block, 784 F.2d 895, 901 (9th Cir. 1986).

The conference report on the Rescission Act was submitted to both houses of Congress by the managers of the bill, led by Senator Hatfield, Chairman of the Senate Appropriations Committee and Rep. Livingston, Chairman of the House Appropriations Committee, on May 16, 1995. See, Plaintiff's Memorandum (#32), Exhibit 8. Both houses approved the conference report. Id., exhibits 9 and 10. The conference

report expressly interprets the law to apply to "all sales offered, awarded, or unawarded" in "the geographic area encompassed by Section 318." Id., Exhibit 1.

The Senate report on the Rescissions Act, authored by Senator Hatfield also indicates a congressional intent for the phrase "subject to section 318" to define the geographic reach of the law, by referring to sales "in the region affected by section 318." Id., Exhibit 2.

The co-author of the bill was Rep. Charles Taylor of North Carolina, a member of the Interior Appropriations Subcommittee of the Appropriations Committee. Before the House voted on the bill, Rep. Taylor offered an explanation of section 2001(k)(1) on the floor of the House which supports plaintiff's interpretation by indicating that "many of the sales were mandated by Congress in Section 318 . . . others were offered in fiscal year 1991 and some more recently. . . ." He continued: "It applies to all national forests and BLM districts that were subject to Section 318" and "throughout fiscal years 1995 and 1996, or longer as necessary." 141 Cong. Rec. H3233 (daily ed. March 15, 1995); see, Plaintiff's Memorandum (#32), Exhibit 3.

The Supreme Court has repeatedly held that the remarks of the sponsor of a bill "are particularly valuable in determining the meaning of [the bill]" and provide "an authoritative guide to the statute's construction." Rice v. Rehner, 463 U.S. 731, 728 (1983).

Also, as noted above, on the day the President signed the bill, the congressional sponsors of the bill wrote a letter to Secretaries Glickman and Babbitt confirming that the reference to section 318 defines the geographic scope of § 2001(k)(1). See, Plaintiff's Memorandum (#32), Exhibit 4.

Defendants argue that this post-enactment statement is not legislative history and should not be considered evidence of congressional intent. I agree. However, the letter was signed the day the law took effect and expressed the contemporaneous views of six of the most influential members of Congress involved in the passage of the bill. Although not "legislative history," the letter is certainly consistent with the above evidence of congressional intent.

Defendants have submitted portions of legislative history that arguably support their proposed interpretation of section 2001(k)(1). However, based on the portions referenced above, the weight of the legislative history strongly favors plaintiff's interpretation. As noted above, if a statute and legislative history clearly reveal Congress' intent, an administrative agency's interpretation is not controlling. Chevron U.S.A., supra, 467 U.S. at 843 n. 9.

The record indicates that plaintiff's proposed interpretation of section 2001(k)(1) is precisely what Congress intended. It does not matter whether the court agrees with that policy choice, which was the prerogative of and was made by Congress.

Plaintiff's motion for summary judgment as to its first and second claims for relief (#31) is allowed. Defendant's cross motion for summary judgment (#24) is denied.

Dated this 8th day of September, 1995.

Michael R. Hogan
UNITED STATES DISTRICT JUDGE

THE WHITE HOUSE

WASHINGTON

Go over carefully –

any further amends of leg. proposal req'd –

e.g. we stand on current wording

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U.S. ATTORNEY
EUGENE ORE.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, Plaintiff, v. DAN GLICKMAN, in his capacity as Secretary of Agriculture; BRUCE BABBITT, in his capacity as Secretary of the Interior, Defendants.	Case No. 95-6244-HO Lead Case Case No. 95-6267-HO Consolidated case ORDER

INTRODUCTION

On July 27, 1995, the President signed the fiscal year 1995 Supplemental Appropriations for Disaster Assistance and Rescissions Act (the Rescissions Act or the Act), Public Law 104-19. Section 2001(k)(1) of the Rescissions Act requires certain executive agencies to award and release timber sales offered between October 23, 1989, and July 27, 1995, notwithstanding otherwise applicable law. Section 2001(k)(2) provides the only exception: for sale units in which a

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threatened or endangered species is "known to be nesting." Pub. L. 104-19, § 2001(k)(2).

