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Timber: NFRC v. Glickman [2]

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

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NUMBER OF PAGES: 11

DATE: January 22, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NERC v. Glickman. Attached is a Notice of Filing and Request for Additional Time to File Forest Service Report and a letter from Mr. Rutzick dated 1/19/96.

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January 19, 1996

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

Dear Michelle:

As you may recall, the Northwest Forest Resource Council moved promptly in September to enforce Judge Hogan's September 13 Order through the court's contempt powers. In many subsequent filings, the government has suggested that NFRC moved too fast, acted precipitously and did not allow the government to act responsibly.

We read your filings. We are also aware of the snowstorm that hit the Washington area last week. As a result, this time, as you must have observed, NFRC has not taken immediate action to enforce Judge Hogan's January 10, 1996 order, even though this time there can be no doubt that the order is an injunction which requires the defendants to act "immediately" to award and release at least 13 timber sales. (It also confirms the prior release of Boulder Crab and Elk Fork, and declares the duty to award and release four sales which may be enjoined by Judge Dwyer.)

Yet for our patience we have been rewarded by nothing but silence. Now nine days have passed since the order was entered, and none of the sales has been awarded or released. The only sign of life to date is a request for a status conference with Judge Dwyer on the First and Last sales, which is, to us, nothing but a transparent ploy to find another excuse not to award those two sales.

As you know, Pilchuck Audubon has filed a motion for a stay and injunction pending appeal. The government has not,

Michelle Gilbert
January 19, 1996
Page 2

NO1-9506\1RL90938.12F

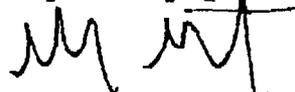
and has given no sign that it intends to appeal the order, with or without a stay.

We feel that the government is taking advantage of our patience to date, and we are beginning to believe that the government will, once again, do nothing to comply with the court's order until we force the issue. This would confirm that we were right in September to go back to court immediately without waiting for the voluntary compliance that should be forthcoming.

Next week, we will have to go back to Judge Hogan if the government does not either move for a stay or award the sales. Government counsel has clarified for us that Secretaries Glickman and Babbitt are personally responsible for compliance with section 2001 of the Rescissions Act. These are the government officials we will have to hold responsible for the government's failure to comply with the January 10 order.

We encourage the government to act responsibly to comply with Judge Hogan's January 10 order. We all know the government is obliged to comply with court orders unless it obtains a stay of an order pending appeal. We shouldn't need to press that point with Judge Hogan.

Very truly yours,



Mark C. Rutzick

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

12	NORTHWEST FOREST RESOURCE COUNCIL,)	
13	Plaintiff,)	
14	v.)	Civil No. 95-6244-HO
15		(lead case)
16	GLICKMAN, in his capacity)	Civil No. 95-6267-HO
17	as Secretary of Agriculture,)	(consolidated case)
18	BRUCE BABBITT, in his capacity)	
19	as Secretary of Interior)	NOTICE OF FILING
20	Defendants.)	AND REQUEST FOR ONE-DAY
21		EXTENSION TO FILE FOREST
22		SERVICE REPORT

23 Pursuant to this Court's October 17, 1995 Order, the Bureau
 24 of Land Management, by and through its counsel, hereby files the
 25 Eleventh Declaration of William L. Bradley describing the actions
 26 taken by the Bureau of Land Management to award and release
 27 timber sales that were offered or awarded between October 1, 1990
 28

1 and July 27, 1995 and within the scope of this Court's September
2 13, 1995 Order.¹

3 As to information relating to the activities of the Forest
4 Service to award and release timber sales that were offered or
5 awarded between October 1, 1990 and July 27, 1995, the federal
6 defendants respectfully request a one-day extension in which to
7 file the Forest Service's Report. The Forest Service Office for
8 Region 6 was closed on Thursday afternoon, January 18, 1996 as a
9 result of inclement weather. Further, the primary responsible
10 official was unavailable today to complete the report.

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23 ¹ On December 20, 1995, as a result of the second partial
24 federal government shutdown, federal defendants requested an
25 extension of five working days upon expiration of the furlough in
26 which to file the fifth bi-weekly progress report. The furlough
27 officially ended on January 5, 1996, and on January 8-10 and
28 January 12 the federal government in Washington, D.C. was closed
due to inclement weather.

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27

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NOTICE OF FILING AND REQUEST FOR ONE-DAY
EXTENSION TO FILE FOREST SERVICE REPORT - 2



1 Dated this 19th day of January, 1996.

2 Respectfully submitted,

3 KRISTINE OLSON
4 United States Attorney

5 LOIS J. SCHIFFER
6 Assistant Attorney General

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)
)
 Plaintiff,)
)
 v.)
)
 DAN GLICKMAN, in his capacity as)
 Secretary of Agriculture,)
 BRUCE BABBITT, in his capacity as)
 Secretary of Interior)
)
 Defendants.)

