

NLWJC- Kagan

Counsel - Box 003 - Folder 002

Timber: NFRC v. Glickman [1]

1 units withheld by the Forest Service under Section 2001(k) (2) of  
2 the Rescissions Act. As described in the Declaration, the Forest  
3 Service has determined that three units on the Abes Wren timber  
4 sale on the Umpqua Nation Forest, and one unit each on the West  
5 Boundary timber sale on the Olympic National Forest and the  
6 Boulder Krab timber sale on the Siskiyou National Forest, do not  
7 qualify for exemption from release under Section 2001(k)2). The  
8 Forest Service anticipates issuing letters of release for these  
9 sale units after the expiration of XXX???)XXX days from the filing  
10 of this Notice.

11  
12 Dated: March X, 1996

13 Respectfully submitted,

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

18 LOIS J. SCHIFFER  
19 Assistant Attorney General

20 \_\_\_\_\_  
21 JEAN WILLIAMS  
22 ELLEN J. KOHLER  
23 EILEEN SOBECK  
24 U.S. Department of Justice  
25 Environment and Natural  
26 Resources Division  
27 Wildlife and Marine Resources  
28 Section  
P.O. Box 7369  
Washington, D.C. 20044-7369  
(202) 305-0460/0228

Attorneys for Defendants

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

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

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

14 NORTHWEST FOREST RESOURCE COUNCIL, )  
15 )  
Plaintiff, )  
16 )  
v. )  
17 )  
18 )  
DAN GLICKMAN, in his capacity )  
19 as Secretary of Agriculture, )  
BRUCE BABBITT, in his capacity )  
20 as Secretary of the Interior, )  
21 Defendants, )  
22 )  
OREGON NAT. RES. COUNCIL, et al., )  
Defendants-Intervenors )  
23 )

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

**NOTICE OF FILING  
OF AMENDED DECLARATION  
OF A. GRANT GUNDERSON**

24 **PLEASE TAKE NOTE** that Federal Defendants file herewith the  
25 Amended Declaration of A. Grant Gunderson. This Declaration is  
26 made to correct the record in this matter regarding five sale

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OF COUNSEL:

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

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

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

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

**AMENDED DECLARATION  
OF A. GRANT GUNDERSON**

24  
25 I, A. Grant Gunderson, declare as follows:

- 26 1. I am the Threatened, Endangered, and Sensitive Species

1 Program Manager for the Pacific Northwest Region of the USDA  
2 Forest Service. I have held my current position since October,  
3 1990. I have been employed as a wildlife biologist with the  
4 federal Government for over 23 years. This declaration is based  
5 on my professional knowledge of northern spotted owl biology,  
6 marbled murrelet biology, and the survey protocols that were  
7 developed for locating nesting spotted owls, and locating forest  
8 stands occupied by marbled murrelets.

9 2. In a declaration dated September 27, 1995, I discussed  
10 certain aspects of biology pertaining to the northern spotted owl,  
11 and the Forest Service's determination that identification of a  
12 spotted owl activity center equated with identification of a  
13 "known nesting" site under Section 2001(k)(2) of the Rescissions  
14 Act. I further stated that based on my knowledge of previous  
15 spotted owl protocol surveys, all remaining units of the Abes Wren  
16 Timber Sale on the Umpqua National Forest had spotted owl activity  
17 centers and were therefore considered to have "known nesting" of a  
18 threatened bird pursuant to Section 2001(k)(2). That statement  
19 was also based on information communicated to me by personnel on  
20 the Umpqua National Forest.

21 3. Subsequent to that declaration there were discussions  
22 with personnel on the Umpqua National Forest about "activity  
23 centers" and "core areas" for spotted owls. During those  
24 discussions it became apparent that personnel on the Umpqua  
25 National Forest had been using the terms interchangeably. Core  
26 areas are defined as 70 to 100 acre areas of late-successional

27 AMENDED DECLARATION OF

28 A. GRANT GUNDERSON - 2 -

1 forests that provide habitat and forage for juvenile spotted owls  
2 as they leave the nest. An activity center on the other hand is  
3 an area, usually 2-5 acres that, on the basis of surveys and  
4 observed behavior of owls, is deemed to contain the nest tree.  
5 The terms are not interchangeable.

6 4. The requirement to have a spotted owl activity center  
7 within a unit to invoke section 2001(k)(2) was explained and  
8 Forest personnel were asked to review the spotted owl survey  
9 information in that context.

10 5. Review by the Umpqua National Forest indicates that  
11 Units 28, 30, and 31 of the Abes Wren sale are located within core  
12 areas of spotted owl pairs but do not contain activity centers.  
13 Only Unit 32 contains an activity center and can be considered to  
14 have "known nesting" by a threatened species pursuant to Section  
15 2001(k)(2).

16 6. In the process of reviewing the applicability of the  
17 January 19, 1996, Order to sales withheld under Section 2001(k)(2)  
18 to protect marbled murrelets, I discovered that Unit 3 of the West  
19 Boundary timber sale on the Olympic National Forest was included  
20 in the "known nesting" category.

21 7. Unit 3 of the West Boundary timber sale has had only 1  
22 year of survey to Pacific Seabird Group protocols with no  
23 detections of marbled murrelet occupied behavior. Therefore I  
24 have concluded that based on this survey information Unit 3 of the  
25 West Boundary timber sale does not fall within the Section  
26 2001(k)(2) nesting exception.

27 AMENDED DECLARATION OF

28 A. GRANT GUNDERSON - 3 -



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

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

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Al Ferlo	514-4240
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Jim Sutherland(503)	465-6582
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 14

DATE: March 4, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman. Attached is Federal Defendants' February 29, 1996 Compliance Report.

On Friday, March 1st Judge Hogan denied, without a hearing, our motion for an emergency stay re: First and Last. On Tuesday we intend to file a response to Plaintiffs SAS' Motion re: First and Last in the action of SAS v. Thomas (Judge Dwyer).

1 KRISTINE OLSON, OSB # 73254  
 United States Attorney  
 2 JAMES L. SUTHERLAND, OSB# 68160  
 Assistant U.S. Attorney  
 3 701 High Street  
 Eugene, OR 97401-2798  
 4 (541) 465-6771

5 LOIS J. SCHIFFER  
 Assistant Attorney General  
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 GEOFFREY GARVER  
 7 U.S. Department of Justice  
 Environment and Natural Resources Division  
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 P.O. Box 663  
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13	NORTHWEST FOREST RESOURCE COUNCIL, )	
	)	
14	Plaintiff, )	Civil No. 95-6244-HO
	)	(lead case)
15	v. )	Civil No. 95-6267-HO
	)	(consolidated case)
16	GLICKMAN, in his capacity )	
	as Secretary of Agriculture, )	FEDERAL DEFENDANTS'
17	BRUCE BABBITT, in his capacity )	FEBRUARY 29, 1996
	as Secretary of Interior )	COMPLIANCE REPORT
18	)	
	Defendants. )	
19	)	

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

1 Attached is the Thirteenth Declaration of William L. Bradley  
2 and the Sixteenth Declaration of Jerry Hofer updating the Court  
3 on the actions of the Bureau of Land Management and Forest  
4 Service as to these timber sales.

5 Dated this 29th day of February, 1996.

6 Respectfully submitted,

7 KRISTINE OLSON  
8 United States Attorney

9 LOIS J. SCHIFFER  
Assistant Attorney General

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MICHELLE L. GILBERT  
GEOFFREY GARVER  
United States Department of Justice  
Environment and Natural  
Resources Division  
General Litigation Section  
P.O. Box 663  
Washington, DC 20044-0663  
(202) 305-0460

Attorneys for Defendants

Of Counsel:

JAY MCWHIRTER  
Office of the General Counsel  
United States Department of Agriculture  
Washington, DC

KAREN MOURITSEN  
Office of the Solicitor  
United States Department of the Interior  
Washington, DC

KRISTINE OLSON, OSB #73254  
 United States Attorney  
 JAMES L. SUTHERLAND, OSB #68160  
 Assistant U.S. Attorney  
 701 High Street  
 Eugene, OR 97401-2798  
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 U.S. Department of Justice  
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 Telephone: (202) 305-0460

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Plaintiff,	)	Civil No. 95-6244-HO
	)	(lead case)
v.	)	Civil No. 95-6267-HO
	)	(consolidated case)
DAN GLICKMAN, in his capacity as	)	
Secretary of Agriculture,	)	FEDERAL DEFENDANTS'
BRUCE BABBITT, in his capacity as	)	FEBRUARY 29, 1996
Secretary of Interior	)	COMPLIANCE REPORT
	)	
Defendants.	)	

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

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

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

3. In its February 16, 1996, compliance report, the BLM provided two tables showing the status of its sales which are covered under Section 2001(k).

4. This declaration is being filed to update the court on the status of these sales. As in our February 16, 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. In our previous compliance report we stated that the original high bidder of the Olalla Wildcat sale had sought to reinstate its high bid. We also stated that while the BLM was considering this action, it issued letters to the second highest bidders of both this sale and the Twin Horse sale to ascertain if they were interested in purchasing the sales at the original high bid price.

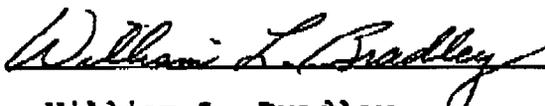
6. The BLM has since interpreted Judge Hogan's January 17, 1996, amended order to require that these sales be awarded to the highest qualified bidder, regardless of whether the bidder had previously rejected the award of the contract and obtained a return of the bid bond. Therefore, the Olalla Wildcat sale (with the exception of unit No. 5) was awarded to Lone Rock Timber on February 26, 1996. A northern spotted owl is known to be nesting on the unawarded unit. In BLM's award letter to Lone Rock Timber, the BLM stated that they will be contacting the company regarding replacement volume for Unit No. 5. A letter was also issued to the second highest bidder, Scott Timber Co., stating that the sale had been awarded to Lone Rock Timber.

7. On February 21, 1996, a letter was sent to Douglas County Lumber Co., the original high bidder on the Twin Horse sale, to ascertain if they were interested in the possible award of the sale at the original high bid price. On the same date a letter was sent to the second highest bidder, Huffman and Wright Timber Corp., stating that the BLM was inquiring if Douglas County Lumber Co. was interested in the award of the sale. They were informed that Douglas County Lumber Co. would be awarded the sale if their reply is affirmative.

8. As a result of Judge Hogan's January 19, 1996, order, the BLM is reviewing its 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 February 27, 1996.

  
\_\_\_\_\_  
William L. Bradley

FEBRUARY 29, 1996

W0200808REPORTLNU

TABLE 2

EIGHTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	STATUS	
88 BLACK JACK	WEYCO	6863	96				6863	EXECUTED
90 PITCHER PERFECT THINNING	SWANCO	2438	180				2438	EXECUTED
90 ROMAN DUNN	HULL-OAKES	10846	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	AWARDED
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	UNAWARDED
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. 2D01(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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FEBRUARY 29, 1996

REPORT DATE

TABLE 1

EIGHTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	STATUS	
91 LOWER DUDLEY'S SUMMIT	BOISE CASCADE	2340	71				2340	Executed
91 MILLER'S 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 B'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	257	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

03/04/96 10:38  
 02/29/96  
 07:53  
 U.S. DEPARTMENT OF THE INTERIOR  
 BUREAU OF LAND MANAGEMENT  
 009/014

KRISTINE OLSON OSB #73254  
United States Attorney  
JAMES L. SUTHERLAND, OSB# 68160  
701 High Street  
Eugene, OR 97401-2798024  
541-465-6771

LOIS J. SCHIFFER  
Assistant Attorney General  
MICHELLE L. GILBERT  
GEOFFREY GARVER  
U.S. Department of Justice  
Environment and Natural Resources Division  
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Washington, D.C. 202-272-8338  
Telephone: 202-305-0460

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Secretary of the Interior )

Defendants. )

Civil No. 95-6244-HO

SIXTEENTH 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 16, 1996, my Fifteenth 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

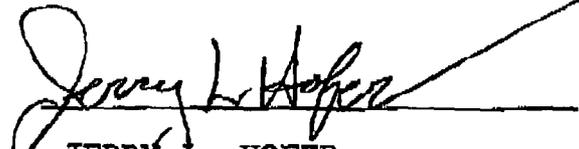
updating the February 16, 1996, status report with the following changes.

4. 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 received notification that the other bidders do not want the following sales awarded to them at the original terms and conditions:

<u>Sale Name</u>	<u>Forest</u>
Banty Salvage	Wallowa-Whitman
Johnson Salvage	Wallowa-Whitman
Hilton	Wallowa-Whitman
Cantrell	Wallowa-Whitman
Forks	Malheur

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

Executed at Portland, Oregon, on February 29, 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)

	<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
1.	JOHN	WIN	1,800 MBF	HUFFMAN/WRIGHT	AWARDED 11/14/95
2.	JOHN LODGEPOLE	WIN	2,200 MBF	DAW	HIGH BIDDER DECLINED AWARD LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
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

	<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
8.	GATORSON	COL	11,860 MBF	VAAGEN BRO	SALE AWARDED 5/6/93; SALE SUSPENDED 5/20/93; USFS AWAITING DETERMINATION OF LEGAL COURSE OF ACTION UNDER <u>SMITH v. USFS</u> , 93-0178-JLQ (E.D.Wa), REPORTED IN 33 F3D 1072 (9TH CIR. 1994). PURCHASER HAS SUBMITTED AN OPERATING SCHEDULE, REQUESTED RELEASE OF 3 PAYMENT UNITS, AND ALLOCATED PAYMENT BOND TO THIS SALE.
9.	TIP	WEN	751 MBF	LONGVIEW FIBER SALE	AWARDED 9/9/94;

ENJOINED 3/3/95. USFS  
AWAITING DETERMINATION OF  
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 NERC V. GLICKMAN

<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
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

<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
15. BLUE FORD FRE		6,500 MBF	BOISE-CASCADE	AWARDED 11/30/95
16. BANTY SLV WAW		610 MBF	ELLINGSON LUM.	NOT AWARDED, NO "RESPONSIBLE BIDDER WANTED SALE
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	HIGH BIDDER DECLINED AWARD

NO OTHER RESPONSIBLE  
BIDDERS, SALE WILL NOT BE  
AWARDED

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.	SALE AWARDED 11/03/95

V. SALES CANNOT BE AWARDED TO HIGH BIDDER

	<u>SALE</u>	<u>NE</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
26.	FORKS	MAL	5,000 MBF	SNOW MIN. 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	ROGGE WOOD	HIGH BIDDER NOT RESPONSIBLE, LETTER OF INTEREST SENT TO OTHER BIDDERS BY COB 1/25/96.
30.	ALLEN	WAW	3,800 MBF	ROGGE WOOD	HIGH BIDDER NOT RESPONSIBLE, LETTER OF INTEREST SENT TO OTHER BIDDERS BY 1/25/96.
31.	CANTREL SPRG	WAW	610 MBF	ROGGE WOOD	NOT AWARDED, NO *RESPONSIBLE BIDDER WANTED SALE
32.	HORN SLV	WAW	1,340 MBF	KINZUA CORP	HIGH BIDDER NO LONGER IN BUSINESS. LETTER OF INTEREST SENT TO OTHER BIDDERS BY 1/25/96.
33.	PRONG SLV	WAW	3,800 MBF	ROGGE WOOD	HIGH BIDDER NOT RESPONSIBLE, LETTER OF INTEREST SENT TO OTHER BIDDERS BY COB 1/25/96.

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

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

PLEASE DELIVER TO:

To: Don Barry 208-4684  
Bob Baum 208-3877  
Dinah Bear 456-0753  
Ted Boling 514-4231  
Peter Coppelman, 514-0557  
Lois Schiffer,  
Jim Simon  
Al Ferlo 514-4240  
Greg Frazier 720-5437  
Mike Gippert, 690-2730  
Jay McWhirter  
Tim Obst  
Jeff Handy (503) 326-3807  
Nancy Hayes 208-5242  
Elena Kagan 456-1647  
Don Knowles (503) 326-6282  
Karen Mouritsen 219-1792  
Roger Nesbit (503) 231-2166  
Chris Nolin 395-4941  
Jim Sutherland(503) 465-6582  
Tom Tuchmann (503) 326-6254  
Sue Zike (503) 326-7742

NUMBER OF PAGES: 3

DATE: January 29, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman. Attached for your information is a summary of timber sales affected by the rulings in NFRC v. Glickman. Please be advised that these are not exact figures. I have rounded most of the volumes and some sales are undergoing further review.

PRIVILEGED AND CONFIDENTIAL  
ATTORNEY/CLIENT DOCUMENT

STATUS OF TIMBER SALES AS OF JANUARY 29, 1996

The status of the timber sales are set forth in three categories: (1) timber sales that are currently required to be released by the agencies; (2) timber sales that may be required to be released on the basis of the Ninth Circuit or other District Courts rulings; and (3) those sales that a court has affirmatively ruled do not have to be released.

**Forest Service:**

1. 154.45 mmbf released.<sup>1</sup>
  - A. 73.4 mmbf Section 318 Sales
    - 58.60 mmbf (released)
    - 8.83 mmbf (Boulder Krab and Elk Fork)
    - 6 mmbf ("High Bidder Sale" -Holdaway II)
  - B. 81.05 FY 1991-1995 Sales.
    - 2.95 mmbf (Tip and Tiptop)
    - 39.4 mmbf ("High Bidder" Sales -Forest Service is soliciting offers)
    - 38.7 mmbf (released)
  
2. 283 mmbf that may be required to be released.
  - 41.4 mmbf (sales subject of litigation in Seattle Audubon Soc'y v. Lyons, Judge Dwyer - W.D. Wash)
  - 11.86 mmbf (Gatorson sale - subject of litigation in Smith v. U.S. Forest Service, Judge Quackenbush - E.D. Wash.)
  - 230 mmbf (Marbled Murrelet and NSO sales)<sup>2</sup>

---

<sup>1</sup> This number remains static. The Forest Service and BLM are in the process of soliciting offers for timber sales that had not been released because the high bidder was either unwilling or unable to accept the sale. For purposes of this report, those sales are assumed to be released.

<sup>2</sup> The agencies are re-evaluating the sales according to the standards set forth in the 1/19/96 Order and will make a final determination as to those sales that may be withheld on the basis of a marbled murrelet nesting determination as defined by the 1/19/96 Order.

3. 304.5 mmbf that Court has affirmatively ruled does NOT have to be released

296 mmbf (pre-318 sales)  
 8.5 mmbf (sales that are impossible to award in original terms and volumes)

**BLM:**

1. 191.9 mmbf released.

A. 76.3 mmbf Section 318 Sales

64.2 mmbf (released).  
 12.1 mmbf (that the agency is currently surveying for threatened or endangered bird species. Will solicit offers after surveying is complete.)

B. 115.6 mmbf FY 1991-1995 Sales

115.6 mmbf (released)

2. 20.1 mmbf that may be required to be released.

Sales withheld for marbled murrelet issues  
 9.9 mmbf (Section 318)  
 10.2 mmbf (FY 1991-1995 sales)

3. 21.8 mmbf that Court has affirmatively ruled does NOT have to be released.

21.8 mmbf (pre-Section 318 sales)  
 \* original volumes not available for two sales that are impossible to award.

**TOTAL VOLUME RELEASED (FS and BLM) = 346.35**

To: Peter Coppelman  
From: Al Ferlo  
Date: February 12, 1996  
Re: "Next high bidder" issue - request for stay pending appeal

You have asked for supplemental information concerning the sales which were subject to our January 31, 1996, request for a stay pending appeal from the Ninth Circuit. The BLM and the Forest Service identified seventeen sales which were subject to the district court's January 10, 1996, order requiring the agencies to release previously withheld timber sales. The sales, which total approximately 62 million board feet, are listed on the attached chart. Also on the chart you will find the location of the sales and the number of board feet for each sale. You should also note that each of these sales was included in our first request for a stay pending appeal to the Ninth Circuit which we filed on October 19, 1995. The Ninth Circuit denied that request. Thus, our January 31, 1996 request is the second attempt to convince the court of appeals to prevent timber cutting on these sales.

The environmental effects from harvesting the sales depends on the location of the sales. Four of the sales (the two BLM sales and two Forest Service sales) are located on land subject to the Northwest Forest Plan. The sales would eliminate spotted owl habitat. One unit on the Ollala Wildcat sale will be withheld under Section 2001(k)(2) due to the presence of a spotted owl nest. The agency will replace the volume withheld under the terms of Section 2001(k)(3). The remaining sales are found in the "eastside" forests which are not subject to the Northwest Forest Plan. The main environmental impacts arising from these sales are adverse habitat impacts to salmon listed as threatened under the Endangered Species Act. More specific information on the environmental harm likely to result from the harvesting of the sales, to the extent we have it, is contained in the affidavits by Mike Spear and Jacqueline Wyland which were attached to the motion for stay in both the district court and the court of appeals.