The dispute here concerns the standards to make a "known to be nesting" determination with regard to the marbled murrelet, a threatened bird species. Defendants contend that marbled murrelets are known to be nesting within certain of the sales offered under section 318 of the 1990 Interior Appropriations Bill. Pub. L. 101-121, 103 Stat. 745 (1989). Plaintiff argues that the standards employed by government agencies to detect murrelets are not appropriate under section 2001(k)(2). Defendants maintain that the standards they wish to use are the best scientific methods available to detect murrelet nesting.

The affidavits and pleadings submitted by defendants indicate that the standards used by the government agencies to detect murrelet nesting and nesting behavior may be the best currently available. However, it is this court's Constitutional duty to make decisions based on law, not science. As the United States Supreme Court stated 192 years ago, the Constitution is an "original and supreme will [which] organizes the government, and assigns to different departments their respective powers. It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). While the court may not agree from a scientific viewpoint with the standards compelled by section 2001(k)(2), its duty here is to interpret

the intent of Congress, rather than substitute its own judgment.

FACTS

1. Timber Sales in Dispute

Under section 318 of the fiscal year 1990 interior appropriations bill, the United States Forest Service (the Forest Service) and the Bureau of Land Management (the BLM) were required to offer specified volumes of timber for sale in fiscal year 1990. Pub. L. 101-121, 103 Stat. 745 (1989). On October 1, 1992, after the Forest Service and BLM had offered many of the section 318 sales, the marbled murrelet was listed as a threatened species under the Endangered Species Act. See Fed. Reg. 45,328 (1992). Subsequent to this listing, the Forest Service withheld 77 previously offered section 318 sales from award and release.

From 1992 to 1995, the United States Fish and Wildlife Service (Fish and Wildlife) prepared a biological opinion regarding the impact of the withheld section 318 sales on the marbled murrelet. In order to prepare this biological opinion, Fish and Wildlife conducted surveys to locate marbled murrelets in and around section 318 sale units. These surveys were conducted according to the Pacific Seabird Group Protocol (the PSG Protocol or the Protocol).

2. The PSG Protocol

The PSG Protocol is an unpublished report drafted by the Pacific Seabird Group. Its formal title is "Methods for

Surveying For Marbled Murrelets In Forests: A Protocol For Land Management and Research." Ex. 104 to Plaintiff's Memorandum in Support of Second Motion for Summary Judgment (#49). The Protocol is designed to "assist wildlife biologists by providing guidance to . . . determine the probable absence of murrelets in a forest stand. . . ." Id. at 2.

The Protocol recognizes a definitional difference between a "nest stand" and an "occupied stand":[1]

> A nest stand is a stand with an active nest or a recent nest site as determined from a fecal ring or eggshell fragment. Evidence of a nest site also includes discovery of a chick or eggshell fragment on the forest floor.
>
> An occupied stand is defined as the stand of potential habitat where murrelets have been observed exhibiting behaviors which have been observed in stands with evidence of nesting. . . . 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. . . .

Id. at 3-4.

The Protocol is designed to identify "occupied" stands.

According to the Protocol, an occupied stand is evidenced by "at least one of the following subcanopy behaviors or conditions":

> (1) discovery of an active nest or a recent nest site as evidenced by a fecal ring or eggshell fragments;
> (2) discovery of a chick or eggshell fragments on the forest floor;
> (3) a murrelet flying below, through, into, or out of the

---

[1] A "stand" is simply a "group or growth of tall plants or trees." AMERICAN HERITAGE DICTIONARY 906 (1st ed. 1981).

> forest canopy within or adjacent to a stand. This includes birds flying over or along logging roads, young stands, or recently-harvested areas adjacent to potential habitat;
> (4) birds perching, landing, or attempting to land on branches;
> (5) birds calling from a stationary location within the stand.