Civil No. 95-6244-HO

ELEVENTH DECLARATION OF
WILLIAM L. BRADLEY

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).

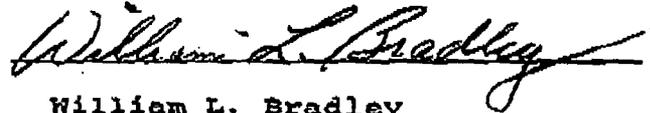
3. In my tenth declaration to the court, I provided two tables showing the status of BLM sales which are covered under Section 2001(k).

4. This declaration is being filed to update the court on the status of these sales. As in my previous declaration, 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) have been added to Table 2. There is no longer a current purchaser for either of these sales. In accordance with the order, these sales will be offered to the second highest bidders after the necessary steps are taken to prepare them for award. The BLM is currently reviewing the existing survey information to determine if threatened or endangered bird species are known to be nesting on any of the sale units. The affected/remaining volume columns on Table 2 will be filled in after the review is completed.

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

Executed at Portland, Oregon, on JANUARY 17, 1996.



William L. Bradley

JANUARY 17, 1995

ANDERSON REPORT (AM)

TABLE 1

FIFTH 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
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	216				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		10167	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.

JANUARY 17, 1998

FIFTH PROGRESS REPORT

TABLE 2

FIFTH PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL. (MBF)	ORIG. ACRES	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
				T & E BIRDS NESTING STATUS	AFFECTED VOL. (MBF)	REMAINING VOL. (MBF)	STATUS
88 BLACK JACK	MVEYCO	6863	95			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	238			6864	EXECUTED
CANTON CREEK II	DOUGLAS CO. FP	3440	47			3440	EXECUTED
CHANEY ROAD	LONE ROCK	3900	75			3900	EXECUTED
HOXIE 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
WHITTS 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

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NUMBER OF PAGES: 18

DATE: January 19, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: Attached are four documents: (1) PAS' Notice of Appeal of 1/10/96 Order issued in NFRC v. Glickman; (2) PAS' Emergency Motion for A Stay and Injunction Pending Appeal; (3) NFRC's Opposition to PAS' Emergency Motion for Stay; and (4) a Notice of Filing and Request for a Status Conference re: First and Last timber sales filed in SAS v. Thomas (W.D. Wash).

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

12	NORTHWEST FOREST RESOURCE)	
13	COUNCIL, an Oregon corporation	)	No. 95-6244-HO
		)	(Lead Case)
14	Plaintiff,)	
	v.	)	No. 95-6267-HO
15		)	(Consolidated Case)
16	DAN GLICKMAN, <u>et al.</u>,	)	No. 95-6384-HO
		)	(Consolidated Case)
17	Defendants,)	
18	OREGON NATURAL RESOURCES COUNCIL,	)	NOTICE OF APPEAL
	<u>et al.</u>)	
19	<u>Amici/Defendants-Intervenors</u>)	

20

21 Plaintiffs Pilchuck Audubon Society, Oregon Natural
 22 Resources Council, Portland Audubon Society, Black Hills Audubon
 23 Society, Western Ancient Forest Campaign, Headwaters, Coast Range
 24 Association, Friends of Elk River, Seattle Audubon Society,
 25 Washington Environmental Council hereby appeal to the United
 26 //
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States Court of Appeals for the Ninth Circuit from the final order entered in this action on January 10, 1996.

DATED this 12th day of January, 1996.


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

12 NORTHWEST FOREST RESOURCE)
 13 COUNCIL, an Oregon corporation)
 14 Plaintiff,)

No. 95-6244-HO
 (Lead Case)

15 v.)

No. 95-6267-HO
 (Consolidated Case)

16 DAN GLICKMAN, et al.,)
 17 Defendants,)

No. 95-6384-HO
 (Consolidated Case)

18 OREGON NATURAL RESOURCES COUNCIL,)
et al.)
 19 Amici/Defendants-Intervenors)

EMERGENCY MOTION FOR A
 STAY AND INJUNCTION
 PENDING APPEAL

Expedited Consideration
 Requested

20
 21
 22 Plaintiffs Pilchuck Audubon Society, Oregon Natural
 23 Resources Council, Portland Audubon Society, Black Hills Audubon
 24 Society, Western Ancient Forest Campaign, Headwaters, Coast Range
 25 Association, Friends of Elk River, Seattle Audubon Society,
 26 Washington Environmental Council respectfully ask this Court to
 27 stay pending appeal the injunction issued in its January 10, 1996

EMERGENCY MOTION FOR A STAY AND
 INJUNCTION PENDING APPEAL

1 order and to enjoin pending appeal logging of previously
2 cancelled timber sales that have been awarded and released under
3 this Court's injunction of October 17, 1995.