The BLM reports that, for the two sales within its jurisdiction, it has identified an eligible bidder and is in a position to actually award the sales pursuant to the district court's order. Two of the fifteen Forest Service sales (the Hiack Thin and the Sweet Pea) have no interested bidders, and will therefore not be awarded. The Forest Service has not yet received information on the remaining thirteen sales to allow the determination to be made with any certainty whether any interested bidders remain. The Forest Service has sent letters to all bidders on the sales, informing them of the court's decision. The letters requested the bidders to make known their interest in the sales by the end of February.

	<u>SALE NAME</u>	<u>NATIONAL FOREST NAME</u>	<u>VOLUME</u>
1.	John Lodgepole	Winema . . . . .	2.2 MMBF
2.	Nelson	Winema . . . . .	7.4 MMBF
3.	Banty Salvage	Wallowa Whitman . . . . .	.610 MMBF
4.	Johnson Salvage	Wallowa Whitman . . . . .	3.6 MMBF
5.	Hilton	Wallowa Whitman . . . . .	5.3 MMBF
6.	Sweet Pea	Wallowa Whitman . . . . .	1.28 MMBF
7.	Forks	Malheur . . . . .	5.0 MMBF
8.	Off Broadway	Ochoco . . . . .	12.3 MMBF
9.	Hiack Thin	Siuslaw . . . . .	1.6 MMBF
10.	Eagle Rdg Houselog	Umatilla . . . . .	.17 MMBF
11.	Allen	Wallowa Whitman . . . . .	3.8 MMBF
12.	Cantrel Springs	Wallowa Whitman . . . . .	.61 MMBF
13.	Horn Salvage	Wallowa Whitman . . . . .	1.34 MMBF
14.	Prong Salvage	Wallowa Whitman . . . . .	3.8 MMBF
15.	Holdaway 2	Gifford Pinchot . . . . .	1.7 MMBF
	<b>TOTAL FOREST SERVICE TIMBER</b> . . . . .		<b>50.63 MMBF</b>
	<b>BLM SALES</b>		
1.	Olalla Wildcat . . . . .		10.568 MMBF
2.	Twin Horse . . . . .		1.498 MMBF
	<b>TOTAL BLM TIMBER</b> . . . . .		<b>12.066 MMBF</b>
	<b>TOTAL ALL TIMBER</b> . . . . .		<b>62.696 MMBF</b>

**Rule 34****RULES OF APPELLATE PROCEDURE**

(e) **Non-Appearance of Parties.** If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(f) **Submission on Briefs.** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) **Use of Physical Exhibits at Argument; Removal.** If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.)

**NOTES OF ADVISORY COMMITTEE  
ON APPELLATE RULES  
1967 ADOPTION**

A majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request. The Committee is of the view that thirty minutes to each side is sufficient in most cases, but that where additional time is necessary it should be freely granted on a proper showing of cause therefor. It further feels that the matter of time should be left ultimately to each court of appeals, subject to the spirit of the rule that a reasonable time should be allowed for argument. The term "side" is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it. In other particulars this rule follows the usual practice among the circuits. See 3d Cir. Rule 31; 6th Cir. Rule 20; 10th Cir. Rule 23.

**1979 AMENDMENT**

The proposed amendment, patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 1975, created by Public Law 489 of the 92nd Cong. 2nd Sess., 86 Stat. 807, sets forth general principles and minimum standards to be observed in formulating any local rule.

**1986 AMENDMENT**

The amendments to Rules 34(a) and (e) are technical. No substantive change is intended.

**1991 AMENDMENT**

Subdivision (d). The amendment of subdivision (d) conforms this rule with the amendment of Rule 28(h).

**1993 AMENDMENT**

Subdivision (c). The amendment deletes the requirement that the opening argument must include a fair statement of the case. The Committee proposed the change because in some circuits the court does not want appellants to give such statements. In those circuits, the rule is not followed and is misleading. Nevertheless, the Committee does not want the deletion of the requirement to indicate disapproval of the practice. Those circuits that desire a statement of the case may continue the practice.

**Rule 35. Determination of Causes by the Court in Banc**

(a) **When Hearing or Rehearing in Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) **Suggestion of a Party for Hearing or Rehearing in Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) **Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate.** If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(d) **Number of Copies.** The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case. (As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994.)



## U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General

Washington, D.C. 20530

DRAFT

February 14, 1996

90-1-1-2928

## MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Northwest Forest Resource Council v. Glickman,  
Civ. No. 95-6244-HO

RECOMMENDING NO REHEARING EN BANC FROM DENIAL OF EMERGENCY STAY PENDING APPEAL. (The Department of Agriculture, by letter dated February 13, 1996, and the Department of the Interior, by letter dated February \*\*, 1996, recommend seeking rehearing en banc from the denial of our motion to stay pending appeal. The General Litigation Section recommends against rehearing. The United States Attorney's Office is not involved in this appeal.)

Time: A motions panel of the court (Judges Canby and Hawkins) denied the motion for stay pending appeal on February 8, 1996. Any motion for rehearing must be filed by February 22, 1996. Because the BLM and the Forest Service are in a position to release several sales within the next two days, expedited consideration of this request is necessary. The intervening environmental groups have not requested en banc consideration of the denial. Briefs on the merits are due on February 29, 1996, and oral argument has been set for the week of May 6, 1996.

## ISSUE PRESENTED

Whether to seek rehearing en banc of the court's denial of our motion for stay pending appeal.

## STATEMENT

On January 30, 1996, you authorized an appeal and stay in this case. We filed our motion for stay pending appeal on January 31, 1996. The motion was first presented to the panel (Judges Leavy, Noonan and Hawkins) which is currently considering the merits of our first appeal in this ongoing dispute over the interpretation of Section 2001(k)(1) of the 1995 Rescissions Act. That panel declined to consider either the motion or the merits of the new

- 2 -

DRAFT

appeals. The motion was then referred to the sitting motions panel. That panel denied the motion without opinion on February 8, 1996.

We have now received requests from the Department of Agriculture and the Department of the Interior to seek rehearing en banc of that order. Neither agency has offered any legal rationale or justification for seeking rehearing en banc. After carefully considering the request, the Environment and Natural Resources Division reluctantly recommends against seeking such extraordinary relief in this case for several reasons.

## DISCUSSION

Rehearing en banc from a denial of a stay request is truly extraordinary relief. The Environment and Natural Resources Division seeks to limit requests for this extraordinary relief to only those cases which present issues of national or regional concern or cases in which the court of appeals has gravely misunderstood or misinterpreted controlling law. Unfortunately, the circumstances of this case simply do not warrant such a request here. Indeed, it is significant that neither of the affected agencies could identify any legal justification to support their request for rehearing. Their inability to identify any issue of great national significance or misinterpretation of controlling law undercuts what is apparently only their sincere desire to prevent these few timber sales from harvest. While we too deplore the unnecessary damage to valuable forest ecosystems which the district court's order requires, absent some valid legal or factual justification we cannot support or recommend any further attempts to obtain equitable relief from the district court's order pending appeal. Such a request under these circumstances would, I believe, severely damage the credibility of the Environment Division, if not the entire Department of Justice, with the Ninth Circuit. There also exist several other reasons which counsel against seeking this extraordinary relief.

First we would have no new arguments to present in favor of rehearing. In In re Becraft, 885 F.2d 547 (9th Cir. 1989), the court of appeals found that a petition for rehearing on the merits of an appeal is frivolous where it did nothing more than simply reargue the same points that had previously been rejected. In those circumstances the court imposed monetary sanctions against the attorney who prepared the petition. We are not aware of any new arguments, nor has any interested federal agency suggested any, that can be presented on rehearing, and no other interested federal agency has suggested that such arguments exist. Moreover, this is not the first time that we have asked the court of appeals to relieve us of the obligation to release these timber sales. All but two of the seventeen timber sales subject to the district court's January 17, 1996, order were also included in the group of

- 3 -

DRAFT

sales addressed in the court's September 10, 1995 order.<sup>1/</sup> The sales were thus within the scope of our October 1995 stay request - a request which the court emphatically denied.<sup>2/</sup> The only reason that these sales have generated an additional round of judicial review is that the agencies, for various reasons, could not award the sale to the high bidder. Thus, our January 31, 1996, request for a stay constituted our second request for relief from the court on these sales.

Second, as a procedural matter, any petition for rehearing and suggestion for rehearing en banc will be first presented to the panel that issued the order on the motion. Under the rules of the court of appeals, it is entirely within the discretion of that panel to decide whether to present the request for en banc consideration to the entire court for consideration. The composition of the panel for this motion would generally be considered favorable to the types of arguments advanced in our original request. The fact that that panel here rejected the request without comment suggests that these judges would be unwilling to refer the matter to the full court. Also, it should be noted that one member of the motions panel, Judge Hawkins, is a member of the panel considering the merits of our appeal from the September 10, 1995 order. That appeal is now under submission, and we anticipate a decision shortly. Judge Hawkins' familiarity with the issues involved due to his participation on the merits panel, and his unwillingness to grant a stay at this time, weighs heavily against our chances of success on any request for en banc consideration.

Third, the court may be near to rendering a decision on the merits of our broader appeal from the September 10, 1995 order. As discussed above, the court has that case under submission. A victory in that case would moot any claim for the release of these sales because none of the sales involved here fall within the scope of Section 2001(k)(1) as interpreted by the government. While we are not overly optimistic of our chances of success on that claim, a victory there would give us all the relief being sought through the request for rehearing en banc.

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<sup>1/</sup> Two of the sales included in January 17, 1996 order are sales previously offered under Section 318. The sales are at issue here because the high bidders on those sales had renounced their bids shortly after the sales were offered in 1990. The high bidder on one of the sales has now asked the BLM to "reinstate" its prior bid. If BLM grants that request, then this sale will no longer be at issue.

<sup>2/</sup> In denying the stay, the court found that we had failed to present a serious legal question and that the balance of hardships did not tip in favor of the government.

- 4 -

**DRAFT**

Finally, the court of appeals has expedited the appeal on the merits. Our brief is due on February 29, 1996, and the case is set for oral argument during the week of May 6, 1996. Thus, we may obtain relief on the merits in time to avoid some, but not all, of the harsh environmental consequences resulting from the harvesting of these sales.

**CONCLUSION**

For the foregoing reasons, I recommend against seeking rehearing and rehearing en banc from the denial of the stay pending appeal.

Respectfully submitted,

IN RE BECRAFT

547

Cite as 883 F.2d 547 (9th Cir. 1989)

He had already received three months severance pay in addition to several other benefits upon his discharge. Although Mundy had not yet filed any claims, he had retained legal counsel at the time the offer was made. Whether the release agreement at issue here more closely resembles a post-termination settlement offer or a contemporaneous severance pay package is a question properly resolved by an examination of the facts. We cannot say that the district court abused its discretion in finding it was a settlement offer, inadmissible under FRE 408.

[6] Even if excluding evidence of the release agreement was an abuse of discretion, Mundy did not suffer any prejudice because of the district court's decision. The mere offer of money in exchange for a release of all claims does not by itself raise an inference that HFC's articulated reasons for discharging Mundy are pretextual. Viewing all of the facts, including evidence of the release agreement, in the light most favorable to Mundy, no genuine issue has been raised as to pretext and the grant of summary judgment is still appropriate.

AFFIRMED.

REINHARDT, Circuit Judge:  
I concur in the result.



In re Lowell H. BECRAFT, Jr.  
UNITED STATES of America,  
Plaintiff/Appellee,

v.

Kenneth W. NELSON,  
Defendant/Appellant.

No. 88-1513.

United States Court of Appeals,  
Ninth Circuit.

Sept. 6, 1989.

The Court of Appeals sua sponte issue show cause order requesting tax evasion

defendant's counsel to explain why he should not be sanctioned for filing frivolous petition for rehearing. The Court of Appeals held that defense counsel's conduct in filing petition for rehearing, based upon argument that federal tax laws did not apply to resident United States citizens, constituted frivolous conduct warranting imposition of sanctions in amount of \$2,500.

Sanctions ordered.

Attorney and Client ¶24

Defense counsel's conduct in filing petition for rehearing in appeal from tax evasion conviction, based upon argument that federal tax laws did not apply to resident United States citizens, constituted frivolous conduct warranting imposition of sanctions in amount of \$2,500. F.R.A.P. Rule 38, 28 U.S.C.A.

Before FERGUSON, NORRIS and WIGGINS, Circuit Judges.

ORDER

In February 1988, Kenneth Nelson was convicted in the United States District Court for the District of Nevada on three counts of failure to file income tax returns in violation of 26 U.S.C. § 7203. Nelson, represented by counsel Lowell H. Becraft, Jr., then appealed to this court claiming, *inter alia*, that the district court erred in refusing to give his proposed jury instruction that a United States citizen residing in the United States is not subject to the federal income tax laws.

By memorandum disposition dated March 22, 1989, this court affirmed Nelson's conviction, noting that Becraft's argument regarding the inapplicability of the federal tax laws to resident United States citizens had no basis in law. Becraft thereafter filed a petition for rehearing and/or suggestion for rehearing en banc [hereafter "petition for rehearing"]. In the petition

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for rehearing, Becraft once again argued that the federal tax laws are inapplicable to resident United States citizens.

Upon receipt of the petition for rehearing, we, *sua sponte*, issued a show cause order requesting Becraft to explain why damages in the sum of \$2500 should not be assessed against him for filing a frivolous petition for rehearing. See Appendix A. We have now reviewed Becraft's several-hundred-page reply to our show cause order [hereinafter "reply"] and have reached the conclusion that Becraft's conduct warrants sanctions.

Federal Rule of Appellate Procedure 38 provides this court with the authority to impose sanctions to deter frivolous appeals and to conserve limited federal judicial resources.<sup>1</sup> See, e.g., *Grimes v. Commissioner*, 806 F.2d 1451, 1454 (9th Cir.1986) (per curiam); *Trohimovich v. Commissioner*, 776 F.2d 873, 876 (9th Cir.1985); *Nunley v. Commissioner*, 758 F.2d 372, 378 (9th Cir.1985) (per curiam). Pursuant to Rule 38, sanctions may be imposed against *pro se* litigants, *Grimes*, 806 F.2d at 1454; *Trohimovich*, 776 F.2d at 876, litigants represented by counsel, *First Investors Corp. v. American Capital Financial Services, Inc.*, 828 F.2d 307, 310 (9th Cir.1987); *Wisconsin v. Glick*, 782 F.2d 670, 678-74 (7th Cir.1986), and/or directly against appellate counsel. *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 675 (9th Cir.1981); *Coghlan v. Starkey*, 852 F.2d 806, 818 (3d Cir.1988); *Bralley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir.1987).

1. Rule 38 provides:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

2. While Becraft devotes a good portion of his brief, petition for rehearing, and reply to a discussion of the structure of the Internal Revenue Service and the control numbers designated to income tax forms pursuant to the Paperwork Reduction Act, he does so only to provide support for his fundamental proposition that the Sixteenth Amendment does not authorize a direct non-apportioned tax on citizens residing in the United States. Hence, his entire legal argument hinges on the constitutionality of directly taxing resident United States citizens. Additionally, we note that much of Becraft's reply is also

In assessing the propriety of appellate sanctions, we must determine whether the issue raised on appeal—or as in this case, a petition for rehearing—is indeed frivolous. It is well settled that an appeal is frivolous when the result is obvious or the arguments of error are wholly without merit. *Grimes*, 806 F.2d at 1454; *Gattuso v. Pecorella*, 733 F.2d 709, 710 (9th Cir.1984); *Dewitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir.1983). We have no hesitation concluding that the petition for rehearing filed by Becraft in this case meets the frivolity standard.

Notwithstanding Becraft's insistence that his argument regarding the inapplicability of the federal income tax laws to resident United States citizens raises numerous complex issues, his position can fairly be reduced to one elemental proposition: The Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens and thus such citizens are not subject to the federal income tax laws.<sup>2</sup> We hardly need comment on the patent absurdity and frivolity of such a proposition. For over 75 years, the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment's authorization of a non-apportioned direct income tax on United States citizens residing in the United States and thus the validity of the federal income tax laws as applied to such citizens. See, e.g., *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 12-19, 36 S.Ct. 286, 239-42, 60 L.Ed. 493 (1916); *Ward*, 833 F.2d at 1539; *Lovell v. United States*, 755 F.2d 517, 519 (7th

devoted to a discussion of the limitations of federal jurisdiction to United States territories and the District of Columbia and thus the inapplicability of the federal income tax laws to a resident of one of the states. We are somewhat perplexed as to why he included this contention in his reply since he omitted any reference to this issue in the petition for rehearing. In any event, as Becraft should be well aware, this claim also has no semblance of merit. The Eleventh Circuit summarily rejected the identical argument in *United States v. Ward*, 833 F.2d 1538, 1539 (11th Cir.1987), cert. denied, — U.S. —, 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988), a case in which Becraft served as the defendant's appellate counsel.

## IN RE BECRAFT

549

Cite as 885 F.2d 947 (9th Cir. 1989)

Cir.1984); *Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir.1984); *United States v. Romero*, 640 F.2d 1014, 1016 (9th Cir. 1981). Indeed, in *Lovell*, one of the more recent cases explicitly rejecting a Sixteenth Amendment argument virtually identical to Becraft's position in this case, the court sanctioned the *pro se* appellants for raising this and other federal tax exemption claims on appeal. See *Lovell*, 755 F.2d at 520. If a claim is sufficiently frivolous to warrant sanctions against a *pro se* appellant, it unarguably supports the assessment of sanctions against a seasoned attorney with considerable experience in the federal courts.

In reaching the conclusion the Becraft's petition for rehearing is frivolous, we rely not only on the fact that the argument is in direct conflict with "firmly established rules of law for which there is no arguably reasonable expectation of reversal or favorable modification," *McDougal v. Commissioner*, 818 F.2d 453, 455 (5th Cir.1987), but also on the fact that this wholly meritless claim was pressed in a petition for rehearing after this court had already summarily rejected the claim and characterized it as having no basis in law. Thus, the result of the petition for rehearing was even more obvious than the initial appeal.

Indeed, it is beyond our comprehension that a competent attorney, which Becraft certainly is, could harbor a good faith belief that this panel or the court sitting *en banc* would reconsider the rejection of Nelson's claim of federal tax exemption. While a finding of bad faith is not necessary to impose sanctions under Fed.R. App.P. 38, see *Coghlan*, 852 F.2d at 814-815 (bad faith not required element of imposition of sanctions under rule 38); *Bralley v. Campbell*, 832 F.2d at 1512 (finding of subjective bad faith unnecessary to impose sanctions under Rule 38); *Grimes*, 806 F.2d at 1454 ("The purpose of Rule 38 ... is to induce litigants to conform their behavior to the governing rules, regardless of their subjective belief."), the fact that Becraft likely filed the petition for hearing absent a good faith belief of its justification contributes to our strong conviction that Becraft's conduct warrants the imposi-

tion of sanctions. See *Coghlan*, 852 F.2d at 814 ("Bad faith may aggravate the circumstances justifying sanctions....")

Moreover, we believe that Mr. Becraft's litigation record in the federal appellate courts demonstrates the necessity of sending a message to Becraft that frivolous arguments will no longer be tolerated. Our research reveals that we are not the first appellate court in which Becraft has raised this patently frivolous Sixteenth Amendment claim. In *Ward*, a case in which Becraft served as defendant's appellate counsel, see *supra*, n. 1, the Eleventh Circuit characterized as "utterly without merit" the identical argument raised by Becraft here regarding the applicability of the federal tax laws to resident United States citizens. 838 F.2d at 1539. Moreover, Becraft also advanced the patently frivolous claim in *Ward* that the federal income tax laws apply only to residents of federal territories and the District of Columbia. *Id.*; see *supra*, n. 1.

Unfortunately, Becraft's record of advancing wholly meritless claims does not end with *Ward*. *United States v. Stahl*, 792 F.2d 1438 (9th Cir.1986), cert. denied, 479 U.S. 1086, 107 S.Ct. 888, 93 L.Ed.2d 840 (1987), and *United States v. Sitka*, 845 F.2d 43 (2d Cir.), cert. denied, — U.S. —, 109 S.Ct. 77, 102 L.Ed.2d 54 (1988), appeals in which Becraft served as co-counsel and counsel respectively, addressed the claim that the Sixteenth Amendment was never properly ratified and that therefore the federal courts lack jurisdiction to entertain tax evasion prosecutions. Needless to say, both courts soundly rejected this contention. See *Sitka*, 845 F.2d 44-47; *Stahl*, 792 F.2d 1438-1441. Becraft's record in the federal courts thus exhibits an alarming willingness to utilize appellate court resources to adjudicate claims that a competent attorney should realize have no reasonable possibility of success.

Based on Becraft's conduct in this case and prior cases, it is clear to us that Becraft has no appreciation for the limited nature of the federal judicial resources upon which all aggrieved individuals depend for vindication of statutory and con-

stitutional rights. For if he did have respect for the extreme demands constantly placed on the court's resources, he would not continue to use the courts as testing ground for revisionist historical theories that have absolutely no basis in law.