The Protocol recommends surveying an entire stand of potential habitat for signs of murrelet occupancy, or, at a minimum, surveying the "contiguous potential habitat extending one-quarter mile" or 125 acres from the boundary of the proposed sale unit. Id. at 9. The reason for extending the survey area beyond the sale unit is that "[h]arvesting a portion of a stand of potential habitat likely will affect the suitability of the entire stand as murrelet habitat[.]" Id. The practical effect of this standard 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.

A sale unit may also be designated "occupied" under the Protocol when there is a potential for nesting or when murrelets are engaged in non-nesting behavior otherwise related to breeding. The Protocol provides:

> Subcanopy behaviors in a stand, while not necessarily indicating nesting, means [sic] either nesting could occur at some time, or the stand has some importance for breeding. An occupied stand could be used for purposes other than nesting that are essential for the complete life history of the bird.

Fish and Wildlife used the Protocol's definition of "occupancy" in forming its biological opinions. Fish and Wildlife issued an initial biological opinion on May 11, 1994,

and a revised biological opinion on June 12, 1995. The revised opinion concluded that 57 of the section 318 sales were "occupied" by murrelets and harvest of these units would jeopardize murrelet viability. Accordingly, the revised biological opinion stated that these sales must be withheld under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

3. Section 2001(k)(2)

In July, 1995, the United States Congress passed the Rescissions Act. 104 H.R. 1944, 109 Stat. 246 (July 27, 1995). Section 2001(k)(1) of the Act requires release of all sales offered or awarded prior to the enactment date, July 27, 1995.[2] The Act specifically includes the withheld section 318 timber sales, requiring that these sales be awarded and released "notwithstanding any other provision of law."

The Act provides one exception to the mandatory release of section 318 sales:

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

104 H.R. 1944, § 2001(k)(2).

In the event a timber sale is withheld under section 2001(k)(2), section 2001(k)(3) requires the appropriate agency to provide the offeree with substitute timber.

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[2] This court recently held that section 2001(k)(1) does not apply to sales offered prior to October 23, 1989, nor to sales that are impossible to award on their original terms.

4. The Administration's Interpretation

On August 23, 1995, the Under Secretary of Agriculture and the Acting Director of the Bureau of Land Management sent a memorandum to the Chief of the Forest Service and the Oregon State Director of the BLM. The memorandum stated that the Protocol's criteria were the "best available scientific evidence" for determining murrelet nesting and directed that these criteria "should be utilized in evaluating whether section 318 sales are subject to section 2001(k)(2)."

Defendants urge the administration's interpretation of section 2001(k)(2) to allow application of Protocol standards to determine murrelet nesting. Experts have submitted affidavits stating that marbled murrelets do not construct nests but lay eggs on the limbs of old-growth conifer trees or on other deformations common on older trees, sometimes in excess of 100 feet above ground. These experts state that physical detection of actual murrelet nest sites is difficult and that the PSG Protocol is widely accepted as the scientifically appropriate method to detect murrelet nesting.

DISCUSSION

A. The Plain Language

> [O]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain--neither to add nor subtract, neither to delete nor to distort.

62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951).

Under section 2001(k)(2), a sale unit may not be released if a murrelet "is known to be nesting within the acreage that is the subject of the sale unit." Plaintiff argues that this language suggests three standards for murrelet detection: (1) the knowledge of nesting must be current; (2) the known nesting must be within the sale unit; and (3) the nesting determination must be based on direct, physical evidence.

1. Current Nesting

Section 2001(k)(2) provides that a sale may be withheld if a murrelet "is" known to be nesting. Therefore, the relevant federal agency may not withhold a sale without sufficient evidence that a murrelet is currently nesting within the sale unit.

Some of the section 318 sales were last surveyed in 1992. Plaintiff argues that these surveys are not sufficient to establish current knowledge of nesting. Defendants contend that "site fidelity" compels murrelets to return to their nests annually and that annual surveys would be a waste of agency resources.

Some inference of a murrelet's site fidelity is necessary to determine current nesting, unless the agency continuously surveys a sale unit up to the moment of its award and release. However, neither the language nor history of section 2001(k)(2) indicates how much "site fidelity" is sufficient to sustain a "known to be nesting" determination. A murrelet survey conducted one or more years in the past may

be sufficient to establish current nesting upon an adequate showing of site fidelity; however, this must be determined with respect to specific sales.