4 Plaintiffs are filing a notice of appeal along with this
5 motion and will seek a similar stay and injunction pending appeal
6 in the Court of Appeals later this week.

7 Pursuant to Rule 8 of the Federal Rules of Appellate
8 Procedure, plaintiffs must ordinarily first seek a stay and
9 injunction pending appeal in the district court. This motion
10 discharges that obligation.

11 This Court considers motions for stays and injunctions
12 pending appeal under the same standard as motions for preliminary
13 injunction. See Warm Springs Dam Task Force v. Gribble, 565 F.2d
14 549, 551 (9th Cir. 1977). "[A] plaintiff may meet its burden [to
15 merit a preliminary injunction] by demonstrating a combination of
16 probable success on the merits and a possibility of irreparable
17 injury." Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668,
18 674 (9th Cir. 1988). In deciding a motion for a preliminary
19 injunction, the court must consider: (1) plaintiffs' likelihood
20 of success on the merits; (2) whether the balance of irreparable
21 harm favors plaintiffs; and (3) whether the public interest
22 favors issuance of the injunction or restraining order.
23 Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668, 674
24 (9th Cir. 1988).

25 Plaintiffs recognize that this Court disagrees that
26 plaintiffs have a likelihood of succeeding on the merits of their
27 appeal as demonstrated by the January 11, 1996 order that is the

1 subject of the appeal. However, because the standard for issuing
2 a preliminary injunction balances the various factors, the
3 extreme harm that will be caused by logging during the pendency
4 of the appeal counsels in favor of issuance of a stay and
5 injunction pending appeal.

6 The old-growth trees that will be cut cannot be replaced.
7 The loss of valuable habitat for various species, including many
8 threatened or endangered species, cannot be reversed. These
9 losses constitute irreparable harm in the purest sense. See
10 Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545
11 (1987) ("Environmental injury, by its nature, can seldom be
12 adequately remedied by money damages and is often of long
13 duration, i.e., irreparable.").

14 Moreover, because this case presents a question concerning
15 the scope of Section 2001(k)(1), the Court of Appeal's resolution
16 of this appeal will establish whether these sales fall within
17 Section 2001(k)(1) at all. Most, if not all, of these sales were
18 cancelled because they violate existing environmental laws, and
19 they cannot legally be logged in their cancelled form.
20 Accordingly, if these sales are logged during the appeal, and the
21 Court of Appeals decides that they fall entirely outside the
22 reach of Section 2001(k)(1), this Court's orders would
23 erroneously permit illegal logging.

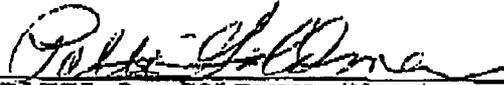
24 Plaintiffs will seek expedition of the Court of Appeals
25 proceedings so that this issue can be resolved by the Court of
26 Appeals as soon as possible. A stay and injunction pending
27 //

EMERGENCY MOTION FOR A STAY AND
INJUNCTION PENDING APPEAL

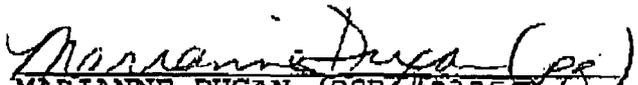
1 appeal would prevent the irreparable harm from logging these
2 sales in the meantime.

3 Because plaintiffs plan to seek expedition in the Court of
4 Appeals later this week, this Court is asked to rule immediately
5 on this motion.

6 DATED this 12th day of January, 1996.

7 
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9 KRISTEN L. BOYLES (WSB# 23806)
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14)	Civil No. 95-6384-HO
15	and)	Consolidated Cases
16)	
17	SCOTT TIMBER CO., VAAGEN BROS.)	NFRC'S OPPOSITION TO
18	LUMBER INC., and WESTERN TIMBER	)	PILCHUCK AUDUBON'S
19	CO.,	)	EMERGENCY MOTION FOR A STAY
20		)	AND INJUNCTION PENDING
21	Plaintiff-intervenors,	)	APPEAL
22)	
23	vs.)	
24)	
25	DAN GLICKMAN, in his capacity)	
26	as Secretary of Agriculture;)	
27	BRUCE BABBITT, in his capacity)	
28	as Secretary of the Interior,)	
29)	
30	Defendants,)	
31)	
32	and)	
33)	
34	OREGON NATURAL RESOURCE)	
35	COUNCIL, et al.,)	
36)	
37	Defendant-intervenors.)	