While we are in general accord with the Seventh Circuit's statement that "[c]riminal defendants and their lawyers must abide by the rules that apply to other litigants, ... including the principle that litigating positions must have some foundation in existing law or be supported by reasoned, colorable arguments for change in the law," *Wisconsin v. Glick*, 782 F.2d 670, 673 (7th Cir.1986) (citation omitted), we are hesitant to exercise our power to sanction under Rule 38 against criminal defendants and their counsel. With respect to counsel, such reluctance, as evidenced by the absence of authority imposing sanctions against defense counsel,<sup>3</sup> primarily stems from our concern that the threat of sanctions may chill a defense counsel's willingness to advance novel positions of first impression. Our constitutionally mandated adversary system of criminal justice cannot function properly unless defense counsel feels at liberty to press all claims that could conceivably invalidate his client's conviction. Indeed, whether or not the prosecution's case is forced to survive the "crucible of meaningful adversarial testing" may often depend upon defense counsel's willingness and ability to press forward with a claim of first impression. See *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984). Moreover, because of the significant liberty deprivation often at stake in a criminal prosecution, courts generally tolerate arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding. See *Glick*, 782 F.2d at 673.

3. Our research did not reveal any case in which the court has imposed sanctions on defense counsel under Rule 38 and only one case in which sanctions were assessed against a criminal defendant. See *Glick*, 782 F.2d at 673-74 (state criminal defendants sanctioned for bringing frivolous appeal after unsuccessfully attempting to remove their state criminal prosecutions to federal court).

Notwithstanding the legitimate countervailing concerns that accompany imposing sanctions against defense counsel, we nevertheless believe that when a criminal defense counsel reasserts an argument in a petition for rehearing which was summarily rejected on direct appeal, and which flies in the face of unambiguous, firmly established law, that attorney exposes himself to the imposition of sanctions under Rule 38. Accordingly, we order Becraft to pay \$2,500 in damages. With so many worthy claims waiting to be adjudicated, we are not obliged to stand by silently when an attorney repeatedly breaches his professional responsibility to the court.

We are fully confident that our assessment of sanctions for a frivolous petition for rehearing in this case will have no deterrent effect on litigants and attorneys' advancement of reasonably based novel positions in the future. We sincerely hope, however, that this assessment will deter Becraft from asking this and other federal courts to expend more time and resources on patently frivolous legal positions.<sup>4</sup>

The Clerk of this Court shall enter a judgment in the sum of \$2,500 in favor of the United States of America and against Lowell H. Becraft, Jr.

#### APPENDIX A

##### ORDER

Counsel for the Appellant Lowell H. Becraft, Jr., 209 Lincoln Street, Huntsville, Alabama 35801, is ordered to show cause why damages in the sum of \$2,500 should not be imposed upon him for filing a frivolous petition for rehearing and suggestion for rehearing en banc.

The reasons for the issuance of this order to show cause are as follows:

4. We wish to emphasize that our decision in this case should not be read as authority for imposing sanctions against a criminal defense counsel for a frivolous direct appeal following conviction; we express no opinion on whether or in what circumstances Rule 38 sanctions may be imposed for such an appeal.

THOMPSON v. U.S. DEPT. OF LABOR

Cite as 885 F.2d 551 (9th Cir. 1989)

APPENDIX A—Continued

1. Appellant Kenneth Nelson was convicted in the United States District Court for the District of Nevada on three counts of failure to file income tax returns in violation of 26 U.S.C. § 7203.

2. By memorandum disposition dated March 22, 1989, this court affirmed the judgment of the district court.

3. On appeal, Nelson claimed, *inter alia*, that the district court erred in refusing to give his proposed jury instructions concerning his theory that a United States citizen is not a "person" and that his wages were not "income" within the meaning of the Internal Revenue Code.

4. In affirming Nelson's conviction, this court emphasized that his construction of the Internal Revenue Code has been consistently rejected by federal courts and had no basis in law.

5. On April 5, 1989, Lowell H. Becraft, Jr., as attorney for Appellant Nelson, filed with this court a petition for rehearing and suggestion for rehearing en banc.

6. In this petition, Nelson realleges the inapplicability of federal tax laws to income earned by United States citizens.

7. Counsel for Nelson acknowledges in his petition that this issue had been presented to, and rejected by, this court in its memorandum disposition of March 22, 1989.

8. While the court did not impose sanctions in its memorandum disposition, the issue of the applicability of federal tax laws to this case was and is patently frivolous as it finds no support in the Internal Revenue Code and ignores clear legal precedent. *See Malhot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir.1984), *cert. denied*, 469 U.S. 1189, 105 S.Ct. 969, 88 L.Ed.2d 965 (1985) (appeal frivolous when "result is obvious or [when] the claims of error are wholly without merit").

9. Frivolous petitions such as this impose an unjustified burden on the federal judiciary. To raise the same frivolous contention on a petition for rehearing and suggestion for en banc review forces this court to consider sanctions in order to assure that its responsibilities are not hindered by

wasteful, time-consuming petitions requiring consideration by not only a three-member panel of the court but also the entire court because of the en banc suggestion.

10. Pursuant to F.R.App.P. 38, this court has the authority to impose sanctions to deter frivolous appeals and to conserve federal judicial resources. *See, e.g., First Investors Corp. v. American Capital Financial Services, Inc.*, 828 F.2d 307, 310 (9th Cir.1987); *Trohimovich v. Commissioner*, 776 F.2d 873, 875-76 (9th Cir.1985); *Nunley v. Commissioner*, 758 F.2d 372, 373 (9th Cir.1985) (*per curiam*); *Stites v. United States Government*, 746 F.2d 1085, 1086 (5th Cir.1984) (*per curiam*).

Therefore, Lowell H. Becraft, Jr., is ordered to show cause as set forth in this order.

All documents in opposition to this order must be filed with the Clerk of this court within 20 days from the date of the filing of this order.

The Clerk of the Court shall serve a copy of this order upon Mr. Becraft by United States mail and shall furnish counsel for appellee with a copy of this order.



Blaine P. THOMPSON, Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR, Respondent.

No. 87-7509.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 15, 1989.

Decided Sept. 8, 1989.

Former employee sought review of order of Secretary of Labor dismissing his complaint under the "nuclear whistleblower protection law." The Court of Appeals, Boochever, Circuit Judge, held that: (1) Secretary of Labor could not dismiss complaint based on settlement between employee and employer where the settlement was intentionally silent as to whether settle-

counter-posing sel, we criminal ment in a ummari-lich flies y estab-ment to Rule 88. to pay worthy we are when an profes- assess-petition ave no orneys' ovel po-ly hope, ll deter federal sources s.4 enter a avor of against H. Be- tsville, cause should a friv- gation his or- in this impos- counsel convic- r or in may be

FRAP 35  
exceptional

← exceptional?  
Paves science? &  
conflicts w/ other sciences.

Enviros want political  
revelation.  
9th case - has sanctioned

---

K McGinley

This is most visible of parts of life.  
Not just of cutthroats  
But we don't know it won't have had  
ground impacts

No calls from enviros saying to appeal.

Judgment call.  
If they're feeling so passionately, so w/ them  
↓  
Enviros they advise - not pushing.

If want to be sure,  
make call to Kirchner.  
(YES)

↓  
Not pushing, bec our org  
is weak.  
But impact - bip, up/4,  
problematic.

PRIVILEGED/CONFIDENTIAL ATTORNEY CLIENT/WORK PRODUCT

- I. INTERPRETATION OF PROVISION THAT ALTERNATIVE TIMBER "SHALL NOT COUNT AGAINST CURRENT ALLOWABLE SALE QUANTITIES"
- A. 2001(k)(3) allows agencies to exceed timber targets by volume of alternative timber
  - B. Congress intended the language in 2001(k)(3) to prohibit the agencies from counting alternative timber in calculating timber targets
  - C. PSQs cannot be used

Responses

1. Plain language of statute does not prevent agencies from using PSQ for alternative timber.

Agencies would report lower PSQ than originally estimated, separate from report on alternative timber mandated under subsection 2001(k)(3).

If report shortfall in PSQ, consider policy implications and potential impacts on litigation before Judge Jackson.

2. Reduction is proper as PSQ is a "goal," calculated for sales over the next decade with annual PSQs fluctuating.
3. If alternative timber cannot be taken from PSQs, compliance with all provisions of Act is impossible.

Dependent upon showing that alternative timber must satisfy standards and guidelines.

Issues if PSQs are not used

1. Alternative timber outside PSQs should comply with standards and guidelines.

"Notwithstanding any other provision of law" does not apply to subsection (k)(3).

Necessary to retain credibility before Judge Dwyer.

2. Address assumption by Dwyer that PSQs represent maximum timber that would be harvested.
3. Address questions re why timber was not produced as part of FY 96 Forest Plan program.

II. TERMINATION OF 2001(K) AND OBLIGATIONS TO PROVIDE ALTERNATIVE TIMBER UNDER (K) (3)

Generally: Decision that alternative timber must be immediately provided should not drive a decision re compliance with standards and guidelines.

stay argument  
K1 + K3 terminate  
1996 - earliest w/j.  
Ind. has supported  
in arguing aft stays.  
At date,  
harvesting can't go  
forward.

Argument

Rights and obligations under 2001(k) (1) and (k) (3) terminate on September 30, 1996

Subsection 2001(k) (1) provides that covered contracts be "permit[ted] to be completed in fiscal years 1995 and 1996."

Contrast with subsection 2001(j) specifying that Act's protections remain in effect as to timber sale contracts offered under **subsections 2001(b) and (d)**. See also Section 318 (k).

Industry has supported such an interpretation. See July 27, 1995 post enactment letter and oppositions to stays.

Alternative timber is a "term and condition" of the Act that does not continue in effect.

Advantages

Trees not cut by September 30, 1996 cannot be harvested under Act.

Potential challenges

1. Claims of agency delay in complying with Act and not supplying replacement timber.

Agency response

Delay has not been due to agencies' actions, but due to challenges by industry of k(2) interpretation.

2. Providing alternative timber by September 30 deadline is not impossible if compliance with the standards and guidelines is not required.

Potential risks: Several

Chief Briefing re: Alternative Volume Issue under Sec. 2001(k)  
February 16, 1996  
prepared by R6, Pacific Northwest Region

DRAFT

DRAFT  
PRIVILEGED AND CONFIDENTIAL

DRAFT

In order for the proposal to work, the the agency would need concurrence from all parties involved on the following assumption:

- ASSUMPTION 1: VOLUME MAY BE FOUND ON OTHER NWFP FORESTS IN OREGON AND WASHINGTON
- ASSUMPTION 2: STUMPAGE (value) WOULD BE ADJUSTED TO COVER DIFFERENCES IN LOGGING COSTS
- ASSUMPTION 3: ALTERNATIVE VOLUME WILL COMPLY WITH THE POLICY TO BE CONSISTENT THE NW FOREST PLAN (MINOR ADJUSTEMNTS MAY BE NEEDED BASED ON LOCAL SITUATION TO PROVIDE THE BEST POSSIBLE ENVIRONMENTAL PROTECTION).
- ASSUMPTION 4: ALTERNATIVE VOLUME WILL COME FROM THOSE LANDS ALLOCATED TO PRODUCE THE PSQ IN THE AMAs AND MATRIX.
- ASSUMPTION 5: STANDS OF MEDIUM AND LARGE CONIFERS IS WHERE ALTERNATIVE VOLUME WILL HAVE TO COME FROM
- ASSUMPTION 6: PROVIDING ALTERNATIVE VOLUME CANNOT REDUCE THE REGION'S ABILITY TO PRODUCE THE PROBABLE SALE QUANTITY (referred to in 2001(k) as "annual sale quantity") AS STATED IN THE NW FOREST PLAN, 533,000 MBF, THROUGH TIME.
- ASSUMPTION 7: ALTERNATIVE VOLUME IN MOST CASES WILL REQUIRE THE SAME PREPARATION AS NEW SALES, (time and resources), i.e. WATERSHED ANALYSIS, OWL AND MARBLED MURRELET SURVEYS, etc. THIS WORK IS IN ADDITION TO THAT PLANNED AND BUDGETED FOR IN FY96, 97, 98, AND 99.
- ASSUMPTION 8: ASSUMING THE DECADE STARTED IN 1994 AND IT WILL BE 1997 BEFORE R6 HAS A SALE PROGRAM AT THE FULL PSQ LEVEL, R6 HAS A CURRENT UNSOLD BACKLOG IN EXCESS OF 600,000 MBF. BY USING THIS BACKLOG FOR ALTERNATIVE VOLUME, R6 WILL BE ABLE TO PRODUCE THE PSQ OF 533,000 MBF IN FUTURE YEARS.

Chief Briefing re: Alternative Volume Issue under Sec. 2001(k)  
 February 16, 1996  
 prepared by R6, Pacific Northwest Region

DRAFT

DRAFT  
 PRIVILEGED AND CONFIDENTIAL

DRAFT

I. UNIVERSE OF SALES AND VOLUME EMBRACED BY 2001(k)

Table A  
 All 2001(k) Timber Sales

<u>Agency</u>	<u>No. of Sales</u>	<u>Vol. MMBF</u>
BLM	44	212
USFS:		
NWFP	78	332
Eastside	31	104
Total	153	648

A. Sales not a part of the USFS Alternative volume issue

1. BLM sales will be addressed by that agency: Vol: 212,000 MBF
2. USFS Eastside sales are not at issue here in relation to the NW Forest Plan: Vol: 104,000 MBF
3. NWFP sales previously awarded or released are not at issue here: Vol: 106, 000 MBF

II. Alternative Volume Needs

A. Suspended units in awarded sales remain at issue under section 2001(k), as to the question of alternative voume. Suspension of units is due to marbled murrelet or spotted owl.

Table B  
 NWFP Awarded Sales with Suspended Units

<u>Suspended Units Meeting Court's Nesting Criteria</u>			<u>Suspended Units Not Meeting Court's Nesting Criteria</u>			<u>Total</u>		
#	Ac	Vol MBF	#	Ac	Vol MBF	#	Ac	Vol MBF
40	954	51065	104	3067	175075	144	4041	226140

B. Unawarded Sales remaining at issue under section 2001(k)

Table C  
NWFP Unawarded Sales  
where Alternative Volume may be desirable  
for other than Nesting

	<u># units</u>	<u>Ac</u>	<u>Vol. MBF</u>
Umpqua	45	905	30600
Siskiyou	5	143	4590
TOTAL	50	1048	35190

C. Total Needed Alternative Volume

Table D  
Needed Alternative Volume

Required by Hogans Decision:	51,065 MBF (954 acres)
Required if Occupancy Definition is used:	226,140 MBF (4,041 acres), includes 51,065 MBF above
Non-nesting units:	<u>35,190 MBF</u> (1,048 acres)
Total:	261,330 MBF (5089 acres)

50 units  
Sisk +  
Umpq.

III. Availability of Alternative Volume

ASSUMPTION 1: VOLUME MAY BE FOUND ON OTHER NWFP FORESTS IN OREGON AND WASHINGTON

ASSUMPTION 2: STUMPAGE (value) WOULD BE ADJUSTED TO COVER DIFFERENCES IN LOGGING COSTS

The following forests are considered to be within the area where alternative volume could be found:

Washington  
Gifford Pinchot  
Mt. Baker-Snoqualmie  
Olympic

Oregon  
Mt. Hood  
Rogue River  
Siskiyou  
Siuslaw  
Umpqua  
Willamette

- ASSUMPTION 3: ALTERNATIVE VOLUME WILL COMPLY WITH THE POLICY TO BE CONSISTENT WITH THE NW FOREST PLAN. 8/23/95 memo
- ASSUMPTION 4: ALTERNATIVE VOLUME WILL COME FROM THOSE LANDS ALLOCATED TO PRODUCE THE PSQ IN THE AMAs AND MATRIX.
- ASSUMPTION 5: STANDS OF MEDIUM AND LARGE CONIFERS IS WHERE ALTERNATIVE VOLUME WILL HAVE TO COME FROM

Table E  
Available Lands for Replacement Volume  
on above listed National Forests

	PSQ <u>Acres</u>	Medium and Large Conifer <u>Acres</u> (equates to suspended kind and value)
AMAs:	347,000	96,000
MATRIX:	1,270,000	406,000
TOTAL	1,617,000	502,000

WE HAVE 502,000 ACRES OF MEDIUM AND LARGE CONIFERS FROM WHICH TO FIND ALTERNATIVE TIMBER OF EQUAL VOLUME, LIKE KIND AND VALUE

- ASSUMPTION 6: PROVIDING ALTERNATIVE VOLUME CANNOT REDUCE THE REGION'S ABILITY TO PRODUCE THE PROBABLE SALE QUANTITY (referred to in 2001(k) as "annual sale quantity") AS STATED IN THE NW FOREST PLAN, 533,000 MBF, THROUGH TIME.
- ASSUMPTION 7: ALTERNATIVE VOLUME IN MOST CASES WILL REQUIRE THE SAME PREPARATION AS NEW SALES, (time and resources), i.e. WATERSHED ANALYSIS, OWL AND MARBLED MURRELET SURVEYS, etc. THIS WORK IS IN ADDITION TO THAT PLANNED AND BUDGETED FOR IN FY96, 97, 98, AND 99.

IV. Funding and Staffing needed to provide 261,330 MBF of Alternative Volume

Table F  
Funding to Provide Alternative Volume

<u>51 MMBF Subject to Court Decision:</u>				<u>210 MMBF Remainder in Question:</u>		
	Volume			Volume		
FY	MBF	\$/MBF	Total	MBF	\$/MBF	Total
96	20,000	80	\$ 1,600,000			\$
97	20,000	80	\$ 1,600,000	70,000	80	\$ 5,600,000
98	11,065	90	\$ 991,000	98,935	90	\$ 8,904,000
99		90		<u>41,333</u>	90	<u>\$ 3,720,000</u>
Total	51,065		\$ 4,191,000	210,268		\$18,224,000

V. Sec. 2001(k)

A. (k)(3) requirements:

1. "Equal volume" means equal board feet
2. "of like kind and value" means same species of tree, same grade and quality (diameter and lack of knots which increases with age)

B. (k)(2) and (3) position

1. Suspension of units is limited to nesting units only and alternative volume under (3) is applicable to only suspended nesting units.
2. With additional time, staff and funding, the alternative volume for suspended units for nesting can be provided.

ASSUMPTION 8: ASSUMING THE DECADE STARTED IN 1994 AND IT WILL BE 1997 BEFORE R6 HAS A SALE PROGRAM AT THE FULL PSQ LEVEL, R6 HAS A CURRENT UNSOLD BACKLOG IN EXCESS OF 600,000 MBF. BY USING THIS BACKLOG FOR ALTERNATIVE VOLUME, R6 WILL BE ABLE TO PRODUCE THE PSQ OF 533,000 MBF IN FUTURE YEARS.

3. Alternative volume for non-nesting reasons cannot be accomplished under Sec. 2001(k)
4. Legislative remedy or adjustment in policy is required for alternative volume for non-nesting units

C. (k)(1)

1. Does section 2001(k) expire at the end of FY96?

a. Industry: subsection expires on Dec. 31, 1996; "notwithstanding any law" protection dissolves; and alternative volume provided after Dec. 31, 1996, will be subject to all environmental procedures and litigation.

b. R6 position:

1. Given the posture of the govt in the Glickman case, the 45 day requirement was tolled (failed to run). Govt agreed to waive its potential defense argument that no obligation ran past 45 days after enactment. In all fairness to beneficiaries of this law (industry), the court is unlikely to find (k) expires due to the protracted litigation in which the govt agreed not to argue a "time defense".