2. Within the Sale Unit

Section 2001(k)(2) requires a murrelet to be nesting "within the acreage that is the subject of the sale unit." Under the Protocol, however, a sale unit is deemed occupied if nesting-related evidence is observed within a quarter mile of the sale unit. This standard cannot be exercised consistently with the plain language of section 2001(k)(2).[3]

---

[3] Defendants argue that under the plain language of section 2001(k)(2), a sale unit may be harvested so as to expose a murrelet nest just inches outside the harvested acreage, whereas the Protocol would avoid such a result by labeling a unit "occupied" when nesting activity is observed within a quarter mile of the sale unit. However, defendants do not offer an interpretation of section 2001(k)(2) that would avoid this result.

One interpretation that may address defendants' concern is to define "nesting" to include all behavior necessary for species viability. Under this interpretation, nesting behavior near the sale unit may be necessary for the propagation of murrelets within the sale unit.

Neither the plain language, the statutory purpose, the legislative history, nor the Protocol itself supports such an interpretation. No matter how broadly "nesting" is defined, the nesting activity must be known to be "within the acreage that is the subject of the sale unit." Invoking the section 2001(k)(2) exception when no nesting activity is known to be occurring within sale unit boundaries is inconsistent with this plain language. Moreover, basing a "nesting" determination on species viability would require an ESA-type analysis, contrary to Congress's intent to preclude such challenges. See H.R. Conf. Rep., 104-124 at 136, *reprinted* at 141 Cong. Rec. H5013 (May 16, 1995). Congress clearly intended "nesting" to have a narrower meaning than this. See id. at 137 (Only exception is for "known nesting site in a sale unit."). Even the Protocol defines "nesting" more narrowly. Ex. 104 to Plaintiff's Memorandum in Support of Second Motion for Summary Judgment (#49) at 9 ("An occupied stand could be used for purposes other than nesting that are essential for the complete life history of the bird.").

Section 2001(k)(2) is also inconsistent with the Protocol's circling standard. Section 2001(k)(2) requires not only that a murrelet be known to be nesting, but also that the nesting be known to be occurring within the sale unit. Assuming that observation of a circling murrelet permits an observer to "know" a murrelet is nesting, there is no evidence in the record that the observer can "know" that the circling murrelet's nest is within sale unit boundaries.

For the same reason, the "within the sale unit" requirement is inconsistent with nesting determinations based on hearing a murrelet call from "within the stand." See supra p.5. Again assuming that the audition of certain murrelet calls permits the hearer to "know" a murrelet is nesting, the hearer must also "know" that the calling murrelet's nest is within sale unit boundaries.

To the extent the Protocol permits nesting determinations to be based on circling, calling, or other evidence that cannot be located "within the acreage that is the subject of the sale unit," the Protocol is inconsistent with the plain language of section 2001(k)(2).

3. Direct Physical Evidence

Plaintiff submits that Congress's use of the word "known" and "nesting" rather than "occupancy" evidences an intent to reject the Protocol's occupancy standards in favor of direct, physical evidence such as eggshell fragments, fecal rings, and

chicks.[4] Defendants argue that the words "known to be nesting" do not evidence congressional intent to require observation of eggshell fragments, fecal rings, or chicks rather than nesting-related behavior when agency experts and scientists have determined that such behavior is the only scientifically valid method for identifying murrelet nesting. The court agrees that the plain language of section 2001(k)(2) does not specify the evidence necessary to sustain a "known to be nesting" determination. Accordingly, it is necessary to consider legislative history.