Page

1 - NFRC'S OPPOSITION TO PILCHUCK AUDUBON'S
EMERGENCY MOTION FOR A STAY AND INJUNCTION
PENDING APPEAL

MARK C. RUTZICK LAW FIRM
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Introduction

Plaintiff Northwest Forest Resource Council ("NFR") opposes Pilchuck Audubon's motions for a stay pending appeal and an injunction pending appeal. The motions are procedurally defective, factually unsupported and deficient under the governing legal standards. The motions should be denied.

Argument

PILCHUCK'S MOTIONS SHOULD BE DENIED BECAUSE PILCHUCK HAS NO CHANCE OF SUCCESS ON THE MERITS, HAS NOT SHOWN THAT ANY IRREPARABLE HARM WILL RESULT FROM AWARD AND RELEASE OF THE SALES IN QUESTION, AND ITS MOTIONS ARE PROCEDURALLY DEFECTIVE.

A. Standard for stay pending appeal.

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

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

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *Texaco Refining And Marketing, Inc. v. Davis*, 819 F. Supp. 1485, 1486 (D. Or. 1993).

A stay requires either a probability of success on the merits or the presence of serious legal questions. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328, 464 U.S. 879 (1983). A stay pending appeal cannot be granted when the appellant has no chance of

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NO1-9506\1RB90929.1E8

1 success on appeal. *Barber v. State of Hawaii*, 42 F.3d 1185, 1199
2 (9th Cir. 1994).

3 A stay also requires a showing of irreparable harm or a
4 balance of hardships sharply tipped in the appellant's favor.
5 *Lopez v. Heckler*, 713 F.2d at 1435. The applicant for a stay
6 must "substantiate the claim that irreparable harm is 'likely' to
7 occur." *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C.
8 Cir. 1985). To establish the existence of irreparable harm and
9 the other required factors for a stay, the moving party must
10 "provid[e] specific facts and affidavits supporting assertions
11 that these factors exist." *Michigan Coalition v. Griepentrog*,
12 945 F.2d 150, 154 (6th Cir. 1991).

13 **B. Standard for injunction pending appeal.**

14 An injunction pending appeal requires consideration of three
15 factors:

- 16 (1) Have the movants established a strong
17 likelihood of success on the merits? (2)
18 Does the balance of irreparable harm favor
the movants? (3) Does the public interest
favor granting the injunction?

19 *Warm Springs Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir.
20 1977).

21 **C. *Pilchuck* is not entitled to a stay pending appeal.**

22 *Pilchuck* seeks a stay of this court's injunction entered
23 January 10, 1996 ordering the Forest Service and BLM to immedi-
24 ately award and release 15 previously-offered timber sales that
25 are not currently enjoined by another court. (The court only
26 granted declaratory relief as to the four enjoined sales.)

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1 1. Procedurally defective. Pilchuck has no standing to
2 appeal the court's injunction, or to seek a stay of the injunc-
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4 *Glickman* case under which the injunction was issued. Pilchuck's
5 intervention in *NFRC v. Glickman* is limited to the claims
6 concerning the "known to be nesting" exemption in section
7 2001(k)(2). Pilchuck is only an *amicus curiae* on the claims
8 under section 2001(k)(1), and a non-party may not appeal an
9 injunction or seek relief from the court.

10 The parties enjoined - the defendant Secretaries - have not
11 appealed the court's injunction. In fact they previously
12 conceded their duty to award and release seven of the sales in
13 question (Last, First, Tip, Tiptop, Gatorson, Boulder Krab and
14 Elk Fork) and awarded and released the last two sales of that
15 group in November 1995.

16 2. Factually unsupported. Pilchuck has submitted no
17 affidavits, documents or other evidence to show that any of the
18 timber sales will cause any irreparable harm. It has made no
19 showing of irreparable harm or hardship to itself. Nor has it
20 addressed or acknowledged the harm to NFRC and its member
21 companies, and the public, that a stay would cause by denying
22 them the benefits of the congressionally-mandated award and
23 release of these sales.

24 In the earlier phase of this case, the defendant Secretaries
25 sought a stay in the Ninth Circuit of this court's October 17,
26 1995 injunction ordering the award and release of some 62 FY

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4 - NFRC'S OPPOSITION TO PILCHUCK AUDUBON'S
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1 1991-95 sales. The defendants supported their motion with
2 declarations purporting to show the environmental harm that would
3 result from the sales in question - the very sort of evidence
4 Pilchuck has failed to submit.