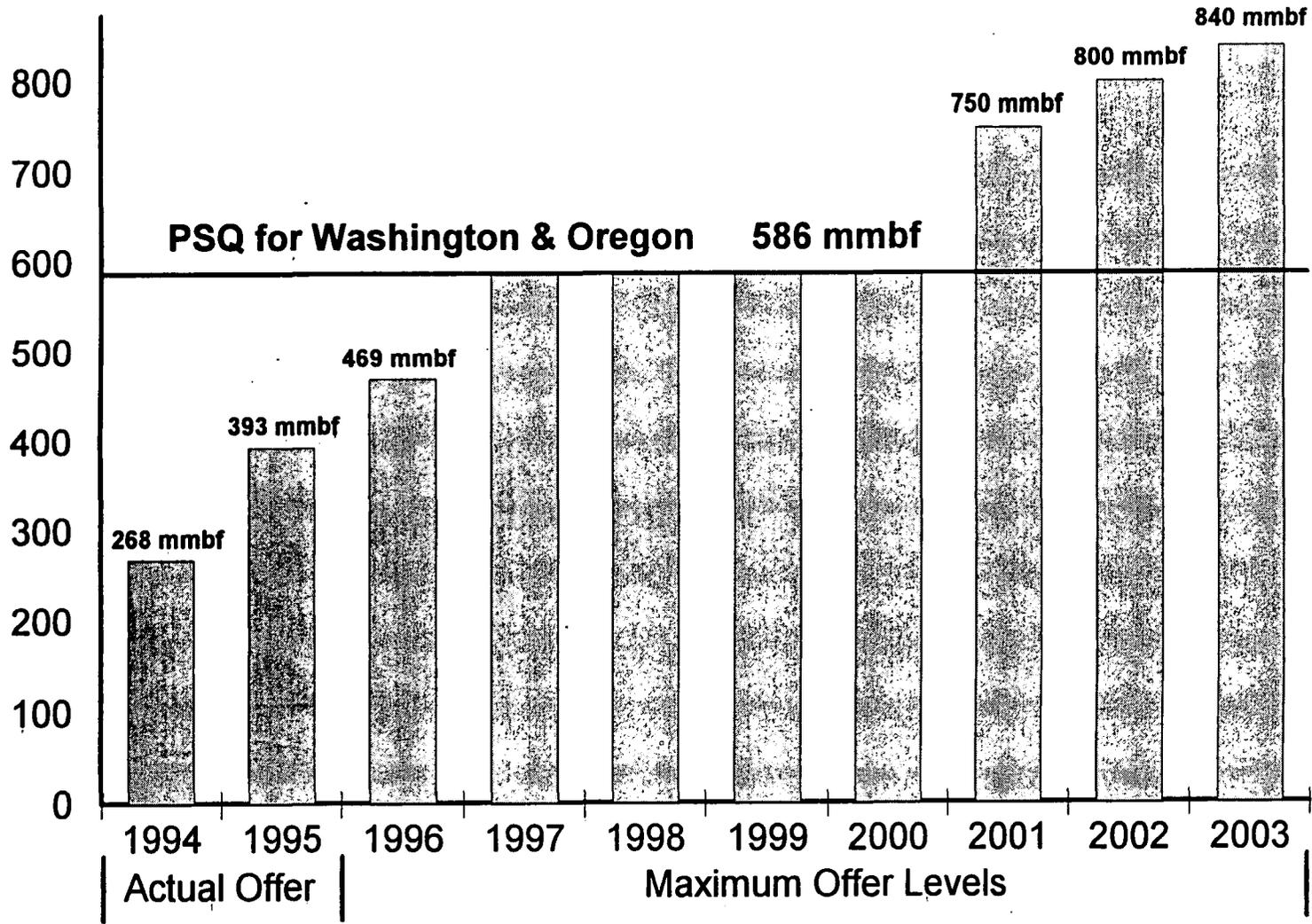
c. Recommendation:

- 1) Govt makes an express promise to provide alternative volume beyond the end of FY96.
- 2) Such a promise could be in the timber sale contract, legislative remedy or a stipulated agreement with contract holders in the Glickman case.

# President's Plan Timber Offer

## USDA Forest Service - Region 6

Millions of Board Feet



\* \* \* PRIVILEGED \* \* \*  
ATTORNEY-CLIENT DOCUMENT

MEMORANDUM

TO: Dinah Bear, CEQ  
FROM: Lois Schiffer, DOJ  
RE: Suspension of Salvage Sales  
DATE: February 21, 1996

You have asked that we review the legality of suspending the salvage timber program in one part of the nation for a period of 30 to 45 days to permit a full review of the salvage program. This would be done in response to numerous letters, concerns and allegations raised about salvage sales. Further, you have asked that we consider who should make the decision on such an administrative action.

The Rescissions Act could provide support for a suspension or moratorium in order to consider the effects of salvage logging on live trees. The expedited procedures for emergency salvage timber sales provide that the Secretaries of Agriculture and the Interior in the decision document "at the sole discretion of the Secretary concerned and to the extent the Secretary concerned considers appropriate and feasible, [can] consider the environmental effects of the salvage timber sale. . . ." § 2001(c)(1)(A). The question of salvaging green trees, therefore, can be made a mandatory consideration as part of the environmental documentation required by the Rescissions Act. Given the amount of discretion afforded the Secretaries, a decision to require such consideration should be highly defensible. }

In addition, the Rescissions Act sets forth that the Secretaries "shall prepare, advertise, offer, and award contracts during the emergency period for salvage timber sales." § 2001(b)(1). The emergency period does not conclude until September 30, 1997. § 2001(a)(2). Moreover, the Secretary is "to achieve, to the maximum extent feasible, a salvage timber sale volume level above the programmed level . . . ." § 2001(b)(1). Given that the salvage program may be operating below the "programmed level," this language would seem to ( (

< indicate that formal adoption of a suspension period or moratorium on salvage sales could be challenged by industry groups as violating the Rescissions Act. Legislative history, however, could support the full discretion of the Secretaries to proceed only with those sales that they believe should go forward. See Conference Report, 141 Cong. Rec. H 5049 (May 16, 1995); Statement of Sen. Gorton, 141 Cong. Rec. S 4875 (March 30, 1995).

Even if a court were sympathetic to the timber industry's arguments, the remedy that any court could order would be limited. A court may be able to declare that the Secretaries must terminate their suspensions, but no court has ever ordered that specific sales be offered in the context of the salvage sale.

As to the best person to make such an announcement, our best legal posture would be if the Secretaries themselves made such an announcement, in the form of the of a decision document, in lieu of the President. The Secretaries are charged under the Rescissions Act with providing salvage timber sales, but they are also charged with determining the proper environmental documentation.

Finally, this approach would seem to work best if it could be implemented prospectively. That would mean that from here on forward all documents should consider the scope of salvage sales before a sale will be approved.

If, however, the Secretaries wish to stop all timber harvesting, even where contracts have already been awarded, we will need to review the specific language in the BLM or Forest Service contracts and determine what, if any, liability could arise from a suspension or moratorium. We'll be happy to work on that tomorrow, together with OGC and the Solicitor's Office.

Approved  
KS

(?)

]?

"PROBLEM" TIMBER SALVAGE SALES

Background

The timber salvage sale program under the Rescission Act has targeted 4.5 billion board feet for the period of the Act which expires December 31, 1996. In April of 1995 timber salvage estimates were made by the Forests. It was estimated that there was 6.7 billion board feet of timber that was economically operable with the provision of the Act in Place. However it was also estimated that the Forest Service only had the administrative capability to salvage approximately 5.6 billion board feet through the end of FY 1997. It was on this basis that the Secretary agree to a volume of 4.5 BBF through December 31, 1996.

Actions

The timber salvage program was approached through a cooperative interagency memorandum of agreement. As part of the approach in determining which sales would be salvaged there were Regional interagency meetings at which areas and sales were identified as the priority areas for salvage and which areas would likely have so many problems that it would be better to pick other areas for the timber salvage effort. As noted in the background above there was the flexibility in the volume that was economically available to make these decisions since organizationally we could only salvage the 4.5 billion board feet. This action helped to eliminate what would have potentially some of the most contentious or "problem" sales.

The interagency memorandum of agreement also laid out a procedure for elevating disagreements between the agencies to higher levels. To date, only one sale has been elevated to the agency head level and ultimately it was decided by the agencies involved to defer the decision on the sale to the Chief of the Forest Service. He decided to proceed with the sale after examining the questions and evidence presented.

Other problems can be identified by litigation that has occurred. To date there have been ten salvage timber sales involved in litigation. The Forest Service has prevailed on the decisions to date. The Act provided a very narrow scope of what could be challenged.

We can also get some sense of what salvage timber sales might be considered a problem by the letters that have come to the President, the Secretary, and Forest Service. Approximately 15 sales have been identified by people who do not want them cut.

We also know that people will express concern about sales in "roadless" areas even though there are no legal prohibitions to cutting as authorized by Forest Plans. It is estimated that less than 35 sales would fall into this category.

<u>Type of Problem</u>	<u>Number of sales involved</u>	
Interagency disagreement	1	
Sales in litigation	10	involved
Concern expressed by letter	15	
Sales in roadless areas	35	
Total	61	Approximately 6% of total

Total salvage sales sold (estimate thru 2/96) 1,000

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

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

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Al Ferlo	514-4240
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Roger Nasbit (503)	231-2166
	Chris Nolin	395-4941
	Jim Sutherland(503)	465-6582
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 12

DATE: March 1, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman. Attached is our emergency motion for a stay as to the First and Last Timber Sales. We are awaiting a decision from Judge Hogan on our request that oral argument be held today.

*\* Exhibit C is not attached. Please call if you did  
not receive a copy of the earlier distribution*

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

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

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

13	NORTHWEST FOREST RESOURCE COUNCIL, )	
14		)
	Plaintiff, )	
15		)
	v. )	Civil No. 95-6244-HO
16		) (lead case)
	DAN GLICKMAN, is his capacity )	Civil No. 95-6267-HO
17	as Secretary of Agriculture; )	(consolidated case)
	BRUCE BABBITT, in his capacity as )	DEFENDANTS' MOTION
18	Secretary of Interior, )	TO STAY JANUARY 10
		) INJUNCTION AS TO FIRST
19	Defendants. )	AND LAST SALES
		) (Expedited consideration
20		) requested)

21 To avoid potentially conflicting injunctions, federal  
 22 defendants move for a stay of this Court's January 10, 1996  
 23 injunction directing the release of the First and Last timber  
 24 sales pending a decision by the United States District Court for  
 25 the Western District of Washington on a recently filed motion by  
 26 plaintiffs in SAS v. Thomas, No. C89-160WD (W.D. Wash.).

1 Upon issuance of this Court's January 10 order, because the  
2 First and Last sales were the subject of previous proceedings  
3 before Judge Dwyer of the Western District of Washington,  
4 including a pending motion to clarify and enforce judgment filed  
5 by SAS plaintiffs, the Forest Service sought an immediate  
6 conference before Judge Dwyer to clarify the status of the First  
7 and Last sales. A copy of the notice was filed with this Court  
8 on January 18.

9 By order entered February 23, 1996 (attached hereto as Ex.  
10 A), Judge Dwyer held that the court would not vacate its prior  
11 injunctions as to four sales, Cowboy, Nita, South Nita and  
12 Garden, pending decision by the Court of Appeals on appeals set  
13 for hearing on May 6, 1996 of this Court's rulings concerning  
14 Section 2001(k). These four sales are the subject of this  
15 Court's January 10 declaratory judgment. However, as to the  
16 First and Last sales, Judge Dwyer found that because the sales  
17 "were never enjoined herein, no relief can be ordered in this  
18 case."

19 On or about February 27, 1996, plaintiffs in SAS v. Thomas  
20 renoted their original motions for summary judgment before Judge  
21 Dwyer, seeking a permanent injunction against the First and Last  
22 sales. See Renoting of Motions, attached hereto as Ex. B. On  
23 February 29, 1996, plaintiffs filed a motion to shorten time  
24 seeking to have the court consider the merits of their motions on  
25 March 6, 1996. See Motion to Shorten Time, attached hereto as  
26 Ex. C.

1 In light of plaintiffs' recent request for an order  
2 permanently enjoining the First and Last sales, federal  
3 defendants may become subject to conflicting injunctions as to  
4 these sales. Accordingly, federal defendants move this Court to  
5 stay its injunction as to the First and Last sales pending a  
6 decision by Judge Dwyer on the renoted motions.

7 Because the First and Last sales were the subject of this  
8 Court's injunction, upon receipt of Judge Dwyer's decision, by  
9 letter dated February 28 federal defendants notified counsel that  
10 the Forest Service intended to issue award letters by close of  
11 business Friday, March 1, 1996, absent a court order. In light  
12 of the SAS plaintiffs' filings, federal defendants respectfully  
13 request an expedited telephonic conference before the close of  
14 business on March 1 to consider this request for a stay of this  
15 Court's injunction. All counsel of record have been advised that  
16 defendants would be seeking an expedited hearing on this motion.

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26

1 Dated this 29th day of February 1996.

2 Respectfully submitted,

3 KRISTINE OLSON  
4 United States Attorney  
5 JAMES L. SUTHERLAND  
6 Assistant United States Attorney

7 LOIS J. SCHIFFER  
8 Assistant Attorney General

9 

10 MICHELLE L. GILBERT  
11 EDWARD BOLING  
12 JEAN WILLIAMS  
13 ELLEN KOHLER  
14 United States Department of Justice  
15 Environment and Natural  
16 Resources Division  
17 General Litigation Section  
18 P.O. Box 663  
19 Washington, DC 20044-0663  
20 (202) 305-0460

21 Attorneys for Defendants

22 Of Counsel:

23 JAY MCWHIRTER  
24 Office of the General Counsel  
25 United States Department of Agriculture  
26 Washington, DC

KAREN MOURITSEN  
Office of the Solicitor  
United States Department of the Interior  
Washington, DC

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FEB 23 1996

AT SEATTLE CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON DEPUTY

COPY RECEIVED

FEB 23 1996

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES ATTORNEY Seattle, Washington

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. JACK WARD THOMAS, et al., Defendants. and WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Defendants-Intervenors.

NO. C89-160WD ORDER ON SAS'S MOTION TO CLARIFY AND ENFORCE AND WCLA'S MOTION TO CLARIFY OR VACATE

ctoc, wld

The history of this matter is set out in the Order on Motions Heard on November 1, 1995 (Dkt. # 1188). Plaintiffs Seattle Audubon Society, et al. (collectively "SAS"), seek an order determining that injunctions issued herein in 1990 preclude the award of six timber sales in Oregon pursuant to Section 2001(k) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act ("Rescissions Act"), Pub. L. No. 104-19. Defendants-intervenors Washington Contract Loggers Association and Northwest Forest Council (collectively "WCLA") seek an order determining that the injunctions as to four of the

ORD ON SAS'S MTN TO CLARIFY AND ENFORCE, ETC. - 1

Ex. A, p. 1 1210

1 sales are no longer in effect, or in the alternative vacating  
 2 them; as to the other two sales, WCLA contends that there is  
 3 nothing to decide, as they were withdrawn by the Forest Service  
 4 and motions to enjoin them were stricken as moot. The federal  
 5 defendants, agreeing with WCLA as to the two withdrawn sales and  
 6 with SAS as to the four others, ask that the injunctions as to the  
 7 latter be left in place pending the Ninth Circuit's expedited  
 8 ruling on the District of Oregon's recent decisions on the scope  
 9 and meaning of Section 2001(k). The matter has been thoroughly  
 10 briefed, and oral argument was heard by telephone conference call  
 11 on February 15, 1996.

12 Chief Judge Hogan, in the District of Oregon, has held that  
 13 "[t]he plain language of section 2001(k) requires the agency to  
 14 award certain previously offered sales, even those canceled or  
 15 enjoined prior to section 2001(k) (1)'s enactment, so long as there  
 16 are no threatened or endangered birds known to be nesting in the  
 17 sale unit." Northwest Forest Resource Council, et al. v.  
 18 Glickman, et al., No. C95-6244 (D. Ore. filed January 10, 1996, at  
 19 16-17). This ruling was entered only as a declaratory judgment in  
 20 regard to the four sales enjoined by this court before Section  
 21 2001(k) was enacted; the other two sales, which had never been  
 22 enjoined, were ordered released. SAS argues that Section 2001(k)  
 23 was not meant to resurrect sales found to be in violation of  
 24 Section 318 and then cancelled. It contends that Section  
 25 2001(k) (1)'s requirement that a sale be awarded "with no change in  
 26 its originally advertised terms," in view of Section 318(k)'s

Ex. A, p. 2

ORD ON SAS'S MTN TO CLARIFY AND ENFORCE, ETC. - 2

1 incorporation of substantive terms into the contracts "for the  
 2 duration of those sale contracts," means that those substantive  
 3 terms still apply, and that, accordingly, no sale can go forward  
 4 where they are violated. That issue will be argued in the Ninth  
 5 Circuit, on appeal from the District of Oregon, in the week of May  
 6 6, 1996.

7 If the sales in question were logged -- or irrevocably  
 8 awarded for logging -- in the meantime, the harm would be irrepa-  
 9 rable. These sales were not only violative of Section 318, they  
 10 would also contravene and jeopardize the Northwest Forest Plan.

11 The injunctions prohibiting the federal defendants from going  
 12 forward with the Cowboy, Nita, South Nita, and Garden sales,  
 13 entered herein, have never been vacated, and the only one appealed  
 14 from was affirmed by the Court of Appeals. The orderly adminis-  
 15 tration of justice, and the avoidance of irreparable harm, require  
 16 that these injunctions not be vacated pending the Ninth Circuit's  
 17 decision in the appeals to be argued in the week of May 6. If the  
 18 Court of Appeals affirms the District of Oregon decision, this  
 19 court will vacate the injunctions; if it reverses, there will be  
 20 no legal authority for the agency to proceed with these four  
 21 sales.

22 The First and Last sales are in a different category. They  
 23 were never enjoined by this court but, instead, were voluntarily  
 24 cancelled by the Forest Service. As to them the District of  
 25 Oregon has issued not just a declaratory judgment but an injunc-  
 26 tion requiring that they go forward under Section 2001(k). The

Ex. A, p. 3

ORD ON SAS'S MTN TO CLARIFY AND ENFORCE, ETC. - 3

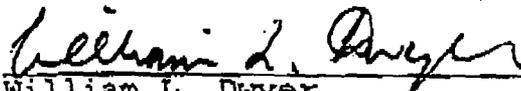
AO 72

1 Court of Appeals will decide whether they are within the scope of  
 2 Section 2001(k). These two sales are not the subject of any  
 3 injunction issued herein, and, as to them, WCLA's motion must be  
 4 granted and SAS's motion denied.

5 For the reasons stated, the court will not vacate the injunc-  
 6 tions as to the Cowboy, Nita, South Nita, and Garden sales pending  
 7 the Court of Appeals' review, set for hearing in the week of  
 8 May 6, 1996, of the District of Oregon's rulings concerning  
 9 Section 2001(k). As to the First and Last sales, which were never  
 10 enjoined herein, no relief can be ordered in this case. The  
 11 motions are granted in part and denied in part accordingly.

12 The clerk is directed to send copies of this order to all  
 13 counsel of record.

14 Dated: February 22, 1996.

15  
 16   
 17 William L. Dwyer  
 18 United States District Judge  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26

Ex. A, p 4

ORD ON SAS'S MTN TO CLARIFY AND ENFORCE, ETC. - 4

JUDGE DWYER

PATTI A. GOLDMAN (WSB #24426)  
TODD D. TRUE (WSB #12864)  
KRISTEN L. BOYLES (WSB # 23806)  
Sierra Club Legal Defense Fund  
705 Second Ave., Suite 203  
Seattle, WA 98104  
(206) 343-7340

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

SEATTLE AUDUBON SOCIETY, et al., )  
Plaintiffs, )  
v. )  
JACK WARD THOMAS, et al., )  
Defendants. )

Civil No. C89-160-WD  
RENOTING OF MOTIONS FOR  
SUMMARY JUDGMENT AND  
PERMANENT INJUNCTION AGAINST  
FIRST AND LAST TIMBER SALES  
Renoted on Motion Calendar  
March 22, 1996

In September 1990, plaintiffs Seattle Audubon Society et al. filed two motions for summary judgment and permanent injunctions challenging the First and Last timber sales on the Umpqua National Forest. SAS' Motion for Summary Judgment and Permanent Injunction Against the Last Timber Sale (Sept. 5, 1990); SAS' Motion for Summary Judgment and Permanent Injunction Against First Timber Sale (Sept. 17, 1990). These sales had been advertised under Section 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, Tit. III, 103, Stat. 745-750 (1989) ("Section 318"). However, in these and other sales, the Forest Service had

RENOTING OF MOTIONS FOR SUMMARY JUDGMENT AND PERMANENT  
INJUNCTION AGAINST THE FIRST AND LAST TIMBER SALES

EX B, f

1 violated its obligations under Section 318 to "minimize such  
2 fragmentation [of old growth forests] . . . on a national forest-  
3 by-national forest basis." Section 318(b)(2). Indeed, this  
4 Court held in this case that four other timber sales were illegal  
5 under Section 318 for this very reason. Order (May 11, 1990),  
6 aff'd, Seattle Audubon Society v. Robertson, No. 90-35519 (9th  
7 Cir. Aug. 27, 1990); Order (Sept. 29, 1990); Order (Oct. 19,  
8 1990).

9 Rather than face a similar court ruling and injunction with  
10 respect to the First and Last sales, the Forest Service withdrew  
11 these sales. Accordingly, this Court struck plaintiffs' motions  
12 for summary judgment and permanent injunction as to these sales  
13 as moot. Order at 1-2 (Oct. 16, 1990).

14 When Seattle Audubon asked this Court to rule on further  
15 motions for summary judgment as to these two sales (along with  
16 three others), this Court declined because the controversy had  
17 become moot. More specifically, this Court held that because the  
18 Forest Service had withdrawn the First and Last sales, and  
19 "[n]othing in the record suggests that the Forest Service plans  
20 to go forward with these sales[, t]here is accordingly no case or  
21 controversy as to them." SAS, No. C89-160WD & C89-99(T) (WD (W.D.  
22 Wash. Mar. 7, 1991). The Court, however, specifically permitted  
23 SAS to renew its motion "should the Forest Service advertise or  
24 otherwise proceed with any of these five sales." Id.

25 The Forest Service is now otherwise proceeding with the  
26 First and Last timber sales under Section 2001(k) of the  
27 Rescissions Act. Accordingly, Seattle Audubon now renews its

Ex B, p. 2

1 motions for summary judgment and permanent injunction with  
2 respect to these two sales.

3 Because these two sales violated Section 318, the authority  
4 under which they were proceeding in 1990, they were illegal ab  
5 initio, and are still illegal since timber sales offered under  
6 Section 318 continue to be "subject to the terms and conditions  
7 of this section for the duration of those sales contracts."  
8 Section 318(k). Moreover, because Section 2001(k) expressly  
9 includes the phrase "subject to Section 318," it carries forward  
10 Section 318's legal requirements with respect to those sales,  
11 like First and Last, that proceeded under that law.