B. The Legislative History

The House of Representative's original version of the rescissions bill, House Bill 1158, was introduced March 8, 1995 and contained no "known to be nesting" exception; it, therefore, mandated the release of all section 318 timber. See Cong. Q. U.S. H.R. 1158 (104th Cong., 1st Sess. Mar. 8, 1995). The March 8, 1995 House Report provided:

> The section also includes . . . a provision to release a group of sales that have already been sold under the provisions of Section 318. . . . The harvest of these sales was assumed under the President's Pacific Northwest Forest Plan, but their release has been held-up due to subsequent review by the U.S. Fish and Wildlife Service. Release of these sales will remove tens of millions of dollars of liability from the government for

---

[4] As noted above, the "within the sale unit" requirement precludes the Protocol's circling standard as well as any standard based on nesting-related evidence found or observed outside sale unit boundaries. At issue here are the Protocol's sub-canopy, perching, landing, and other similar standards and whether nesting determinations are limited to eggshell fragments, fecal rings, and chicks.

> contract cancellation. Also, the revenues from timber receipts will increase by over $155 million from current estimates.

H.R. Rep. No. 71, 104th Cong., 1st Sess. at 1159 (Mar. 8, 1995).

Senator Gorton sponsored a "known to be nesting" exception to amend House Bill 1158. The language proposed in Senator Gorton's amendment is the same as the version of section 2001(k)(2) eventually enacted into law. See Cong. Q. U.S. H.R. 1158 (104th Cong., 1st Sess., April 6, 1995). The Senate Report discussed Senator Gorton's amendment as follows:

> The only limitation on release of these sales is in the case of a nesting of an endangered bird species with a known nesting site in a sale unit. In this case, the Secretary must provide a substitute volume under [now section 2001(k)(3)].

S. Rep. No. 17, 104th Cong., 1st Sess. at 123 (Mar. 24, 1995).

The Senate amendments to House Bill 1158 were debated on the Senate floor on March 30, 1995. Senator Murray introduced the following alternative to Senator Gorton's amendment:

> With respect to each timber sale awarded pursuant to section 318 . . . , the performance of which is, on or after July 30, 1995, precluded under the Endangered Species Act of 1973 due to requirements for the protection of the marbled murrelet, the Secretary of Agriculture shall provide the purchaser replacement timber, at a site or sites selected at the discretion of the Secretary, that is equal in volume, kind and value to that provided by the timber sale contract.

141 Cong. Rec. S4870 (daily ed. Mar. 30, 1995).

Thus, Senator Murray's amendment would have perpetuated the hold-up of section 318 sales and provided substitute timber without any "known nesting" requirement. The Senate rejected

the Murray amendment. Id at S4882.

Senator Gorton's amendment, unlike the Murray amendment, requires a "known to be nesting" determination. Senator Gorton explained the significance of this requirement:

> The proposal that the committee has made simply says that those sales would go ahead unless they involved places in which endangered species are actually found, in which case substitute lands will take their place.

Id. at S4875.

Senator Hatfield commented:

> To ensure further protections, the Gorton amendment includes provisions prohibiting activities in timber sale units which contain any nesting threatened or endangered species.

Id. at S4881.

The conferees adopted the Gorton amendment, and the conference report explained:

> The only limitation on release of these sales is in the case of any threatened or endangered bird species with a known nesting site in a sale unit. In this case, the Secretary must provide a substitute volume under the terms of subsection (k)(3).

H.R. Rep. No. 124, 104th Cong., 1st Sess. at 137 (1995). President Clinton vetoed the original rescissions bill, H.R. 1158, on June 7, 1995. 141 Cong. Rec. H5682-03 (June 7, 1995) (President's veto message read before House).

After the President vetoed the original bill, congressional leaders, including Senator Gorton, negotiated with the President on a revised rescissions bill, H.R. 1944. House Bill 1944 included no changes to section 2001(k)(2), and

there was no discussion in the House regarding negotiations related to section 2001(k)(2).

In the Senate, however, Senator Gorton described the section 2001(k)(2) negotiations in considerable detail:

> Roughly 300 [million board feet] of timber sales have been held up due to agency gridlock over the marbled murrelet. The administration asked the House and Senate to include in (k)(2) its definition of "occupancy." That change in Subsection (k)(2) . . . would undermine the ability to move these sales forward. That suggestion was soundly rejected by the House and Senate authors of the provision.
>
> The language of (k)(2) requires that if a threatened or endangered bird species is "known to be nesting" in the sale unit that the administration not harvest that unit, but come up with an equal amount of timber in exchange for preserving that unit. This was written up to give the administration flexibility to protect that individual sale unit in which the bird resides.
>
> I wish to clarify that it is the intention of the House and Senate authors of this provision that the administration must provide physical evidence that the bird is "nesting" in that unit before the administration may enact (k)(3).