5 Even with evidence of purported environmental harm in the
6 record, the Ninth Circuit denied the stay pending appeal. It
7 found: "Although some hardship may result from either a grant or
8 denial of a stay pending appeal, the balance of hardships does
9 not tip sharply in favor of one party or the other." Order,
10 October 25, 1995 at 1 (Attachment 1). With the balance of
11 hardships inconclusive, the court denied the stay because the
12 likelihood of success was "negligible." *Id.*

13 The same result is compelled here since Pilchuck has not
14 documented any environmental harm from the 15 sales in question,
15 while the harm to NFERC and its members is evident from the
16 language of legislative history of section 2001(k). Without
17 evidence of harm, the stay must be denied.

18 3. Deficient under governing legal standard. Since
19 Pilchuck has no right to appeal the injunction in *NFERC v.*
20 *Glickman*, it has no chance of success on its appeal, and there-
21 fore is not entitled to a stay.

22 As to the merits of the issues decided by the court in its
23 January 10 order, Pilchuck also has no chance of success even if
24 it could appeal the order. The court applied the straightforward
25 plain meaning of both sentences of section 2001(k)(1). Pil-
26 chuck's arguments have consistently ignored the language of the

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1 statute, and have given no meaning at all to the second sentence.
2 It has no chance of success on appeal.

3 **D. Pilchuck is not entitled to an injunction pending appeal.**

4 1. Procedurally defective. Pilchuck's motion for an
5 injunction pending appeal in its own case - where NFRC is a
6 defendant-intervenor - is also procedurally defective. Pilchuck
7 has not identified the names or numbers of the sales it wants
8 enjoined. It merely seeks to enjoin an unspecified number of
9 "previously cancelled timber sales" - including sales currently
10 at issue in *NFRC v. Glickman* and sales that have already been
11 awarded and released under section 2001(k) - without identifying
12 what sales it refers to, what it means by "cancelled" or how many
13 sales might be affected.

14 Pilchuck's motion does not comply with Fed. R. Civ. P. 65(d)
15 as it is not specific and does not describe in reasonable detail
16 the act or acts it seeks to restrain.

17 2. Factually unsupported. Pilchuck's motion is totally
18 unsupported by any evidence, even the names of the sales it seeks
19 to enjoin. Since it has not identified the sales, it obviously
20 has not shown that any of the sales will result in any irrepara-
21 ble harm.

22 3. Deficient under governing legal standard. Pilchuck has
23 not shown the "strong likelihood of success on the merits"
24 required under *Warm Springs Task Force v. Gribble*, 565 F.2d at
25 551. It has no chance of success on the merits. The second
26 sentence of section 2001(k) (1) specifically addresses previously-

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6 - NFRC'S OPPOSITION TO PILCHUCK AUDUBON'S
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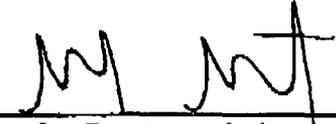
cancelled sales, where the bid bond was returned to the high bidder, and requires the award and release of those sales. Pilchuck has no answer to the plain meaning of the second sentence of the statute, and no chance of success on appeal.

Conclusion

Pilchuck's motions for a stay pending appeal and an injunction pending appeal should be denied.

Dated this 16th day of January, 1996.

MARK C. RUTZICK LAW FIRM
A Professional Corporation

By: 
Mark C. Rutzick
Alison Kean Campbell
Attorneys for Plaintiff



U.S. Department of Justice

Environment and Natural Resources Division

General Litigation Section

Washington, D.C. 20530

January 16, 1996

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

Facsimile Number: 503 225-1257

Re: Northwest Forest Resource Council v. Glickman

Dear Mr. Horngren:

We received today your letters of January 12, and January 16, 1996, in which you raise questions about compliance with Judge Hogan's Order of January 10, 1996. As you may be aware, the federal government has been shut down due to a funding shortage from December 16 through January 5, 1996. Following that furlough situation, Washington, D.C. was hit with a winter blizzard, and these weather conditions closed the federal government for January 8-10 and 12. Thus, today represents our first day back in the office.

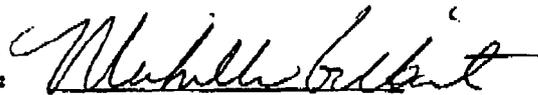
You advise us in your letter that unless you hear from us by the close of business today regarding the First and Last timber sales you will file a motion of contempt based on the court's January 10, 1996 Order. As with all previous orders, we take the Court's directions seriously. We are aware of the Court's ruling on First and Last and the importance of prompt compliance.