12 On February 26, 1996, this Court refused to prohibit logging  
13 of the First and Last sales because no injunction had previously  
14 been issued by this Court. No such order issued previously  
15 because the Forest Service withdrew the sales. The government  
16 should not be permitted to cease illegal conduct to avoid  
17 judicial review and then reinstate that very conduct after a  
18 challenge has been held to be moot.

19 Seattle Audubon recognizes that Chief Judge Hogan has issued  
20 an injunction directing the Forest Service to award and release  
21 certain timber sales under Section 2001(k), and the First and  
22 Last sales fall within the broad reach of that ruling. Northwest  
23 Forest Resource Council v. Glickman, No. C95-6244 (D. Ore. Jan.  
24 10, 1996). However, at a hearing held on January 25, 1996, Judge  
25 Hogan made it clear that Seattle Audubon could ask him to modify  
26 that order with respect to particular sales based on the nature  
27 of proceedings in other courts concerning those sales. If this

1 Court enjoins the First and Last sales because they violate  
 2 Section 318, Seattle Audubon would ask Judge Hogan to modify his  
 3 January 10, 1996 injunction to exclude the First and Last Sales  
 4 as he previously had excluded four other sales enjoined by this  
 5 Court.

6 Respectfully submitted,

7 *Patti Goldman*

8 PATTI A. GOLDMAN (WSB #24426)  
 9 TODD D. TRUE (WSB #12864)  
 10 KRISTEN L. BOYLES (WSB #23806)  
 11 Sierra Club Legal Defense Fund  
 12 705 Second Ave., Suite 203  
 13 Seattle, WA 98104  
 14 (206) 343-7340

15 Attorneys for Plaintiffs

16 328RENOT.MOT

27 Ex.B, p.4

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1 Mark C. Rutzick, OSB #84336  
 2 Alison Kean Campbell, OSB #93011  
 3 MARK C. RUTZICK LAW FIRM  
 4 A Professional Corporation  
 5 500 Pioneer Tower  
 6 888 S.W. Fifth Ave.  
 7 Portland, Oregon 97204-2089  
 8 (503) 499-4573

Attorneys for Plaintiff

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

11	NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
12	COUNCIL, an Oregon corporation,	)	Lead Case
13		)	
14	Plaintiff,	)	Civil No. 95-6267-HO
15		)	Civil No. 95-6384-HO
16	and	)	Consolidated Cases
17		)	
18	SCOTT TIMBER CO., VAAGEN BROS.	)	MEMORANDUM IN SUPPORT OF
19	LUMBER INC., and WESTERN TIMBER	)	NFRC'S MOTION FOR ORDER
20	CO.,	)	COMPELLING PRODUCTION OF
21		)	DOCUMENTS
22	Plaintiff-intervenors,	)	
23		)	
24	vs.	)	
25		)	
26	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.	)	

Page

1 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS

**MARK C. RUTZICK LAW FIRM**  
 A Professional Corporation  
 Attorneys at Law  
 500 Pioneer Tower  
 888 S.W. Fifth Avenue  
 Portland, OR 97204-2089  
 (503) 499-4573 • Fax (503) 285-0916

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26**Introduction**

Plaintiff Northwest Forest Resource Council ("NFR") must ask the court to resolve a discovery dispute that has arisen during the 60 day stay granted by the court on January 25, 1996. The dispute involves the Forest Service survey forms and maps that contain the information required to evaluate each sale unit under the standards set out in the court's January 19, 1996 order concerning the interpretation of section 2001(k)(2).

NFR requested all of these documents from defendant Glickman in September 1995. Defendant Glickman did not object to the request, and produced approximately 10-50 pages of survey forms, maps or other documents for each sale unit in October. Declaration of Mark C. Rutzick, ¶¶ 2-4.

Following the court's January 19, 1996 order, NFR retained a biological consultant to review the survey forms and maps under the standards in the order to advise NFR which units could contain a nesting murrelet under those standards, and which units must be released.

The consultant has advised NFR that the information provided by defendant Glickman on approximately 100 of the 135 units involved is incomplete, due primarily to the absence of "detection maps" showing the location of murrelet sightings, or due to the absence of sale unit maps showing the location of the sale units, or due to the absence of both maps for some units. Both maps are required to determine if a murrelet sighting is within the boundary of a sale unit. Rutzick Declaration, ¶¶ 5-6.

Page

2 - MEMORANDUM IN SUPPORT OF NFR'S MOTION FOR  
ORDER COMPELLING PRODUCTION OF DOCUMENTS

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 285-0915

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1 For some units, both detection maps and unit maps were  
2 produced, while some units have only one of the maps and some  
3 have neither. In addition, the consultant advised NFRC that some  
4 of the documents produced by the Forest Service were illegible or  
5 incomplete. *Id.* The consultant cannot make a determination on  
6 the incomplete units without the additional information. *Id.*

7 All the missing and illegible documents were supposed to  
8 have been produced last October. NFRC has provided defendant  
9 Glickman a list of the missing and illegible documents, and  
10 requested their prompt production. Rutzick Declaration, ¶ 7.

11 Defendant Glickman has refused to produce any additional  
12 documents, to provide legible copies of illegible documents, or  
13 to investigate to determine if any additional documents exist  
14 until after the Forest Service completes its own review of all of  
15 the sale units, and has refused to make any commitment about when  
16 that review may be completed. Rutzick Declaration, ¶¶ 8-9. Yet  
17 on February 23, 1996 a reliable Forest Service employee advised  
18 NFRC that in fact the Forest Service has already completed its  
19 review of all the units, and has made determinations of which  
20 units must be released under the January 19, 1996 order. *Id.*,  
21 ¶ 10.

22 Counsel have consulted by telephone and exchange of letter,  
23 and have been unable to resolve the dispute. See attached  
24 Certificate of Compliance with Local Rule 230-2.

Page

3 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR  
ORDER COMPELLING PRODUCTION OF DOCUMENTS

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
600 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 295-0915

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**Argument**

THE COURT SHOULD ORDER DEFENDANT GLICKMAN TO PRODUCE THE MISSING AND ILLEGIBLE DOCUMENTS PROMPTLY

A. Defendant Glickman waived any objection to producing the requested documents and is required to comply fully with NFRC's document request.

As a discovery dispute, this matter is simple: NFRC requested these documents last September, defendant Glickman did not object and produced some of the documents last October, but defendant Glickman now refuses to produce the missing and illegible maps and forms until an unspecified time in the future, and even then only at some unidentified and currently unknown location. According to a reliable Forest Service employee, that review has already been completed.

Under Local Rule 230-3, defendant Glickman waived any objection to the request by failing to object to it, and must produce all the requested documents.

B. The documents are necessary for NFRC to determine which sale units may be withheld and which sale units must be released under the court's January 19, 1996 order.

From a practical standpoint, NFRC is also entitled to the documents in question promptly. During the 60 day stay granted on January 25, 1996 the Forest Service is reviewing all the sale units to be able to advise the court which units must be released under the January 19 order, and which may continue to be withheld.

Since the Ninth Circuit has scheduled oral argument on the appeals of the January 19 order for May 6, 1996, it is reasonable

Page

4 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 498-4973 • Fax (503) 295-0915

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1 to assume that defendant Glickman may ask the court to extend the  
2 stay for some or all of the units in question. NFRC's position  
3 on that issue, and its position concerning the ultimate release  
4 of each unit, is largely dependent on the information on the  
5 survey forms and maps for each unit.

6 Defendant Glickman's position makes it impossible for NFRC  
7 to knowledgeably evaluate the 100 units with missing information.  
8 Without detection maps and unit maps for each sale unit, it is  
9 impossible for anyone (including the Forest Service) to determine  
10 whether a unit can be withheld under section (k)(2). The  
11 location of each murrelet detection in relation to the boundaries  
12 of each sale unit is central to invoking section (k)(2) under the  
13 January 19 order.

14 Defendant Glickman's offer to allow NFRC to review the  
15 missing and illegible documents in an undisclosed location some  
16 time in the future effectively deprives NFRC of any ability to  
17 take a knowledgeable position on any of the sale units with  
18 incomplete data prior to the current expiration of the 60 day  
19 stay on March 25.

20 Defendant Glickman's position gives the government a  
21 monopoly on the relevant information until after March 25, and  
22 thus until after the government seeks an extension of the stay,  
23 as is highly likely.

24 Indeed, the only reason defendant Glickman gives for  
25 withholding the documents is that they are very important to the  
26 current Forest Service review of the sale units. Government

Page

5 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR  
ORDER COMPELLING PRODUCTION OF DOCUMENTS

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
600 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4673 • Fax (503) 285-0915

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counsel justifies withholding the documents by a desire to preserve "the integrity of the deliberative process." Rutzick Declaration, Attachment B.

This concern is not legitimate. NFRC has no interest in interfering with whatever "deliberative process" the Forest Service may be undertaking: we simply want a copy of the missing and illegible documents. Making a copy of maps does not interfere with any deliberative process. In any event, it appears that the Forest Service "deliberative process" is complete.

The greater puzzle is how the Forest Service could review the sale units in question without the missing maps and survey forms that have been identified by NFRC's consultants. Without detection maps and unit boundary maps, no one could determine validly if a unit could be withheld. It is far more likely that the Forest Service review process will be improved if the Forest Service responds to NFRC's requests now, and assures itself that it has all the relevant documents. That result would be in everyone's interest. Defendant Glickman's resistance to NFRC's very reasonable request seems inexplicable and should not be accepted.

**Conclusion**

The court should compel defendant Glickman to produce all

Page

6 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS

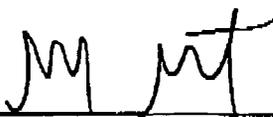
**MARK C. RUTZICK LAW FIRM**  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4572 • Fax (503) 295-0915

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1 missing and illegible documents responsive to Request For  
2 Production No. 1 immediately as required by Local Rule 230-2(c).

3 Dated this 23rd day of February, 1996.

4 MARK C. RUTZICK LAW FIRM  
5 A Professional Corporation

6 By:   
7 Mark C. Rutzick  
8 Alison Kean Campbell  
9 Attorneys for Plaintiff

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Page

7 - MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR  
ORDER COMPELLING PRODUCTION OF DOCUMENTS

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(603) 499-4573 • Fax (603) 285-0915

N01-9506\IRP91014.IGR

1 Mark C. Rutzick, OSB #84336  
 Alison Kean Campbell, OSB #93011  
 2 MARK C. RUTZICK LAW FIRM  
 A Professional Corporation  
 3 500 Pioneer Tower  
 888 S.W. Fifth Ave.  
 4 Portland, Oregon 97204-2089  
 (503) 499-4573

5 Attorneys for Plaintiff

6  
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 9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE DISTRICT OF OREGON

11	NORTHWEST FOREST RESOURCE )	Civil No. 95-6244-HO
	COUNCIL, an Oregon corporation, )	Lead Case
	)	
12	Plaintiff, )	Civil No. 95-6267-HO
	)	Civil No. 95-6384-HO
13	and )	Consolidated Cases
	)	
14	SCOTT TIMBER CO., VAAGEN BROS. )	NFRC'S MOTION FOR ORDER
15	LUMBER INC., and WESTERN TIMBER )	COMPELLING PRODUCTION OF
	CO., )	DOCUMENTS
	)	
16	Plaintiff-intervenors, )	DISCOVERY MOTION
	)	
17	vs. )	EXPEDITED CONSIDERATION
	)	REQUESTED
18	DAN GLICKMAN, in his capacity )	
	as Secretary of Agriculture; )	REQUEST FOR TELEPHONE ORAL
19	BRUCE BABBITT, in his capacity )	ARGUMENT
	as Secretary of the Interior, )	
20	)	
	Defendants, )	
21	)	
	and )	
22	)	
	OREGON NATURAL RESOURCE )	
23	COUNCIL, et al., )	
	)	
24	Defendant-intervenors. )	

Page

1 - NFRC'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS

**MARK C. RUTZICK LAW FIRM**  
 A Professional Corporation  
 Attorneys at Law  
 500 Pioneer Tower  
 888 S.W. Fifth Avenue  
 Portland, OR 97204-2089  
 (503) 499-4573 • Fax (503) 295-0810

NDI-9506\IRP91014.IGR

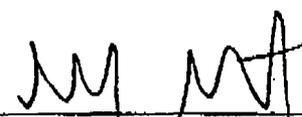
1 Pursuant to Fed. R. Civ. P. 37(a) plaintiff Northwest Forest  
 2 Resource Council ("NFRC") moves for an order compelling defendant  
 3 Glickman to produce the documents requested by NFRC in its  
 4 Request For Production No. 1 served September 12, 1995. Defen-  
 5 dant Glickman failed to produce some of the requested documents,  
 6 and produced illegible copies of other documents. Defendant  
 7 Glickman has refused to produce the missing and illegible  
 8 documents until some unspecified time in the future.

9 The parties have conferred by telephone to attempt to  
 10 resolve the dispute, but were unable to do so. A certificate of  
 11 compliance with Local Rule 230-2 is attached.

12 In support of this motion the court is respectfully referred  
 13 to the Memorandum In Support of NFRC's Motion to Compel Produc-  
 14 tion of Documents, and to the Declaration of Mark C. Rutzick  
 15 filed herewith.

16 Dated this 23rd day of February, 1996.

17 MARK C. RUTZICK LAW FIRM  
 18 A Professional Corporation

19 By:   
 20 Mark C. Rutzick  
 21 Alison Kean Campbell  
 22 Attorneys for Plaintiff

Page

2 - NFRC'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS

MARK C. RUTZICK LAW FIRM  
 A Professional Corporation  
 Attorneys at Law  
 500 Pioneer Tower  
 888 S.W. Fifth Avenue  
 Portland, OR 97204-2089  
 (503) 499-4573 • Fax (503) 295-0814

NO1-9506\RP91016.1GT

1 Mark C. Rutzick, OSB #84336  
 2 Alison Kean Campbell, OSB #93011  
 3 MARK C. RUTZICK LAW FIRM  
 4 A Professional Corporation  
 5 500 Pioneer Tower  
 6 888 S.W. Fifth Ave.  
 7 Portland, Oregon 97204-2089  
 8 (503) 499-4573

Attorneys for Plaintiff

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

11	NORTHWEST FOREST RESOURCE )	Civil No. 95-6244-HO
12	COUNCIL, an Oregon corporation, )	Lead Case
13	Plaintiff, )	
14	and )	Civil No. 95-6267-HO
15	SCOTT TIMBER CO., VAAGEN BROS. )	Civil No. 95-6384-HO
16	LUMBER INC., and WESTERN TIMBER )	Consolidated Cases
17	CO., )	
18	Plaintiff-intervenors, )	CERTIFICATE OF COMPLIANCE
19	vs. )	UNDER LOCAL RULE 230-2
20	DAN GLICKMAN, in his capacity )	
21	as Secretary of Agriculture; )	
22	BRUCE BABBITT, in his capacity )	
23	as Secretary of the Interior, )	
24	Defendants, )	
25	and )	
26	OREGON NATURAL RESOURCE )	
	COUNCIL, et al., )	
	Defendant-intervenors. )	

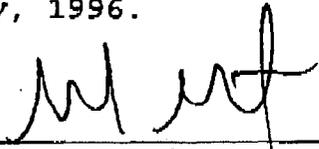
MARK C. RUTZICK LAW FIRM  
 A Professional Corporation  
 Attorneys at Law  
 500 Pioneer Tower  
 888 S.W. Fifth Avenue  
 Portland, OR 97204-2089  
 (503) 499-4573 • Fax (503) 295-0815

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I certify under Local Rule 230-2 that I had telephone consultation with counsel for defendant Glickman, Ms. Jean E. Williams, on February 23, 1996 to attempt to resolve the dispute described in the attached discovery motion, and despite sincere effort was unable to do so.

Dated this 23rd day of February, 1996.

  
\_\_\_\_\_  
Mark C. Rutzick

Page

2 - CERTIFICATE OF COMPLIANCE UNDER LOCAL RULE 230-2

**MARK C. RUTZICK LAW FIRM**  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 488-4673 • Fax (503) 295-0915

NOI-9506\IRP91015.IGS

1 Mark C. Rutzick, OSB #84336  
 2 Alison Kean Campbell, OSB #93011  
 3 MARK C. RUTZICK LAW FIRM  
 4 A Professional Corporation  
 5 500 Pioneer Tower  
 6 888 S.W. Fifth Ave.  
 7 Portland, Oregon 97204-2089  
 8 (503) 499-4573

Attorneys for Plaintiff

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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  DECLARATION OF MARK C. RUTZICK
--	--

**MARK C. RUTZICK LAW FIRM**  
 A Professional Corporation  
 Attorneys at Law  
 500 Pioneer Tower  
 888 S.W. Fifth Avenue  
 Portland, OR 97204-2089  
 (503) 499-4573 • Fax (503) 295-0916

NO1-9506\IRP91015.IG5

1 Mark C. Rutzick, with full knowledge of the penalty of  
2 perjury, declares as follows:

3 1. I am the attorney for plaintiff Northwest Forest  
4 Resource Council in the above-captioned matter. I make this  
5 declaration on personal knowledge, and if called to testify as a  
6 witness herein would testify as set forth below.

7 2. On September 12, 1995 NFRC served its first set of  
8 interrogatories and requests for production of documents on the  
9 defendants. Interrogatory No. 1 stated:

10 Interrogatory No. 1:

11 For each of the 135 timber sale units that are being  
12 withheld from award or release as described in paragraph 4 of the  
13 Declaration of Richard Prausa dated September 8, 1995 in this  
14 case, describe separately for each unit 1) all site-specific  
15 information upon which "a determination of marbled murrelet  
16 nesting" has been made for the unit (as referenced in the Prausa  
17 declaration), 2) each date on which information was observed or  
18 collected, 3) the name of the person who observed or collected  
19 the information, 4) the last date on which any person visited the  
20 site of the unit to look for marbled murrelet nesting, occupancy  
21 or presence, 5) the name of the person who made the "determina-  
22 tion of marbled murrelet nesting" that is mentioned in Mr.  
23 Prausa's declaration, 6) the date this "determination" was made  
24 and 7) state for each unit if any marbled murrelet egg shell  
25 fragments, fecal ring, currently active nest or formerly active  
26 nest have ever been found.

Page

2 - DECLARATION OF MARK C. RUTZICK

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 488-4573 • Fax (503) 293-0810

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1 3. Request For Production No. 1 stated:

2 Request For Production No. 1:

3 Please produce all documents containing any information that  
4 is responsive to Interrogatory No. 1.

5 4. On October 5, 1995 defendant Glickman responded to the  
6 interrogatory and document request by producing approximately  
7 110-50 pages of survey forms, maps and related materials on each  
8 Forest Service sale unit in question. Defendant Glickman did not  
9 object to the document request.

10 5. Following the court's order on January 19, 1996  
11 regarding subsection 2001(k)(2), NFRC retained a biological  
12 consultant to review the survey forms, maps and other documents  
13 to provide expert assistance concerning the status of each sale  
14 unit under the standards articulated in the January 19 order.

15 6. Our consultant reviewed the documents from the Forest  
16 Service and advised us that the information on approximately 100  
17 of the 135 units was incomplete, due primarily to the absence of  
18 "detection maps" showing the physical location of murrelet  
19 sightings, or due to the absence of sale unit maps showing the  
20 location of the sale units. In addition, the consultant advised  
21 us that some of the documents produced by the Forest Service were  
22 illegible or incomplete. The consultant also advised us that  
23 they cannot make a determination on the incomplete units without  
24 the additional information.

25 7. On February 21, 1996 I wrote a letter to defendants'  
26 counsel (Ms. Williams) requesting the missing and illegible

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documents. Attachment A.

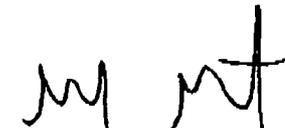
8. On February 22, 1996 Ms. Williams responded advising that the government will not produce any additional documents, or produce legible copies of previously-produced documents, until the Forest Service completes its review of the sale units. Attachment B. No date was offered for when that would occur.

9. I spoke with Ms. Williams on the telephone on February 23, 1996. She reiterated the position in her letter, and would not give a commitment as to when we could see any additional documents. In addition, Ms. Williams refused to agree to produce copies of any of the missing documents. Instead, she advised me that we would have to go to wherever the documents are currently located (she did not know where they are) and review them at their current location. We ended the conversation without being able to resolve the dispute.

10. On February 23, 1996 the NFRC was advised by a reliable Forest Service employee that the Forest Service has in fact already completed its review of all the sales, and had made determinations of which sales are releasable under section (k) (2) as interpreted in the January 19, 1996 order.

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

Executed on February 23, 1996.