141 Cong. Rec. S10464 (daily ed. July 21, 1995) (statement of Sen. Gorton).

President Clinton signed House Bill 1944 into law July 27, 1995. Pub. L. 104-19, 109 Stat. 246 (1995).

Consistent with the plain language, the legislative history of section 2001(k)(2) repudiates a wholesale application of the PSG Protocol. The rejection of the Murray amendment, which would have automatically exempted sale units determined to be "occupied" by murrelets for purposes of the Endangered Species Act, strongly suggests that Congress

intended stricter standards for determining nesting than those applicable under the Protocol. The legislature's use of geographical terms such as a known nesting "site" within an "individual sale unit" and "places in which endangered species are actually found" indicates that Congress intended section 2001(k)(2) to require evidence which can be physically located within sale unit boundaries. This intent is consistent with the statute's express requirement that the nesting be known to be within the "acreage" of the sale unit.

In addition, Senator Gorton's recounting of the negotiations with the administration indicates that the Protocol's "occupancy" standard was rejected. The statements of a bill's sponsor "are particularly valuable in determining the meaning of [the bill]" and provide "an authoritative guide to the statute's construction." Rice v. Rehner, 463 U.S. 713, 728 (1983). Senator Gorton's statements are entitled to "substantial weight in interpreting the statute." FEA v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

Senator Gorton's remarks indicate that the drafters of section 2001(k)(2), the legislators who were involved in negotiations with the administration, and those who heard or read Senator Gorton's comments all knew that the administration's definition of "occupancy" was rejected in favor of a stricter standard to determine nesting under section 2001(k)(2). In addition, Senator Gorton's remarks suggest that the administration was aware that its "occupancy"

definition had been rejected during the negotiation process. The court finds that "occupancy" determinations made under Protocol standards are not necessarily sufficient to sustain a "known to be nesting" determination under section 2001(k)(2).

While section 2001(k)(2) precludes any wholesale application of the PSG Protocol, it does not clearly state the specific standards sufficient for a "known to be nesting" determination. As noted above, the plain language and legislative history of section 2001(k)(2) require evidence of a nest located within sale unit boundaries. Under section 2001(k)(2), therefore, a "known to be nesting" determination may not be based only on behavioral observations of a murrelet located outside sale unit boundaries. This requirement precludes nesting determinations based solely on the sighting of a murrelet outside sale unit boundaries (including circling), or any evidence not located within sale unit boundaries.

Neither the plain language nor the legislative history of section 2001(k)(2), however, expressly limits the evidence necessary to sustain a nesting determination to eggshell fragments, fecal rings, or chicks. The congressional record places "nesting" in quotation marks when quoting Senator Gorton's remarks:

> [T]he administration must provide physical evidence that the bird is "nesting" in that unit before the administration may enact (k)(3).

141 Cong. Rec. S10464 (daily ed. July 21, 1995).

The fact that Congress used the word "nesting" and the transcribers of the congressional record placed the word in quotations does not necessarily indicate congressional intent to adopt the Protocol's definition of "nesting," or any other definition limited to eggshell fragments, fecal rings, chicks or other specific physical evidence.

Plaintiff also points to a letter sent July 27, 1995 (the day the President signed the bill) to defendants by six members of Congress (Senators Gorton, Murkowski, Craig, Young, Taylor, and Roberts). That letter provides in relevant part:

> We have been informed that the Office of Forestry and Economic Development has suggested that subsection (k)(2) bars the release of any timber sale unit that has previously been determined to be "occupied" by a marbled murrelet. This interpretation of the law (1) directly contradicts the agreement reached between Congress and the Administration; (2) imposes language which we explicitly rejected; and (3) is flatly illegal.
>
> Subsection (k)(2) bars the release of a timber sale unit only if a threatened or endangered species "is known to be nesting" with the unit. This approach is much narrower than all "occupied" units, for three reasons:
>
> a) We were thoroughly informed and understand that the expert marbled murrelet biologists define occupancy of an area as much broader than nesting. We have been informed that the 1994 Pacific Seabird Group marbled murrelet protocol treats various subcanopy behavior as evidence of occupancy even though they do not necessarily indicate nesting, and treats circling above the canopy as evidence of possible occupancy although murrelets also circle above non-nesting habitat. We discussed these matters during our negotiations with the Administration. At the conclusion of this discussion, we refused to agree that evidence of occupancy would qualify a timber sale as "known to be nesting" under subsection (k)(2). The legislative history is explicit on this point.
>
> (b) To the contrary, we intended the requirement that a threatened or endangered bird be

> "known" to be nesting to require actual direct evidence of a nesting, and does not allow an inferential conclusion from possible occupancy. Actual direct evidence would be observation of an active nest, fecal ring or eggshell fragments.

Ex. 102 to Plaintiff's Memorandum in Support of Second Motion for Summary Judgment (#49) at 2.

This letter was dated after section 2001(k)(2) was passed and the same day the bill was signed by the President. The letter was unaccompanied by legislative process and is not entitled to the weight of legislative history. Nevertheless, while this post-enactment legislative statement "is not by any means conclusive, it cannot merely be ignored." Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1086 n.10 (9th Cir. 1986), *cert. denied* 479 U.S. 1103 (1987). The interpretation of a bill by the bill's sponsor is entitled to some weight.

At the same time, the court is obligated to give some deference to an administrative agency's reasonable interpretation of a statute with an ambiguous provision. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The premise for this so-called "Chevron doctrine" is that an ambiguous statutory provision may implicitly indicate congressional intent to defer to an agency for the promulgation of gap-filling rules. Id. 467 U.S. at 843. The deference due an agency interpretation may vary, depending on whether the agency's interpretation developed out of long-standing practical application of the statute and whether the agency interpretation was accompanied by formal

rulemaking or other quasi-legislative procedures. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988).

Ultimately, though, it remains the court's responsibility to elicit the intent of Congress. Chevron, 467 U.S. at 842 and n.9 ("if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"). Here, neither the language nor the legislative history of section 2001(k)(2) indicates an intent to require eggshell fragments, fecal rings, chicks or any other specific physical evidence. Although the July 27, 1995 letter states that "[a]ctual direct evidence would be observation of an active nest, fecal ring or eggshell fragments[,]" the letter does not state whether these are examples of permissible evidence or whether these types of evidence constitute the full range of permissible evidence.

Moreover, Senator Gorton added section 2001(k)(2) to a House version which contained no nesting exemption in order to "give the administration flexibility to protect that individual sale unit in which the bird resides." 141 Cong. Rec. S10464 (daily ed. July 21, 1995) (statement of Sen. Gorton). Senator Hatfield also noted that the Gorton amendment was intended "(t)o ensure further protections. . . ." Id. at S4881. Had Congress intended to limit "known to be nesting" evidence to eggshell fragments, fecal rings, chicks, or other specific types of evidence, it could have adopted

more specific language.

Although section 2001(k)(2) requires evidence of a nest located within sale unit boundaries, it does not limit this evidence to any specific types. Rather, the language and legislative history of section 2001(k)(2) suggest that Congress intended to allow the agencies some leeway to determine what types of physical evidence observed within sale unit boundaries are sufficient to establish a "known" nesting site within the sale unit. Thus, an agency may rely on the visual or auditory observation of a murrelet located sub-canopy within sale unit boundaries engaging in behavior that the agency determines is sufficiently indicative of nesting to establish a "known" nesting site within that sale unit.

CONCLUSION

An "occupancy" determination under the PSG Protocol is not necessarily sufficient to sustain a "known to be nesting" determination under section 2001(k)(2). Accordingly, any section 318 sale withheld pursuant to a determination of "occupancy" under PSG Protocol standards must be awarded and/or released unless a murrelet nesting determination is made under the section 2001(k)(2) standards articulated in this order.[5]

To invoke section 2001(k)(2), the agency must find that a murrelet is (1) currently (2) nesting (3) within sale unit

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[5] This is a final order for injunctive relief pursuant to Federal Rule of Procedure 65 and the court's inherent authority.

boundaries. This finding must be based on the observation of evidence located sub-canopy within sale unit boundaries.