We are also mindful, however, that these sales are also the subject of a motion for clarification and enforcement by the plaintiffs in SAS v. Thomas Civ. No. 89-160(WD) before Judge Dwyer. On November 3rd, 1995, Judge Dwyer stayed that motion pending a ruling by Judge Hogan. Thus, we are in the process of determining what filings are required before Judge Dwyer before releasing these sales. We will, of course, want to keep Judge Hogan apprised of our actions in connection with these sales before the District Court for the Western District of Washington.

We are committed to complying fully and promptly with Judge Hogan's Order. We will be contacting you by Thursday to discuss our next step. In the meanwhile, we certainly believe that any motion for contempt would be improper.

Sincerely,

By:



Michelle Gilbert
Ellen M. Athas

UNITED STATES DISTRICT COURT
United States Courthouse
211 East 7th Avenue
Eugene, Oregon 97401
(503) 465-6773

93 JAN 10 11 22

Gibert

Michael R. Hogan
Chief Judge

January 5, 1996

James Sutherland
Assistant United States Attorney
701 High Street
Eugene, Oregon 97401-2713

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Environmental and Natural
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PO Box 663
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Patti Goldman, Esq.
Sierra Club Legal Defense Fund
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Seattle, Washington 98104

Marianne Dugan, Esq.
Western Environmental
Law Center
1216 Lincoln Street
Eugene, Oregon 97401

Scott Horngren, Esq.
Haglund & Kirtley
101 SW Main Street, Suite 1800
Portland, Oregon 97204

RE: NERC v. Glickman, Civ. No. 95-6244-HO; summary judgment motions on "known to be nesting" issue

Counsel:

The court will issue its ruling on this matter shortly. All parties are hereby excused from their obligation to notify the court under Local Rule 205-2(a).

Sincerely,

Michael R. Hogan
Michael R. Hogan
Chief Judge

3

1299 Rec'd

MRH/mpp

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

FAX NUMBER (202) 305-0506, 0267
CONFIRMATION NUMBER (202) 305-0503

PLEASE DELIVER TO:

To: Don Barry 208-4684
Bob Baum 208-3877
David Gayer
Dinah Bear 456-0753
Ted Boling 514-4231
Peter Coppelman 514-0557
Lois Schiffer
Jim Simon
Greg Frazier 720-5437
Mike Gippert, 690-2730
Jay McWhirter
Jim Perry
T.J. Glauthier 395-4639
Jeff Handy (503) 326-3807
Nancy Hayes 208-5242
Elena Kagan 456-1647
Don Knowles (503) 326-6282
Jim Sutherland(503) 465-6582
Karen Mouritsen 219-1792
Kris Clark
Roger Nesbit (503) 231-2166
Chris Nolan 395-4941
Dave Shilton 514-4240
Al Ferlo
Anne Almy
Tom Tuchmann (503) 326-6254
Sue Zike (503) 326-7742

NUMBER OF PAGES: 15

DATE: January 17, 1996

FROM: Michelle Gilbert (202) 305-0460

MESSAGE: NFRC v. Glickman, 95-6244

Attached is a copy of NFRC's Opposition to
Pilchuck Audobon's Emergency Motion for a
Stay and Injunction Pending Appeal.

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2 Alison Kean Campbell, OSB #93011
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4 A Professional Corporation
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6 888 S.W. Fifth Ave.
7 Portland, Oregon 97204-2089
8 (503) 499-4573

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

10	NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
11	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 OPPOSITION TO
15	LUMBER INC., and WESTERN TIMBER	)	PILCHUCK AUDUBON'S
	CO.,	)	EMERGENCY MOTION FOR A STAY
16	Plaintiff-intervenors,	)	AND INJUNCTION PENDING
		)	APPEAL
17	vs.)	
)	
18	DAN GLICKMAN, in his capacity)	
	as Secretary of Agriculture;)	
19	BRUCE BABBITT, in his capacity)	
	as Secretary of the Interior,)	
20)	
	Defendants,)	
21)	
	and)	
22)	
23	OREGON NATURAL RESOURCE)	
	COUNCIL, et al.,)	
24)	
	Defendant-intervenors.)	

Page

1 - NFRC'S OPPOSITION TO PILCHUCK AUDUBON'S
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Introduction

Plaintiff Northwest Forest Resource Council ("NFRC") opposes Pilchuck Audubon's motions for a stay pending appeal and an injunction pending appeal. The motions are procedurally defective, factually unsupported and deficient under the governing legal standards. The motions should be denied.

Argument

PILCHUCK'S MOTIONS SHOULD BE DENIED BECAUSE PILCHUCK HAS NO CHANCE OF SUCCESS ON THE MERITS, HAS NOT SHOWN THAT ANY IRREPARABLE HARM WILL RESULT FROM AWARD AND RELEASE OF THE SALES IN QUESTION, AND ITS MOTIONS ARE PROCEDURALLY DEFECTIVE.