  
\_\_\_\_\_  
Mark C. Rutzick

**Mark C. Rutzick Law Firm***A Professional Corporation**Attorneys at Law*

500 Pioneer Tower

888 S.W. Fifth Avenue

Portland, Oregon 97204-2089

(503) 499-4573

Fax (503) 295-0915

February 21, 1996

**MARK C. RUTZICK\***

Direct Dial (503) 499-4572

**ALISON KEAN CAMPBELL**

Direct Dial (503) 499-4574

Admitted to practice in  
Oregon and Washington

\* Also admitted in New York

Jean E. Williams  
Department of Justice  
Environment and Natural Resources Division  
Benjamin Franklin Station  
Post Office Box 7369  
Washington, D.C. 20044-7369

Re: *NFERC v. Glickman*, No. 95-6244-HO

Dear Jean:

Our consultants have been reviewing the documents produced by the Forest Service last October regarding the nesting determinations on the sales withheld under section 2001(k)(2). They report some inconsistencies, gaps and other problems with the documents.

I would like to ask you to check with the Forest Service and see if you can help us with any of these problems.

Some of the sales have maps showing the physical location of sightings and the direction of movement, and many of the sales have a map showing the location of the unit being surveyed. However, some of the sales do not have detection maps, some do not have unit maps, and some have neither. We don't know if the maps simply do not exist, or if they were inadvertently omitted. These maps are of course critical to evaluating each unit under Judge Hogan's January 19, 1996 order.

There are some other assorted problems: some pages can't be read, some pages are missing, and some data is missing or obscured.

I am enclosing our consultants' handwritten notes showing the missing or unclear documents for each sale. I am asking you to review these notes with the Forest Service and to let us know if the missing documents exist, to provide with any missing documents that do exist, and also to provide us with clearer copies of the pages we can't read. I would be happy

EXHIBIT     A    PAGE     1

Ms. Jean E. Williams  
February 21, 1996  
Page 2

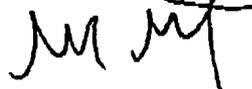
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to work directly with Sue Zike if you prefer, but I need to go through you at least initially.

I don't know how long it will take you to do all this, but why don't you get back to me in a few days to tell me if you can do this and when. We would like as many of the documents as possible by February 27.

Thank you for your cooperation.

Very truly yours,



Mark C. Rutzick

Enclosure



142  
72

- 10) Doc #29 - Stalwart3 - No general maps - <sup>sale</sup> unit location unknown
- 11) Doc #30 - Fish Story - No general maps - <sup>sale</sup> unit location unknown.
- 12) Doc #31 - Boyd Creek - No general maps - sale unit location unknown
- 13) Doc #32 - Old Grade - No general maps - sale unit location unknown
- 14) Doc #34 - Stevens - Stat. # 2B - 16 July 1992 - data obscured by post-it.

15) Doc. # 35 - Decoder - Station ? - 1 July 1992  
 - no detection map

16) Doc #36 - You Who - Station 2 - 6 July 1992  
 - no detection map

17) Doc # 37 - Not Bad - Station 1 - 12 July 1992  
 - no detection map

18) Doc # 37 - Not Bad - Station 1 - 7 July 1995  
 - missing maps - pgs 4, 6, 7, 8 of 10

19) Doc # 37 - Not Bad Station B  
 - missing page 3? - 8 detections on data forms, 25 on maps

20) Doc #38 - Wynoochee  
 Station 3, 21 May '92  
 Station 3, 5 June '92  
 Station 2, 9 June '92  
 Station 1N, 24 June '92  
 station 2, 7 July '92  
 } no detection maps

21) Doc #40 - Folan Ridge  
 Station 5 16 July '94  
 station 3 13 July '94  
 } no detection maps

EXHIBIT   A    
 PAGE   4  

22) Doc #41 - Wheelock 403 - no general maps - sale unit location unknown

23) Doc #41 - Wheelock 403  
 Station ? 26 May '92      Station ? 7 July '92      Station ? 17 July '92  
 Station ? 8 June '92      Station ? 9 July '92      Station ? 20 July '92  
 } No detection

RJ  
TL

- 24) Doc #42 Gorday Bluff - no general maps, sale unit location unknown
- 25) Doc #43 Canal 606 - no general maps, sale unit location unknown

- 26) Doc #43 Canal 606
  - Station ? 27 May '92
  - Station ? 23 June '92
  - Station ? 14 July '92
  - Station ? 21 July '92
  - Station ? 29 July '92
  - Station 1 16 June '94
  - Station 6 29 June '94
  - Station 3 25 July '94

} no detection maps

27) Doc #43 Canal 606 Station 2 31 July '94 - missing maps? 10 detections on data form, only one mapped.

28) Doc #44 Square Clare - station ?, ? August '94 - no 1st page, no map  
No general map, sale unit location unknown

- 29) Doc #45 South Paxton
  - Station A1, 26 June '92
  - Station B1, 26 June '92
  - Station A1, 2 July '92
  - Station A2, 9 July '92
  - Station AS, 9 July '92
  - Station 2, 10 July '92
  - Station A3, 16 July '92
  - Station 6, 16 July '92
  - Station 3, 26 May '94
  - Station 1, 5 June '94
  - Station 2, 22 June '94
  - Station 4, 7 July '94
  - Station 3, 11 July '94

} No detection maps

30) Doc #45 South Paxton - Station 1 27 July '94 - have only 1 map, missing?

- 31) Doc #12A Maria Skyline
  - Station A3, 27 May '92
  - Station A1, 23 June '92
  - Station B1, 30 June '92
  - Station 4, 28 July '92
  - Station B2, 13 July '94
  - Station A4, 13 July '94
  - Station AS, 22 July '94

} No detection maps

pg 4  
TL

- 32) Doc #12b - ~~Ketter~~ Beamer 712 - No detection maps for any data.
- 33) Doc #13 - No data.
- 34) Doc #14 - Green Apple - No general map, sale unit location unknown
- 35) Doc #15 - Green Apple - Station #?, 1 July '92 - No behavior indicated
- 36) Doc #14 - Green Apple - No detection maps for any data
- 37) Doc #17 - Randall Salado  
 Station ?, 14 July '92 U-2 } No detection maps  
 Station ?, 5 August '92
- 38) Doc #18 - Upperten  
 Station 3, 27 May '93 } No detection maps  
 Station 4, 14 June '93  
 Station 5, 22 June '93  
 Station 3, 29 June '93  
 Station 1, 2 July '93  
 Station 4, 12 July '93  
 Station 2, 12 July '93  
 Station 2, 15 July '93  
 Station 3, 22 July '93
- 39) Doc #19 - No Data
- 40) Doc #20 - No Data
- 41) Doc #21 - Lobster Cr. - No general map, sale unit location unknown
- 42) Doc #21 - Lobster Cr.  
 Station ?, 10 July '89 } No detection maps  
 Station ?, 9 Aug '90  
 Station ?, 1 Aug '91  
 Station ?, 4 May '92  
 Station ?, 16 June '92  
 Station ?, 22 June '94  
 Station ?, 28 July '94
- 43) Doc #22 - Winriver  
 Station WR-13, 19 July '93 } No detection maps  
 Station WR-13, 27 July '93
- 44) Doc #23 - Spur Trigger - No detection maps
- 45) Doc #24 - Sugar Cube  
 Station 3B, 8 July '93 } No detection maps  
 Station 3B, 3 Aug '93  
 Station NF 13, 21 June '94
- 46) Doc #24 - Sugar Cube - Data forms for NF Pistol River Basin, Sunrise Cr. and meadow Cr.

EXHIBIT	<u>  A  </u>
PAGE	<u>  6  </u>

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47) Doc# 26 - No data

6  
2d

Document  
Number

46

- 7-17-92 unit 1, site A, station 3 need Detection Map
- 6-24-92 unit 1, site B, station 2 Date on Survey Form looks like 6-14-92 but is hard to read. The Summary form lists the date a 6-29-92.
- 7-24-92 Unit 1, site A, station 5 (extra visit to A3) copy is not readable and need Detection Map

47

Green  
Horn

- Station 2, 7-2-92: need detection map
- 7-21-92, Station 6: "notes" are not readable. there are relevant comments here I believe.

48

Grass  
Tula

- ~~6-17-92~~ 6-17-92, Station 3, Unit 2: need detection Map
- 7-20-92, Station 6, Unit 2: need detect. map.
- 6-18-92 Station 2, Unit 1: " " "
- 7-7-92 Station 2, Units 4&5: " " "
- 8-11-92 Station 6, Units 4&5: " " "
- 6-12-92 Station 1, Unit 3: " " "
- 6-25-92 Station 3, Unit 3: " " "
- 8-3-92 Station 4, Unit 3: " " "
- 7-27-92 Station 5, Unit 3 " " "
- 8-6-92 Station 2, Unit 3 " " "

49

Inner  
Barich

• There are no detections of murrelets on any of the survey forms or summary forms. Are we missing something? We have Units 3, 4, & 5 Data.

50

per  
site lead

• 7-28-92 station 2: Copy is not readable & the detection map is missing.

EXHIBIT  
PAGE 00

7  
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Document  
number

51/52

- There was no Data in Document 51, however Document 52 has Data form sets Named "Mr Roger" and "Ryan Wapiti". Is one Document 51 & the other 52 or are Both "Mr. Rogers" & "Ryan Wapiti" part of the data for 52?

Mr Rogers

- ~~There is no general Map of Unit 2~~
- Summary Page for Unit 3 is a crooked copy; missing data
- 6-26-92 Unit 2, Sta. C, Site A: need detection Map and the "notes" are not readable on survey form copy
- 6-29-92 Unit 3, Sta #2: need detection Map
- 7-15-92 Unit 3, Sta #4: " " "
- 7-14-92 Unit 4, Sta 2: " " "
- and clear copy - can't read notes on survey form

yan  
wapiti

- 7-2-92 Unit 2, Sta 1: need Detection Map
- 7-9-92 Unit 1, Sta 2: " " "
- ~~7-16-92 Unit 2, Sta 2: " " "~~
- 7-16-92 Unit 1, Sta 1: " " "

53  
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neek

- Need a General Unit Map.

Siuslaw N.F. Units

Unreadable/Missing Data -

Sale Name

Formander  
103

- 6-15-93 Site #4, Sta. #4: photo copy of aerial photo is attached but unable to see mapping of unit, detection, etc. - is there a map?

Formander  
717

- 7-6-93 Site 2, Sta. 1: need detect. map

Rankin  
Ridge

- 7-20-93 Site B, Sta. 4: Page 3 of 4 notes can't be read, & mapping on aerial photo does not show up

\* All Aerial photos in this data set do not show the detections that have been mapped on them; Copie are too dark

Bear Maple

- 7-1-93 Unit 5, Sta. 2: need page 2 of 2 (Page 1 of 2 says presence)

North Ball

- 7-24-93 Aerial Photo w/ detections mapped. is too dark a cop, <sup>no topo map + dete</sup>
- 8-1-93 Missing Survey Form - have aerial photo with detections mapped.

2-20-96

We do not have sale unit maps for the following areas :

- 1) Doc 18 - Upperten
- 2) Doc 21 - Lobster
- 3) Doc 29 - Stalwart
- 4) Doc 30 - Fish Story
- 5) Doc 32 - Old Grade
- 6) North Ball
- 7) Ryan Wapiti
- 8) Clear Creek.

This should be the end of the missing info.  
(along with the list faxed on 2-19-96).

EXHIBIT     A      
PAGE     11



JEW:snf  
90-8-6-489

## U.S. Department of Justice

## Environment and Natural Resources Division

Wildlife and Marine Resources Section

Washington, D.C. 20530

February 22, 1996

VIA FAX AND FIRST CLASS MAIL

Mark C. Rutzick, Esq.  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089

Facsimile Number: 503 295-0915

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

Dear Mr. Rutzick:

This is in response to your February 13, 1996, and February 21, 1996, letters. In your February 13 letter, you correctly note that, during the district court litigation in this matter, there were several sales determined to be subject to Section 2001(k)(2) after the initial response to your discovery request was provided to you. Since the material you request on these sales -- murrelet survey information -- would comprise part of the administrative record for the "K2" determinations on these sales, for your convenience I will informally provide to you the survey documents for these sales (Boulder Krab, Elk Fork, Deep Creek, Lost Sock, North Fork Chetco, and Wren'N Doubt) shortly, and have requested the agencies to provide me with copies of the documents for that purpose.

You also state that you did not receive a copy of Defendant Glickman's responses to your interrogatories and requests for production of documents. I attach a copy of the Forest Service's October 5, 1995, letter to you enclosing an index of the documents produced in response to your requests for production, and a copy of Secretary Glickman's responses to NFRC's interrogatories and requests for production, with another copy of the responses. The responses were the second document attached to the letter.

- 1 -

EXHIBIT B

PAGE 1

With regard to your inquiry on the Cat Track, Fallen Hall and Raspberry sales, the September 27, 1995, Declaration of Sarah Madsen, filed in this matter, states as follows:

16. Raspberry was surveyed to protocol in 1995 with no detections. In 1995 there was an auditory detection (3 "keers") that indicated presence. However the sale was not considered to be occupied and all units were released.

17. Occupied behavior was detected in Fallen Hall timber sale in 1993, 1/4 mile north of Unit 1 over an area of blowdown and dead standing trees. Because this area was not suitable murrelet habitat, the unit was not considered occupied. In 1994 and 1995, surveys to protocol did not result in any detections of marbled murrelets. This unit was therefore released for harvest in accordance with the U.S. Fish and Wildlife Service June 12, 1995 Biological Opinion.

18. Cat Track was surveyed to protocol in 1994 and 1995. No murrelets were detected, and the sale was therefore released for harvest in accordance with the U.S. Fish and Wildlife Service June 12, 1995 Biological Opinion.

You also ask that we submit to you a "privilege list" regarding our response to NFRC's interrogatory No. 3 and Request For Production No. 3. As you know, in response to your discovery requests, the Defendants provided to you in an expedited fashion all the survey documentation for each of the units then withheld from release under "K2." These documents, and others submitted in this litigation, comprise the core of the administrative records for the agencies' determination that these sales should be withheld under "K2", and in the spirit of cooperation, the Defendants were willing to cooperate with you in providing this information, though you did not challenge individual determinations. However, with regard to the above noted interrogatory and request for production, we objected on grounds of privilege and burdensomeness. Since your request for this information did not come until after the briefs were submitted, I believed then, and still do, that by that point the pleadings were closed. We certainly would have provided to you any reasonable supplementation of this response had the request come sooner, but this matter is now in the Court of Appeals and further discovery is inappropriate and irrelevant.

I should have those documents on the six sales in the next few days and will overnight them to you and other counsel as soon as they are received and copied. In your February 21 letter you also raise concerns about the murrelet survey documents you received last October. As we advised the parties and the court

- 2 -

EXHIBIT   8  

PAGE   2

during the oral argument on the motion for stay, the agencies have commenced the process of reviewing their murrelet survey files on the sales withheld under Section 2001(k)(2), to determine the applicability of Judge Hogan's Order. This review is ongoing, and I do not want to interfere with the integrity of the deliberative process. However, I understand your concerns and therefore propose that, once the agencies have concluded their review, your clients or their representative may inspect the Forest Service's files to examine the documents. I will advise you when the review process is complete, and we can sort out the details of inspection, if you wish to proceed with this request.

Sincerely,

*Jean Williams*  
Jean E. Williams  
Senior Trial Counsel

cc: All Counsel

United States  
Department of  
Agriculture

Forest  
Service

Pacific  
Northwest  
Region

P.O. Box 3623  
Portland, OR 97208-3623  
333 S.W. First Avenue  
Portland, OR 97204

File Code: 1570

Date: October 5, 1995

Mark Rutzick  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089

Re: NFRC v. Glickman, Civil No. 95-6244-HO (D.Or.)

Dear Mr. Rutzick:

I have enclosed the FEDERAL DEFENDANTS DAN GLICKMAN'S RESPONSES TO NFRC'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS and the documents as provided in this discovery response. The enclosed Index lists the records attached herewith. I received additional records from the Siuslaw National Forest today, which I expect to complete indexing by October 6, 1995 at which time I will deliver to you.

Sincerely,

SUSAN M. ZIKH *SMAZ*  
Litigation Coordinator

Enclosure

EXHIBIT     B      
PAGE     4    

*Wms Decl., p-12*  
*Att. 3, p.1*

Caring for the Land and Serving People



1 KRISTINE OLSON  
 United States Attorney  
 2 888 SW Fifth Avenue  
 Suite 1000  
 3 Portland, OR 97204-2024  
 (503) 727-1008

4 LOIS J. SCHIFFER  
 5 Assistant Attorney General  
 MICHELLE L. GILBERT  
 6 EDWARD A. BOLING  
 JEAN WILLIAMS  
 7 ELLEN J. KOHLER  
 U.S. Department of Justice  
 8 Environment and Natural Resources Division  
 P.O. Box 7369  
 9 Washington, D.C. 20044-7369  
 Telephone: (202) 272-4421

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

12 NORTHWEST FOREST RESOURCE COUNCIL, )  
 13 )  
 Plaintiff, )  
 14 )  
 v. )  
 15 )  
 GLICKMAN and BABBITT, )  
 16 )  
 Defendants, )  
 17 )  
 OREGON NAT. RES. COUNCIL, et al., )  
 18 )  
 Defendants-Intervenors )  
 19 )

Civil No. 95-6244-HO

20 SCOTT TIMBER CO., )  
 Plaintiff, )  
 21 )  
 v. )  
 22 )  
 GLICKMAN and BABBITT, )  
 23 )  
 Defendants. )  
 24 )  
 OREGON NAT. RES. COUNCIL, et al., )  
 25 )  
 Defendants-Intervenors )  
 26 )

Civil No. 95-6267-HO

FEDERAL DEFENDANT  
 DAN GLICKMAN'S  
 RESPONSES TO NFRC'S  
 INTERROGATORIES AND  
 REQUESTS FOR PRODUCTION  
 OF DOCUMENTS

27 DEF. GLICKMAN'S RESPONSES TO  
 28 NFRC'S INTERROG. AND RFP - 1

EXHIBIT   B    
 PAGE   5

1 COMES NOW Federal Defendant Dan Glickman, Secretary of  
2 Agriculture, and submits the following response to NERC's  
3 September 12, 1995, Interrogatories and Requests for Production  
4 of Documents directed at the Secretary of Agriculture:

5 Interrogatory No. 1: For each of the 135 timber sale units  
6 that are being withheld from award or release as described in  
7 Paragraph 4 of the declaration of Richard Prausa dated Sept. 8,  
8 1995, in this case, describe separately for each unit 1) all  
9 site-specific information upon which "a determination of marbled  
10 murrelet nesting: has been made for the unit (as referenced in  
11 the Prausa declaration), 2) each date on which information was  
12 observed or collected, 3) the name of the person who observed or  
13 collected the information, 4) the last date on which any person  
14 visited the site of the unit to look for marbled murrelet  
15 nesting, occupancy or presence, 5) the name of the person who  
16 made the "determination of marbled murrelet nesting" that is  
17 mentioned in Mr. Prausa's declaration, 6) the date this  
18 "determination" was made and 7) state for each unit if any  
19 marbled murrelet egg shell fragments, fecal ring, currently  
20 active nest or formerly active nest have ever been found.

21 Response: Interrogatory No. 1 (1-3 and 5-6): In accordance  
22 with Fed. R. Civ. Pro. 33(d), the answer to these interrogatories  
23 may be ascertained from the documents provided under separate  
24 cover to NERC which are portions of the administrative records  
25 for the sales referenced in Interrogatory No. 1, including the  
26 documents contained in the administrative record served on NERC

27 DEF. GLICKMAN'S RESPONSES TO  
28 NERC'S INTERROG. AND RFP - 2

EXHIBIT BPAGE 6

1 in CLR Timber Holdings v. Babbitt, Civ. No. 94-6403 (D. Or.), as  
 2 identified by Federal Defendants on the administrative record  
 3 index also provided under separate cover. With regard to  
 4 Interrogatory No. 1 (7), no marbled murrelet eggshell fragments,  
 5 fecal ring, currently active or formerly active nest have ever  
 6 been found in any unit of the sales identified in Interrogatory  
 7 No. 1, except for the Father Oak sale. With regard to  
 8 Interrogatory No. 1 (4), Federal Defendants object to this  
 9 interrogatory on the grounds that a request seeking the date on  
 10 which "any person" visited the site of all these units is overly  
 11 broad and not within the knowledge of the Defendant Glickman, but  
 12 state that the last date on which the sales referenced in  
 13 Interrogatory No. 1 was visited to look for marbled murrelet  
 14 nesting, occupancy or presence, according to Forest Service  
 15 records, can be ascertained from the documents produced as  
 16 described above.

17 Request for Production No. 1: Please produce all documents  
 18 containing any information that is responsive to Interrogatory  
 19 No. 1.

20 Response: Documents are being provided under separate  
 21 cover.

22 Interrogatory No. 3: Please identify every "agency expert"  
 23 and every other person, in or outside of the executive branch of  
 24 the federal government, who was consulted by Secretary Lyons,  
 25 Director Dombeck or any other person in connection with the  
 26 adoption of the Additional Direction on Section 2001(k) of the

27 DEF. GLICKMAN'S RESPONSES TO  
 28 NFRS'S INTERROG. AND RFP - 3

EXHIBIT     B      
 PAGE     7

1 1995 Rescission Act issued Aug. 23, 1995, describe when they were  
2 consulted, by whom, what information they were asked for and what  
3 information they provided.