Plaintiff's motion for summary judgment (#46) as to its third and fourth claims for injunctive and declaratory relief is granted. Intervenor Scott Timber's motion for summary judgment (#7 in consolidated case 95-6267) is granted to the extent indicated in this order. Defendants' cross-motion for summary judgment (#99) is denied. Intervenor-defendants Oregon Natural Resources Council's motion for summary judgment (#105) is denied. Intervenor-defendants Oregon Natural Resources Council's motion to clarify the court's October 4, 1995 minute order or to expedite the court's ruling on the motion to transfer venue (#156) is denied as moot.

DATED this 19th day of January, 1996.

Michael R. Hogan
UNITED STATES DISTRICT JUDGE

This is a final order for declaratory judgment pursuant to Federal Rule of Procedure 57 and the court's inherent authority.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

23-Jan-1996 12:14pm

TO: (See Below)

FROM: Thomas C. Jensen
Council on Environmental Quality

SUBJECT: SALVAGE LOGGING: Judge loosens protections for murrelet.

SALVAGE LOGGING: JUDGE LOOSENS PROTECTIONS FOR MURRELET

A federal judge on 1/19 "threw out the protocol the US Forest Service used to keep loggers from cutting old-growth forests" where the threatened marbled murrelet is believed to be nesting. The ruling by US District Judge Michael Hogan was "another loss for environmentalists" fighting the salvage-logging law signed by Pres. Clinton in 7/95 (AP/mult., 1/21).

The timber industry had asked the district court to order the release of dozens of timber sales being held up because of the murrelet. This request was opposed by the federal government and enviro groups (Sierra Club Legal Defense Fund release, 1/19).

CLARIFYING PROOF OF NESTING

The salvage law stipulates that no logging can occur if the murrelet is "known to be nesting" in a timber sale unit (GREENWIRE sources). The scientific protocol used by the USFS to determine nesting areas was based on bird sightings, but the timber industry argued that nesting must be proven by finding physical evidence such as a nest or eggshell fragments.

Hogan ruled that when Congress enacted the rider, it rejected the USFS protocol and put in place a new standard for judging whether murrelets are nesting in a timber sale. Hogan didn't require finding a nest or eggshells, but did rule that evidence of nesting, such as seeing or hearing a bird engage in nesting behavior, could stop logging only in the unit of a timber sale where it was observed. "Under the old protocol, evidence of nesting would stop logging in an entire stand of trees."

WHEN WILL SALES PROCEED?

Patti Goldman of SCLFD said the ruling doesn't immediately release for logging any of the 52 national forest timber sales in Oregon and Washington contested in the lawsuit -- "that determination will be made by the [USFS] under the new rules set out by the judge." But Jim Geisinger of the Northwest Forestry Assn., a timber industry group, said he expects all the sales to eventually be harvested (AP/Medford [OR] MAIL TRIBUNE, 1/20).

SCLDF is appealing the ruling to the Ninth Circuit Court of Appeals. The admin. is studying how much timber would be

released under the ruling, and is weighing an appeal. Dept. of

Justice's Peter Coppelman: "We thought [Hogan] would go with either the industry's interpretation or the scientific protocol. Instead, he cut the baby in half" (GREENWIRE sources).

PUSH CONTINUES FOR LEGISLATIVE CHANGES

VP Al Gore on 1/19 said the Clinton admin. is working to change the salvage-logging law and predicted Congress eventually will alter its "worst features." Gore: "We're not going to rest until it's fixed" (Jeff Mapes, Portland OREGONIAN, 1/20).

Legislation introduced by Reps. Elizabeth Furse (D-OR) and Connie Morella (R-MD) to completely repeal the salvage-logging law (GREENWIRE 12/8/95) now has 85 co-sponsors, including seven GOPers (GREENWIRE sources).

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