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13 **B. Standard for injunction pending appeal.**

14 An injunction pending appeal requires consideration of three
15 factors:

- 16 (1) Have the movants established a strong
17 likelihood of success on the merits? (2)
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1 1. Procedurally defective. Pilchuck has no standing to
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 13 question (Last, First, Tip, Tiptop, Gatorson, Boulder Krab and
 14 Elk Fork) and awarded and released the last two sales of that
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1 1991-95 sales. The defendants supported their motion with
2 declarations purporting to show the environmental harm that would
3 result from the sales in question - the very sort of evidence
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13 The same result is compelled here since Pilchuck has not
14 documented any environmental harm from the 15 sales in question,
15 while the harm to NFRC and its members is evident from the
16 language of legislative history of section 2001(k). Without
17 evidence of harm, the stay must be denied.

18 3. Deficient under governing legal standard. Since
19 Pilchuck has no right to appeal the injunction in *NFRC v.*
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1 statute, and have given no meaning at all to the second sentence.
2 It has no chance of success on appeal.

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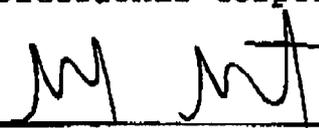
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3 Pilchuck has no answer to the plain meaning of the second
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5 **Conclusion**

6 Pilchuck's motions for a stay pending appeal and an injunc-
7 tion pending appeal should be denied.

8 Dated this 16th day of January, 1996.

9 MARK C. RUTZICK LAW FIRM
10 A Professional Corporation

11 By: 
12 _____

13 Mark C. Rutzick
14 Alison Kean Campbell
15 Attorneys for Plaintiff
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7 - NERC'S OPPOSITION TO PILCHUCK AUDUBON'S
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The Law Firm for the Environmental Movement

Sumie, Mr. McKinley

M. Arvid Adams

203 Hoge Building, 705 Second Avenue, Seattle, WA 98104-1711 (206) 343-7340 FAX (206) 343-1526

January 12, 1996

Clerk of the Court
U.S. District Court of Oregon
240 U.S. Courthouse
211 E. 7th
Eugene, OR 97401

Re: Northwest Forest Resource Council, et al. v. Dan Glickman, et al., Oregon Natural Resources Council, et al. Amici/Defendants-Intervenors, No. 95-6244-HQ (Lead Case), No. 95-6267-HQ (Consolidated Case), No. 95-6384-HQ (Consolidated Case)

Dear Clerk:

Enclosed for filing with the Court please find the original and one copy of the following:

- 1) EMERGENCY MOTION FOR A STAY AND INJUNCTION PENDING APPEAL;
- 2) NOTICE OF APPEAL;
- 3) Check for Notice of Appeal Fee of \$105.00;
- 4) CERTIFICATE OF SERVICE.

Please file-stamp and return the extra copy to our office in the enclosed postage-paid envelope.

Thank you for your cooperation.

Very truly yours,

Tina Dickey
Assistant to Patti Goldman

cc: All Counsel



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

4 Attorneys for Plaintiffs

5 MARIANNE DUGAN (OSB# 93256)
 6 DEBORAH N. MAILANDER (OSB# 92380)
 Western Environmental Law Center
 7 1216 Lincoln Street
 Eugene, Oregon 97401
 8 (503) 485-2471

9 Local Counsel for Plaintiffs

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

12	NORTHWEST FOREST RESOURCE)	
13	COUNCIL, an Oregon corporation	)	No. 95-6244-HO
		)	(Lead Case)
14	Plaintiff,)	
	v.)	
15		)	No. 95-6267-HO
		)	(Consolidated Case)
16	DAN GLICKMAN, <u>et al.</u> ,)	
		)	No. 95-6384-HO
17	Defendants,	)	(Consolidated Case)
)	
18	OREGON NATURAL RESOURCES COUNCIL,	)	EMERGENCY MOTION FOR A
	<u>et al.</u>	)	STAY AND INJUNCTION
		)	PENDING APPEAL
19	<u>Amici/Defendants-Intervenors</u>)	
		)	Expedited Consideration
20		)	Requested
)	

21

22 Plaintiffs Pilchuck Audubon Society, Oregon Natural
 23 Resources Council, Portland Audubon Society, Black Hills Audubon
 24 Society, Western Ancient Forest Campaign, Headwaters, Coast Range
 25 Association, Friends of Elk River, Seattle Audubon Society,
 26 Washington Environmental Council respectfully ask this Court to
 27 stay pending appeal the injunction issued in its January 10, 1996

EMERGENCY MOTION FOR A STAY AND
 INJUNCTION PENDING APPEAL

1 order and to enjoin pending appeal logging of previously
2 cancelled timber sales that have been awarded and released under
3 this Court's injunction of October 17, 1995.