4 Response: This interrogatory is objected to on the grounds  
5 that it seeks information subject to the deliberative process  
6 privilege and the attorney-client and attorney work-product  
7 privileges.

8 Request for Production No. 3: Please produce all documents  
9 used, considered or relied on directly or indirectly, in  
10 connection with the adoption of the Additional Direction on  
11 Section 2001(k) of the 1995 Rescission Act issued Aug. 23, 1995,  
12 including but not limited to any documents containing any  
13 information that is responsive to Interrogatory No. 3.

14 Response: This request is objected to in part on the ground  
15 that it seeks documents containing information that is subject to  
16 the deliberative process privilege, and the attorney-client  
17 and/or attorney work-product privileges. The request is also  
18 overly broad and burdensome and is objected to on these grounds,  
19 but documents which were relied on in connection with the  
20 adoption of the August 23, 1995, Memoranda referenced in  
21 Interrogatory No. 3 include, but are not limited to, the Pacific  
22 Seabird Group Protocol and the survey data collected on the sales  
23 referenced in Interrogatory No. 1. Plaintiffs are already in  
24 possession of the PSG protocol; the referenced survey data is  
25 being provided in response to this discovery request as described  
26 above.

27 DEF. GLICKMAN'S RESPONSES TO  
28 NFRC'S INTERROG. AND RFP - 4

EXHIBIT     B      
PAGE     8

1 Interrogatory No. 4: Please state if Secretary Lyons,  
 2 Director Dombeck or any other government official has utilized  
 3 the Pacific Seabird Group or any subcommittee thereof for advice  
 4 or recommendations as to the adoption of the Additional Direction  
 5 on Section 2001(k) of the 1995 Rescission Act Issued Aug. 23,  
 6 1995, or any other government decision, and, if so, whether the  
 7 Pacific Seabird Group operated in accordance with the procedures  
 8 in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

9 Response: Neither the Pacific Seabird Group nor any  
 10 subcommittee thereof was utilized for advice or recommendations  
 11 as to the adoption of the August 23, 1995, Memorandum referenced  
 12 in Interrogatory No. 4. The balance of this interrogatory is  
 13 objected to on the grounds that seeking information regarding  
 14 "any other government decision" is burdensome, overly broad, and  
 15 seeks information beyond the administrative records for the  
 16 timber sales on which the Forest Service has made nesting  
 17 determinations under Section 2001(k)(2).

18 Request for Production No. 4: Please produce all documents  
 19 relating to the Pacific Seabird Group or to the documents  
 20 entitled the "Methods for Surveying for Marbled Murrelet in  
 21 Forests: A Protocol for Land Management and Research" issued by  
 22 the Pacific Seabird Group Marbled Murrelet Technical Committee in  
 23 March 1994.

24 Response: This request for production is objected to on the  
 25 grounds that the Pacific Seabird Group Marbled Murrelet Technical  
 26 Committee is not an agency of the Department of Agriculture, and

27 DEF. GLICKMAN'S RESPONSES TO  
 28 NFRC'S INTERROG. AND RFP - 5

EXHIBIT     B      
 PAGE     9

1 therefore documents issued by that committee are not under the  
2 control of the Secretary of Agriculture.

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10

*Mark Gaede*  
MARK GAEDE  
Deputy Undersecretary of Agriculture  
for Natural Resources and Environment  
As to Interrogatories #3 & 4  
and Requests for Production #3 & 4

11 GRANT GUNDERSON  
12 Threatened and Endangered and Sensitive  
13 Species Program Manager  
14 Pacific Northwest Region  
15 United States Forest Service  
16 As to Interrogatory #1  
17 and Request for Production # 1

18 Dated: 5 October 1995

19 Respectfully submitted,  
20 KRISTINE OLSON  
21 United States Attorney  
22 LOIS J. SCHIFFER  
23 Assistant Attorney General

*Jean Williams*  
JEAN WILLIAMS  
ELLEN J. KOHLER  
MICHELLE GILBERT  
EDWARD BOLING  
U.S. Department of Justice  
Environment and Natural  
Resources Division  
Wildlife and Marine Resources  
Section

24  
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28 DEF. GLICKMAN'S RESPONSES TO  
NFRS'S INTERROG. AND RFP - 6

EXHIBIT   B    
PAGE   10

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P.O. Box 7369  
Washington, D.C. 20044-7369  
(202) 272-6864

Attorneys for Defendants

OF COUNSEL:

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

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

DEF. GLICKMAN'S RESPONSES TO  
NFRG'S INTERROG. AND RFP - 7

EXHIBIT     B      
PAGE     12

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

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

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Al Ferlo	514-4240
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Jim Sutherland(503)	465-6582
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 15

DATE: February 19, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman. Attached is Federal Defendants' February 16, 1996 Compliance Report. This is our seventh report to the Court on FY 1991-1995 sales.

1 KRISTINE OLSON, OSB # 73254  
 United States Attorney  
 2 JAMES L. SUTHERLAND, OSB# 68160  
 Assistant U.S. Attorney  
 3 701 High Street  
 Eugene, OR 97401-2798  
 4 (541) 465-6771

5 LOIS J. SCHIFFER  
 Assistant Attorney General  
 6 MICHELLE L. GILBERT  
 GEOFFREY GARVER  
 7 U.S. Department of Justice  
 Environment and Natural Resources Division  
 8 General Litigation Section  
 P.O. Box 663  
 9 Washington, D.C. 20044-0663  
 Telephone: (202) 305-0460

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

13	NORTHWEST FOREST RESOURCE COUNCIL, )	
	)	
14	Plaintiff, )	Civil No. 95-6244-HO
	)	(lead case)
15	v. )	Civil No. 95-6267-HO
	)	(consolidated case)
16	GLICKMAN, in his capacity )	
	)	FEDERAL DEFENDANTS'
17	as Secretary of Agriculture, )	FEBRUARY 16, 1996
	)	COMPLIANCE REPORT
18	BRUCE BABBITT, in his capacity )	
	)	
19	as Secretary of Interior )	
	)	
	Defendants. )	
	)	

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

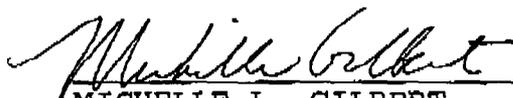
1 Attached is the Declaration of Michael R. Crouse and the  
2 Fifteenth Declaration of Jerry Hofer updating the Court on the  
3 actions of the Bureau of Land Management and Forest Service as to  
4 these timber sales.

5 Dated this 16th day of February, 1996.

6 Respectfully submitted,

7 KRISTINE OLSON  
8 United States Attorney

9 LOIS J. SCHIFFER  
10 Assistant Attorney General

11 

12 MICHELLE L. GILBERT  
13 GEOFFREY GARVER  
14 United States Department of Justice  
15 Environment and Natural  
16 Resources Division  
17 General Litigation Section  
18 P.O. Box 663  
19 Washington, DC 20044-0663  
20 (202) 305-0460

21 Attorneys for Defendants

22 Of Counsel:

23 JAY MCWHIRTER  
24 Office of the General Counsel  
25 United States Department of Agriculture  
26 Washington, DC

27 KAREN MOURITSEN  
28 Office of the Solicitor  
United States Department of the Interior  
Washington, DC

KRISTINE OLSON OSB #73254  
United States Attorney  
JAMES L. SUTHERLAND, OSB# 68160  
701 High Street  
Eugene, OR 97401-2798024  
541-465-6771

LOIS J. SCHIFFER  
Assistant Attorney General  
MICHELLE L. GILBERT  
GEOFFREY GARVER  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 663  
Washington, D.C. 202-272-8338  
Telephone: 202-305-0460

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

FIFTEENTH DECLARATION  
OF JERRY L. HOFER

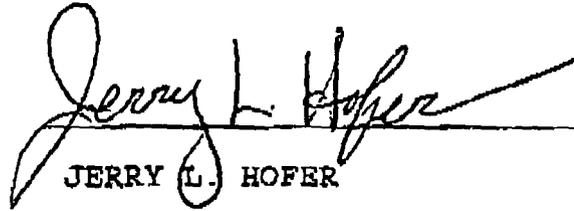
I, Jerry L. Hofer, hereby declare the following to be true and correct:

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

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

3. There have been no changes in the status of these sales since that date. Attached is a copy of the sales and status for the Court's convenience.

Executed at Portland, Oregon, on February 16, 1996.

  
JERRY L. HOFER

NERC 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)

	<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
1.	JOHN	WIN	1,800 MBF	HUFFMAN/WRIGHT	AWARDED 11/14/95
2.	JOHN LODGEPOLE	WIN	2,200 MBF	DAW	HIGH BIDDER DECLINED AWARD LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
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

	<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
8.	GATORSON	COL	11,860 MBF	VAAGEN BRO	SALE AWARDED 5/6/93; SALE SUSPENDED 5/20/93; USFS AWAITING DETERMINATION OF LEGAL COURSE OF ACTION UNDER <u>SMITH v. USFS</u> , 93-0178-JLQ (E.D.Wa), REPORTED IN 33 F3D 1072 (9TH CIR. 1994). PURCHASER HAS SUBMITTED AN OPERATING SCHEDULE, REQUESTED RELEASE OF 3 PAYMENT UNITS, AND ALLOCATED PAYMENT BOND TO THIS SALE.
9.	TIP	WEN	751 MBF	LONGVIEW FIBER SALE	AWARDED 9/9/94;

ENJOINED 3/3/95. USFS  
AWAITING DETERMINATION OF  
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 NERC V. GLICKMAN

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

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

<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
15. BLUE FORD	FRE	6,500 MBF	BOISE-CASCADE	AWARDED 11/30/95
16. BANTY SLV WAW	WAW	610 MBF	ELLINGSON LUM.	HIGH BIDDER DECLINED AWARD LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
17. JOHNSON SLV	WAW	3,600 MBF	ROSBORO LUMBER	HIGH BIDDER DECLINED AWARD LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
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	HIGH BIDDER DECLINED AWARD LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
21. SWEET PEA	WAW	1,280 MBF	ELLINGSON LUM	HIGH BIDDER DECLINED AWARD

					NO OTHER RESPONSIBLE BIDDERS, SALE WILL NOT BE AWARDED
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.	SALE AWARDED 11/03/95

V. SALES CANNOT BE AWARDED TO HIGH BIDDER

	<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
26.	FORKS	MAL	5,000 MBF	SNOW MTN. PINE	LETTER OF INTEREST SENT TO OTHER BIDDERS 1/18/96
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	ROGGE WOOD	HIGH BIDDER NOT RESPONSIBLE, LETTER OF INTEREST SENT TO OTHER BIDDERS BY COB 1/25/96.
30.	ALLEN	WAW	3,800 MBF	ROGGE WOOD	HIGH BIDDER NOT RESPONSIBLE, LETTER OF INTEREST SENT TO OTHER BIDDERS BY 1/25/96.
31.	CANTREL SPRG	WAW	610 MBF	ROGGE WOOD	HIGH BIDDER NOT RESPONSIBLE, LETTER OF INTEREST SENT TO OTHER BIDDERS BY 1/25/96.
32.	HORN SLV	WAW	1,340 MBF	KINZUA CORP	HIGH BIDDER NO LONGER IN BUSINESS. LETTER OF INTEREST SENT TO OTHER BIDDERS BY 1/25/96.
33.	PRONG SLV	WAW	3,800 MBF	ROGGE WOOD	HIGH BIDDER NOT RESPONSIBLE, LETTER OF INTEREST SENT TO OTHER BIDDERS BY COB 1/25/96.

KRISTINE OLSON, OSB #73254  
 United States Attorney  
 JAMES L. SUTHERLAND, OSB #68160  
 Assistant U.S. Attorney  
 701 High Street  
 Eugene, OR 97401-2798  
 Telephone: (541) 465-6771

LOIS J. SCHIFFER  
 Assistant Attorney General  
 MICHELLE L. GILBERT  
 GEOFFREY GARVER  
 U.S. Department of Justice  
 Environment and Natural Resources Division  
 General Litigation Section  
 P.O. Box 663  
 Washington, D.C. 20044-0663  
 Telephone: (202) 305-0460

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,	)	
	)	
Plaintiff,	)	Civil No. 95-6244-HO
	)	(lead case)
v.	)	Civil No. 95-6267-HO
	)	(consolidated case)
DAN GLICKMAN, in his capacity as	)	
Secretary of Agriculture,	)	FEDERAL DEFENDANTS'
BRUCE BABBITT, in his capacity as	)	FEBRUARY 16, 1996
Secretary of Interior	)	COMPLIANCE REPORT
	)	
Defendants.	)	

I, Michael R. Crouse do hereby depose and say that:

1. My name is Michael R. Crouse. Since May 1989, I have been the Branch Chief for the Branch of Biological Resources in the Oregon/Washington state Office of the Bureau of Land Management. Since that time, my responsibilities included oversight of all programs dealing with biological resources including wildlife and range. In November 1994, my role of

Branch Chief was expanded to cover the forestry program in the states of Oregon and Washington. The BLM timber sale program is one of my current 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 2, 1996, compliance report, the BLM provided two tables showing the status of its sales which are covered under Section 2001(k).

4. This declaration is being filed to update the court on the status of these sales. As in our February 2, 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 a result of Judge Hogan's January 10, 1996, order, two additional sales (Olalla Wildcat and Twin Horse) were added to Table 2. As stated in our previous compliance report, there is no longer a current purchaser for either of these sales. Lone Rock Timber, the original high bidder on the Olalla Wildcat sale, has sought to reinstate its high bid. The BLM is still

considering the legal effect of Lone Rock's recent letter purporting to vacate its earlier withdrawal of the high bid. In the interim, the pertinent District Offices were directed to issue letters to the second highest bidders of both sales to ascertain if they are interested in purchasing these sales at the original high bid price. The letter to the second highest bidder of the Olalla Wildcat sale was issued on February 5, 1996. The letter to the second highest bidder of the Twin Horse sale was issued on February 2, 1996.

6. As stated in our previous compliance report, the BLM is continuing its review of the existing survey information on these two sales to determine if threatened or endangered bird species are known to be nesting on any of the sale units. To date our review has shown that a northern spotted owl is known to be nesting on unit No. 5 of the Olalla Wildcat sale. The affected/remaining volume columns on Table 2 will be filled in after the review is completed.

7. As a result of Judge Hogan's January 19, 1996, order, the BLM is continuing its review of its 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 2/16/96.

Michael R. Crouse

Michael R. Crouse

FEBRUARY 16, 1996

SEVENTH PROGRESS REPORT 1994

TABLE 1

## SEVENTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	STATUS	
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 B'S	CLR	3957	140				3957	Executed
CAFFI DORA	SCOTT	4654	67				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.

FEBRUARY 16, 1996

ANALYSIS REPORT

TABLE 2

## SEVENTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	STATUS	
88 BLACK JACK	WEYCO	6863	96				6863	EXECUTED
90 PITCHER PERFECT THINNING	SWANCO	2438	180				2438	EXECUTED
90 ROMAN DUNN	HULL-OAKES	10646	142	MM OCC. - #1,2	5264		5382	EXECUTED
BEAR AIR	MURPHY TIMBER	11564	201	MM OCC. - #2	4617		6947	UNAWARDED
BIG WINDS	SPALDING	6864	236				6864	EXECUTED
CANTON CREEK II	DOUGLAS CO. FP	3440	47				3440	EXECUTED
CHANEY ROAD	LONEROCK	3800	75				3800	EXECUTED
ROXIE GRIFFIN	CROMAN	2809	255				2809	EXECUTED
OLALLA WILDCAT		10568	280	UNKNOWN				UNAWARDED
SUMMIT CREEK	SCOTT	7910	126				7910	EXECUTED
SWINGLOG THINNING	SWANCO	1542	95				1542	EXECUTED
TEXAS GULCH	DR JOHNSON	6212	119				6212	EXECUTED
TWIN HORSE		1498	17	UNKNOWN				UNAWARDED
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		9881		64180	

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 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

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

DATE: February 9, 1996

FROM: Albert M. Ferlo, Jr.

RE: NFRC v. Glickman and Babbitt

OFFICE PHONE: (202) 514-2757

NUMBER OF PAGES: Message ~~only~~ + 3 pages

PLEASE DELIVER TO:

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

**MESSAGE:** In an order dated January 8, 1996, the 9th Circuit has denied our motion for a stay pending appeal on the "next high bidder" issue. As a result sales for which the agencies have identified a bidder who is willing and qualified to accept the contract must be released. The panel denying the stay consisted of Judges Hawkins and Canby.

Further review of the decision to deny the stay pending appeal is technically available in two forms, both of which require further approval from the Solicitor General. First we can ask that the entire Court reconsider the order en banc. The request for such review is controlled by the original motions panel. It is unlikely that the panel will allow the case to go any further. The second avenue of review is a request to the Circuit Justice O'Connor for a stay pending appeal. The standard applied to such a request is whether the issue in the case is one which falls within the Court's standards for granting certiorari. The issue of statutory interpretation presented here, given its limited scope, does not appear to meet any of the Court's traditional standards. **ANY REQUEST FOR FURTHER REVIEW SHOULD BE MADE ASAP. PLEASE FORWARD YOUR RECOMMENDATIONS BY TELEPHONE ASAP.**

ORDER IS ATTACHED Al Ferlo

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**COPY**

**FILED**

FEB - 8 1996

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

No. 96-38106 *overruled*

DC# CV-95-6244-MRH  
Oregon (Eugene)

PILCHUCK AUDUBON SOCIETY, et al.,

Plaintiffs-Appellants,

vs.

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

Defendants,

and

NORTHWEST FOREST RESOURCE COUNCIL,  
an Oregon corporation, et al.,

Defendant-Intervenors-Appellees.

NORTHWEST FOREST RESOURCE COUNCIL,  
an Oregon corporation,

Plaintiff-Appellee,

vs.

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

Defendants,

and

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

Defendant-Intervenors-Appellants.

No. 96-35107 *overruled*

DC# CV-95-6244-MRH  
Oregon (Eugene)

PILCHUCK AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

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

Defendants-Appellants,

and

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation, et al.,

Defendant-Intervenors-Appellees.

NORTHWEST FOREST RESOURCE COUNCIL, an Oregon corporation,

Plaintiff-Appellee,

vs.

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

Defendants-Appellants,

and

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

Defendant-Intervenors.

No. 96-35123

DC# CV-95-6284-MRH Oregon (Eugene)

*high bidder*

No. 96-35132

DC# CV-95-6244-MRH Oregon (Eugene)

*murrelets*

ORDER

Before: CANBY and HAWKINS, Circuit Judges

The merits panel in related appeal no. 95-35042, Northwest Forest Resources Council v. Glickman, has declined to hear these new appeals. Accordingly, the motions filed by Pilchuck Audubon Society ("Pilchuck") and Northwest Forest Resource Council ("NFR") to assign these appeals to that panel are denied.

96-35106, et al.

Dilchuck's emergency motion for an injunction pending appeal in no. 96-35106 is denied. Secretary Glickman's emergency motion for a stay pending appeal in no. 96-35123 is denied.

NPRC's motion to consolidate these appeals is granted. The motions to expedite filed by all parties are granted in part. The opening briefs are due February 29, 1996. The answering briefs are due March 21, 1996. The optional reply briefs are due April 1, 1996. All parties on a side are encouraged to join in a single brief to the greatest extent practicable. 9th Cir. R. 28-4. Filing and service of briefs shall be by hand or overnight delivery service. Extensions of time will not be granted absent a showing extraordinary and compelling circumstances.

The Clerk shall set these appeals for oral argument in Portland the week of May 6, 1996.

CLERK  
FEB 29 1996  
10:27 AM  
96-35106/2.7.96/mg

02/09/96 13:38 FAX 2025144240

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

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

PLEASE DELIVER TO:

To: Don Barry 208-4684  
Bob Baum 208-3877  
Dinah Bear 456-0753  
Ted Boling 514-4231  
Peter Coppelman, 514-0557  
Lois Schiffer,  
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Al Ferlo 514-4240  
Greg Frazier 720-5437  
Mike Gippert, 690-2730  
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Jeff Handy (503) 326-3807  
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Elena Kagan 456-1647  
Don Knowles (503) 326-6282  
Karen Mouritsen 219-1792  
Roger Nesbit (503) 231-2166  
Chris Nolin 395-4941  
Jim Sutherland(503) 465-6582  
Tom Tuchmann (503) 326-6254  
Sue Zike (503) 326-7742

NUMBER OF PAGES: 14

DATE: January 24, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman. Attached is Federal Defendant's Memorandum in Support of Motion for Stay Pending Appeal and in Response to PAS' Motion for Stay Pending Appeal. Due to its length, this document is being transmitted with the four attached Declarations from the FWS, NMFS, BLM and Forest Service. If you would like a copy of any of these Declarations, please call.

The hearing on the stay is scheduled for Thursday at 2:00.

1 KRISTINE OLSON OSB#73254  
 United States Attorney  
 2 District of Oregon  
 888 Fifth Avenue, Suite 1000  
 3 Portland, Oregon 97204-2024  
 (503) 727-1000

4 LOIS J. SCHIFFER  
 5 Assistant Attorney General  
 MICHELLE L. GILBERT  
 6 GEOFFREY GARVER  
 U.S. Department of Justice  
 7 Environment and Natural Resources Division  
 General Litigation Section  
 8 P.O. Box 663  
 Washington, D.C. 20044-0663  
 9 (202) 305-0481

10 Counsel for Federal Defendants

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

13	NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
14	COUNCIL,	)	(Lead case)
		)	
	Plaintiff,	)	Civil No. 95-6267-HO
15		)	(Consolidated case)
	v.	)	
16		)	Civil No. 95-6384-HO
17	DAN GLICKMAN, in his capacity as	)	(Consolidated case)
	Secretary of Agriculture, and	)	
18	BRUCE BABBITT, in his capacity as	)	MEMORANDUM IN SUPPORT OF
	Secretary of Interior,	)	DEFENDANTS' MOTION FOR
19		)	STAY PENDING APPEAL AND
	Defendants.	)	IN RESPONSE TO PILCHUK
20		)	AUDUBON SOCIETY'S MOTION
		)	FOR STAY PENDING APPEAL

21 I. INTRODUCTION

22 The federal defendants respectfully request that the  
 23 court stay pending appeal its January 10, 1996, Order  
 24 (hereinafter "Order") enjoining the federal defendants "to  
 25 attempt to award and release offered sales to other qualified  
 26  
 27

1 bidders in the event the original high bidder is unqualified or  
2 has rejected the sale," Order at 24. As demonstrated below,  
3 award and release of the fifteen Forest Service and two Bureau of  
4 Land Management timber sales subject to the injunction prior to  
5 review of the underlying legal issues by the Ninth Circuit Court  
6 of Appeals will cause irreparable harm. The federal defendants  
7 commit to seeking to expedite any appeal of the Order to the  
8 maximum extent possible under the rules of the court of appeals.

9 As this case has shown, Section 2001(k)(1) is subject  
10 to vastly divergent interpretations. The final decision on the  
11 appropriate scope of Section 2001(k)(1) must be made by the court  
12 of appeals. In order to preserve the status quo, the federal  
13 defendants ask that this court issue a stay of the Order pending  
14 the Ninth Circuit's review of the Order. In the event the court  
15 declines to issue a stay pending appeal, the federal defendants  
16 request that a temporary stay of the injunction be issued to  
17 allow the federal defendants to seek a stay pending appeal on an  
18 emergency basis from the court of appeals.

19 For sales other than those at issue in this motion, the  
20 federal defendants neither support nor oppose plaintiffs/  
21 defendant-intervenors' Pilchuk Audubon Society et al.'s motion  
22 for a stay pending appeal. However, certain of those sales are  
23 currently subject to injunctions in other courts. Of particular  
24 concern are the GARDEN, NITA, SOUTH NITA and COWBOY sales.  
25 Should those injunctions be lifted and this court impose an  
26 injunction requiring the federal defendants to award and release  
27

1 those enjoined sales, the federal defendants may seek a stay of  
2 any such injunction pending appeal of this court's judgments  
3 relating to those sales.<sup>1</sup>

#### 4 II. BACKGROUND

5 Section 2001(k)(1) of the 1995 Rescissions Act, Pub. L.  
6 104-19, seeks to expedite the award and completion of certain  
7 previously offered timber sales. At issue here is the award and  
8 release of sales for which (1) prior to enactment of Section  
9 2001(k)(1), the original high bidder informed either the Forest  
10 Service or BLM that it was no longer interested in being awarded  
11 the sale, and (2) after enactment of Section 2001(k)(1) was  
12 enacted, the high bidder was unwilling or unqualified to accept  
13 the sale. Together, these categories include two BLM sales and  
14 fifteen Forest Service sales. See Bradley Declaration; Twelfth  
15 Hofer Declaration (both attached hereto).

16 In the first category, the Forest Service has  
17 identified one sale, the HIACK THIN sale, and the BLM has  
18 identified two sales, the OLALLA WILDCAT and TWIN HORSE sales.  
19 These sales differ from sales for which the Forest Service and  
20 BLM told willing purchasers that the sale was being withdrawn and  
21 then returned the high bidder's bond and rejected all other bids.  
22 For the HIACK THIN, OLALLA WILDCAT and TWIN HORSE sales, once-

---

23  
24 <sup>1</sup> The defendants are also not at this time appealing or  
25 seeking a stay of the court's ruling to the FIRST, LAST, BOULDER  
26 KRAB or ELK FORK sales, or to any other sales subject to the  
27 Order that are not covered by the injunction to award and release  
sales that the original high bidder rejected or is unqualified to  
accept.

1 willing purchasers changed their minds for economic or other  
2 reasons and expressed their intention to repudiate the contract.  
3 Thus, under normal Forest Service and BLM procedures, these  
4 sales, if they went forward at all, would be re-advertised and  
5 re-offered, be re-awarded -- especially not to a high bidder that  
6 had expressly rejected the sale.

7 All the sales in the second category are Forest Service  
8 sales. They include five sales, the JOHN LODGEPOLE, NELSON,  
9 BANTY SALVAGE, JOHNSON SALVAGE, SWEET PEA sales, rejected by the  
10 original high bidder and nine sales, the HILTON, FORKS, OFF  
11 BROADWAY, EAGLE RIDGE HOUSELOG, ALLEN, CANTREL SPRINGS, HOLDAWAY  
12 2, PRONG SALVAGE and HORN SALVAGE sales, for which the original  
13 high bidder is unable or unqualified to take the sale. See  
14 Twelfth Hofer Declaration.

15 The federal defendants contend that where the apparent  
16 high bidder rejected a sale before July 27, 1995, the sale does  
17 not fall under Section 2001(k)(1) at all, because Congress  
18 excluded such sales with one exception that does not apply to  
19 them. For all sales where the original high bidder was  
20 unwilling, unable or unqualified to accept the sale, the federal  
21 defendants further argue that even if Section 2001(k)(1) applies,  
22 it does not require the agencies to look past the high bidder in  
23 acting to meet the statute's requirements.

24 On January 10, 1996, the Court held that Section  
25 2001(k)(1) requires the agencies to award sales for which the  
26 original high bidder is unwilling or unable to accept the sale  
27

1 "to other qualified bidders at the terms originally agreed on by  
2 the unqualified high bidder according to agency regulations and  
3 policies." Order at 20; see also Order at 22.<sup>2</sup> The court  
4 reasoned that sales that high bidders rejected prior to enactment  
5 of section 2001(k)(1) must be awarded under Section 2001(k)(1)  
6 because they had been "offered" within the meaning of the  
7 statute. Order at 19, 22. Further, the court found that  
8 "[r]egulations that give the agency discretion not to try to  
9 award an offered sale to other bidders [when the high bidder will  
10 not or cannot take the sale] would frustrate section 2001(k)(1)'s  
11 objectives." Order at 20.

12 The federal defendants now file this motion for stay  
13 pending appeal to allow the court to prevent the irreparable harm  
14 that will occur if the 17 sales at issue, which the agencies  
15 submit are protected from harvest under Section 2001(k)(1), are  
16 released prior to allowing the court of appeals to review the  
17 court's legal interpretation of the relevant provisions of the  
18 statute. See, e.g., Alaska Wilderness Recreation and Tourism  
19 Association, et al. v. Morrison, 67 F.3d 723, 726 (9th Cir.  
20 1995) (court of appeals granted injunction pending appeal to  
21

---

22 <sup>2</sup> With respect to sales that the original high bidder  
23 rejected, the Order states: "If the high bidder is not willing to  
24 proceed under the contract, the Secretary concerned must award  
25 the sale to other qualified bidders at the terms agreed to by the  
26 repudiating high bidder." Order, at 22. The defendants do not  
27 interpret this as requiring the agencies to award sales to  
original high bidders who, prior to or after enactment of Section  
2001(k)(1), have already rejected the sale. Rather, the agencies  
will attempt to award the sale to other bidders.

28 DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION  
FOR STAY PENDING APPEAL AND IN RESPONSE TO PILCHUK AUDUBON  
SOCIETY'S MOTION FOR STAY PENDING APPEAL -- 5

1 review legal premises of district court decision). As  
2 demonstrated below, the federal defendants meet the legal  
3 standard established in this circuit for obtaining a stay pending  
4 appeal.

### 5 III. ARGUMENT

#### 6 A. Standard For Relief Pending Appeal

7 The standard for evaluating a motion for a stay or an  
8 injunction pending appeal mirrors that employed by district  
9 courts in deciding whether a preliminary injunction should issue.  
10 See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir.), stay  
11 granted in part, 463 U.S. 1328 (Rehnquist, J., in chambers),  
12 motion to vacate denied, 464 U.S. 879 (1983). This circuit  
13 recognizes two interrelated standards for evaluating claims for  
14 injunctive relief. The "traditional" test requires consideration  
15 of (1) whether the movants have established a strong likelihood  
16 of success on the merits; (2) whether the balance of irreparable  
17 of harm favors the movants; and (3) whether the public interest  
18 favors granting the injunction. American Motorcyclist Ass'n v.  
19 Watt, 714 F.2d 962, 965 (9th Cir. 1983) (citation omitted). The  
20 "alternative" test

21 permits the moving party to meet its burden by demonstrating  
22 either a combination of probable success and the possibility  
23 of irreparable injury or that serious questions are raised  
24 and the balance of hardship tips sharply in its favor.

25 Id. These standards are not separate but rather represent "the  
26 outer reaches of a single continuum." Los Angeles Memorial  
27 Coliseum Comm'n v. NFL, 634 F.2d 1197, 1201 (9th Cir. 1980).

1 Under either standard, to the extent that they differ, the  
2 federal defendants meet the required showing.

3 **B. The Federal Defendants Have a Strong Likelihood of Success**  
4 **on the Merits.**

5 The court is well aware of the federal defendants'  
6 interpretation of the scope of Section 2001(k)(1) as articulated  
7 in the government's briefs in this litigation.

8 First, the federal defendants submit that sales that  
9 original high bidders rejected prior to enactment of Section  
10 2001(k)(1) do not even fall under the statute. With one narrow  
11 exception, Section 2001(k)(1) does not apply to timber sales that  
12 were cancelled or withdrawn prior to enactment of the Rescissions  
13 Act on July 27, 1995. Section 2001(k)(1) clearly covers  
14 cancelled or withdrawn timber sales that were awarded or for  
15 which the Forest Service or the Bureau of Land Management had  
16 rejected all bids prior to enactment of Section 2001(k)(1).  
17 However, to give the "return of the bid" provision of Section  
18 2001(k)(1) meaning, Section 2001(k)(1) must be read to exclude  
19 all other timber sales cancelled or withdrawn by the time Section  
20 2001(k)(1) was enacted, including sales withdrawn or cancelled at  
21 the request of the apparent high bidder, or because the apparent  
22 high bidder was no longer willing or able to proceed with the  
23 sale.

24 Second, the federal defendants contend that  
25 interpretation of Section 2001(k)(1) to sales where the original  
26 High bidder is unwilling or unable to accept the sale requires  
27

1 application of the implied repeal doctrine. Although Section  
2 2001(k)(1) applies "notwithstanding any other provision of law,"  
3 the implied repeal doctrine should be applied here because  
4 Section 2001(k)(1) borrows terms and procedures from the very  
5 statutory scheme with which it conflicts. Under that doctrine, a  
6 statute is read to repeal conflicting provisions of earlier law  
7 only to the extent of the conflict, and only to the minimum  
8 extent necessary. As explained in the government's brief's, full  
9 effect can be given to the language of Section 2001(k)(1) without  
10 requiring release of these sales under its provisions. See In re  
11 The Glacier Bay, 944 F.2d 577, 581-82 (9th Cir. 1991).

12 It is clear that the court disagrees with the federal  
13 defendants' reading of the statute as to the sales at issue.  
14 Nonetheless, there can be no doubt that the legal dispute  
15 regarding these sales raises serious questions for consideration  
16 by the court of appeals. The strength of the merits of the  
17 federal defendants' legal arguments is more than enough to  
18 justify a stay pending appeal.

19 **C. Compliance With the Court's Injunction to Award These Sales**  
20 **Will Result in Irreparable Harm.**

21 None of the sales at issue here would proceed absent  
22 the court's January 10 interpretation of Section 2001(k)(1).  
23 Requiring their award and release will result in irreparable  
24 harm. The two BLM sales, the OLALLA WILDCAT and TWIN HORSE  
25 sales, and two Forest Service sales, the HIACK THIN and HOLDAWAY  
26 2 sales, are west of the Cascade Mountains and risk adverse  
27

1 impacts to northern spotted owls ("NSOs") and marbled murrelets,  
2 as well as fish species of concern. The remaining Forest Service  
3 sales are east of the Cascades and, as described below and in the  
4 attached declarations, would adversely affect several fish  
5 species of concern.

6 In addition, all of these sales would go forward  
7 without their normal level of environmental review, including,  
8 for example, marbled murrelet surveys and NEPA documentation,  
9 because such review was terminated when the agencies withdrew the  
10 sales. Thus, all of the sales could have consequences in  
11 addition to the adverse impacts discussed herein that could only  
12 be known if additional information could be gathered. The Order  
13 pre-empts such review.

14 1. The 4 West slope sales.

15 The BLM submitted both the OLALLA WILDCAT and TWIN  
16 HORSE sales to the U.S. Fish and Wildlife Service ("FWS") for  
17 consultation as to impacts to the NSO, a declining threatened  
18 species strongly associated with late successional forests.  
19 Spear Declaration, at ¶ 6 (attached hereto). After FWS issued a  
20 biological opinion in November 23, 1990, that recommended  
21 dropping the TWIN HORSE sale and 1900 MBF of the OLALLA WILDCAT  
22 sale to avoid an incidental take, BLM reconsulted on the NSO.  
23 Spear Declaration, at ¶ 7.

24 On August 7, 1991, the FWS issued a draft biological  
25 opinion that both sales were likely to jeopardize the continued  
26 existence of the NSO due to harvest within a NSO Habitat  
27

1 Conservation Area and, in the case of the TWIN HORSE sale, the  
2 taking of a known pair of owls. Bradley Declaration, at ¶ 4;  
3 Spear Declaration, at ¶¶ 7, 8. The BLM withdrew both sales after  
4 concluding that they would not be viable if their original terms  
5 were modified to comply with the Endangered Species Act. Bradley  
6 Declaration, at ¶ 6.

7           Although the TWIN HORSE and OLALLA WILDCAT sales were  
8 not surveyed to determine marbled murrelet occupancy, they  
9 contain suitable habitat for the marbled murrelet, a threatened  
10 species in decline due primarily to habitat loss, adult mortality  
11 and breeding failure. Spear Declaration, at ¶ 10, 11. If the  
12 sales proceed, up to 271 acres of this suitable murrelet habitat  
13 would be destroyed. Bradley Declaration, at ¶ 7. The  
14 destruction of this murrelet habitat would adversely impact  
15 marbled murrelets, primarily by (1) possibly directly killing  
16 murrelets during harvest; (2) displacing any nesting birds from  
17 traditional nests sites, resulting in reduced likelihood of  
18 successful breeding; and (3) increasing predation by increasing  
19 edge habitat. Spear Declaration, at ¶¶ 12-14. Although it does  
20 not contain suitable marbled murrelet habitat, the HIACK THIN  
21 sale is one quarter mile from an occupied murrelet stand and  
22 would also likely adversely impact murrelets. Spear Declaration,  
23 at ¶ 15, App. I.

24           **2. The 13 East slope sales.**

25           At least eleven of the thirteen east slope Forest  
26 Service sales at issue here -- the ALLEN, JOHN LODGEPOLE, NELSON,  
27

1 HILTON, SWEET PEA, BANTY SALVAGE, JOHNSON SALVAGE, PRONG SALVAGE,  
2 HORN SALVAGE, CANTREL SPRINGS and EAGLE RIDGE HOUSELOG sales --  
3 are within the range of the bull trout, a category one candidate  
4 species under the Endangered Species Act. Spear Declaration, at  
5 ¶ 18. Timber management activities likely to occur in connection  
6 with these sales would further degrade existing watershed  
7 conditions, especially without environmental safeguards that  
8 might not apply under Section 2001(k)(1), and therefore have  
9 adverse impacts to the bull trout. Spear Declaration, at ¶¶ 19-  
10 21. Eight of the nine sales in the Umatilla and Wallowa-Whitman  
11 National Forests -- the HILTON, SWEET PEA, BANTY SALVAGE, HORN  
12 SALVAGE, PRONG SALVAGE, JOHNSON SALVAGE, CANTREL SPRINGS and  
13 EAGLE RIDGE HOUSELOG sales -- have the highest potential for harm  
14 to the bull trout. Id. at ¶ 20.

15 The nine Umatilla and Wallowa-Whitman National Forest  
16 sales (the eight listed immediately above and the ALLEN sale) are  
17 also within the range of the Snake River spring/summer chinook  
18 salmon and Snake River fall chinook salmon, two threatened  
19 species under the Endangered Species Act that are in serious  
20 decline. Wyland Declaration, at ¶ 12 (attached hereto).<sup>3</sup> Both  
21 forests contain critical habitat for salmon. Id. at ¶¶ 16, 35,  
22 36. The National Marine Fisheries Service ("NMFS") conducted  
23 consultations on listed salmon for five of the Wallow Whitman

24  
25 <sup>3</sup> This declaration was also submitted in connection with  
26 the federal defendants' motion in the Ninth Circuit for stay  
27 pending appeal of this court's September 13 and October 17  
orders.

1 sales, and concluded that the sales would not be likely to  
2 jeopardize salmon if they were modified from their original  
3 terms. Id. at ¶ 22, Attachment A.

4           However, if these five sales are awarded, released and  
5 completed under Section 2001(k)(1) on their original, unmodified  
6 terms, the timber harvest activities involved would increase the  
7 level of incidental taking of spring/summer salmon at a time when  
8 their condition is particularly precarious and could jeopardize  
9 their continued existence in the area. Id. at ¶¶ 22-34.

10 Consequently, the overall risk of extinction of this species  
11 would increase. Id. at ¶ 22. The NMFS concluded that, in  
12 conjunction with other land management activities in the area,  
13 the four remaining Wallowa-Whitman and Umatilla sales would also  
14 adversely affect listed Snake River spring/summer and fall  
15 chinook salmon if awarded, released and completed in their  
16 unmodified form. Id. at ¶¶ 35, 36, Attachment A.

17           Two sales, the JOHN LODGEPOLE and NELSON sales, are  
18 also in the range of the shortnose sucker, and endangered species  
19 resident in the Sprague River of the Upper Klamath Basin. Spear  
20 Declaration, at ¶ 16. Timber harvest activities involved in  
21 these sales are likely to have adverse impacts on this endangered  
22 species. Id. at ¶ 17.

23 **D. A Stay Will Not Substantially Injure Other Parties**  
24 **Interested in These Proceedings.**

25           Should the court issue a stay pending appeal, neither  
26 NFRC nor Scott Timber will suffer any substantial injury. The  
27

1 federal defendants have acted in good faith to determine whether  
2 the remaining bidders for these sales are interested in them and  
3 to prepare the sales so that they can go forward quickly should  
4 the Ninth Circuit rule against the defendants' position on  
5 appeal. Any economic harm suffered by individual operators due  
6 to a delay in releasing these sales pending appeal pales in  
7 comparison with the serious irreparable harm to forest resources  
8 and endangered, threatened and other species of concern that will  
9 result if the sales are released in their original, unmodified  
10 forms. Once cut, the timber involved in these sales, much of it  
11 old growth, cannot be resurrected. If this stay is denied and  
12 the defendants win on appeal, its harvest in the interim will  
13 have caused needless destruction and harm. However, if the  
14 court's injunction is upheld on appeal, the timber interests will  
15 still have ample opportunity to harvest the timber at issue.

16 **E. The Public Interest Favors Granting A Stay.**

17 Granting a stay pending appeal is in the public  
18 interest in this case. As interpreted by the district court,  
19 Section 2001(k)(2) requires the release of 17 timber sales that,  
20 for environmental and other reasons, would not be cut absent the  
21 court's Order. In a plethora of statutes enacted over the past  
22 two decades, Congress has made clear that preservation and  
23 protection of the environment is a paramount public concern.  
24 Section 2001(k)(2) provides a narrow and limited exception to the  
25 normal process, involving reviews of the impacts to the agencies  
26 timber programs, the environment, threatened and endangered  
27



1 and release these sales.

2

3 Respectfully submitted this 23<sup>rd</sup> day of January, 1996.

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KRISTINE OLSON  
United States Attorney  
JAMES L. SUTHERLAND  
Assistant United States Attorney  
District of Oregon

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6

7

LOIS J. SCHIFFER  
Assistant Attorney General

8

9

  
GEOFFREY GARVER  
MICHELLE L. GILBERT  
Trial Attorneys  
U.S. Department of Justice  
Environment and Natural Resources  
Division  
General Litigation Section  
P.O. Box 663  
Washington, D.C. 20044-0663  
(202) 305-0481

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11

12

13

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Attorneys for Defendants

15

Of Counsel:

16

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

17

18

19

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

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