4 Plaintiffs are filing a notice of appeal along with this
5 motion and will seek a similar stay and injunction pending appeal
6 in the Court of Appeals later this week.

7 Pursuant to Rule 8 of the Federal Rules of Appellate
8 Procedure, plaintiffs must ordinarily first seek a stay and
9 injunction pending appeal in the district court. This motion
10 discharges that obligation.

11 This Court considers motions for stays and injunctions
12 pending appeal under the same standard as motions for preliminary
13 injunction. See Warm Springs Dam Task Force v. Gribble, 565 F.2d
14 549, 551 (9th Cir. 1977). "[A] plaintiff may meet its burden [to
15 merit a preliminary injunction] by demonstrating a combination of
16 probable success on the merits and a possibility of irreparable
17 injury." Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668,
18 674 (9th Cir. 1988). In deciding a motion for a preliminary
19 injunction, the court must consider: (1) plaintiffs' likelihood
20 of success on the merits; (2) whether the balance of irreparable
21 harm favors plaintiffs; and (3) whether the public interest
22 favors issuance of the injunction or restraining order.
23 Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668, 674
24 (9th Cir. 1988).

25 Plaintiffs recognize that this Court disagrees that
26 plaintiffs have a likelihood of succeeding on the merits of their
27 appeal as demonstrated by the January 11, 1996 order that is the

1 subject of the appeal. However, because the standard for issuing
2 a preliminary injunction balances the various factors, the
3 extreme harm that will be caused by logging during the pendency
4 of the appeal counsels in favor of issuance of a stay and
5 injunction pending appeal.

6 The old-growth trees that will be cut cannot be replaced.
7 The loss of valuable habitat for various species, including many
8 threatened or endangered species, cannot be reversed. These
9 losses constitute irreparable harm in the purest sense. See
10 Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545
11 (1987) ("Environmental injury, by its nature, can seldom be
12 adequately remedied by money damages and is often of long
13 duration, i.e., irreparable.").

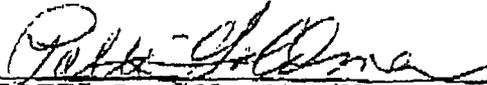
14 Moreover, because this case presents a question concerning
15 the scope of Section 2001(k)(1), the Court of Appeal's resolution
16 of this appeal will establish whether these sales fall within
17 Section 2001(k)(1) at all. Most, if not all, of these sales were
18 cancelled because they violate existing environmental laws, and
19 they cannot legally be logged in their cancelled form.
20 Accordingly, if these sales are logged during the appeal, and the
21 Court of Appeals decides that they fall entirely outside the
22 reach of Section 2001(k)(1), this Court's orders would
23 erroneously permit illegal logging.

24 Plaintiffs will seek expedition of the Court of Appeals
25 proceedings so that this issue can be resolved by the Court of
26 Appeals as soon as possible. A stay and injunction pending
27 //

1 appeal would prevent the irreparable harm from logging these
2 sales in the meantime.

3 Because plaintiffs plan to seek expedition in the Court of
4 Appeals later this week, this Court is asked to rule immediately
5 on this motion.

6 DATED this 12th day of January, 1996.

7 
8 PATTI A. GOLDMAN (WSB# 24426)
9 KRISTEN L. BOYLES (WSB# 23806)
10 Sierra Club Legal Defense Fund
11 705 Second Avenue, Suite 203
12 Seattle, Washington 98104
13 (206) 343-7340

14 Attorneys for Plaintiffs

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17 DEBORAH N. MAILANDER (OSB# 92380)
18 Western Environmental Law Center
19 1216 Lincoln Street
20 Eugene, OR 97401
21 (503) 485-2471

22 Local Counsel for Plaintiffs

23 518stay.moc

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 16 FOR THE DISTRICT OF OREGON

17	NORTHWEST FOREST RESOURCE)	
18	COUNCIL, an Oregon corporation)	No. 95-6244-HO
19)	(Lead Case)
20	Plaintiff,)	
21	v.)	No. 95-6267-HO
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23	DAN GLICKMAN, <u>et al.</u> ,)	
24)	No. 95-6384-HO
25	Defendants,)	(Consolidated Case)
26)	
27	OREGON NATURAL RESOURCES COUNCIL,)	NOTICE OF APPEAL
28	<u>et al.</u>)	
29	<u>Amici/Defendants-Intervenors</u>)	

30

31 Plaintiffs Pilchuck Audubon Society, Oregon Natural
 32 Resources Council, Portland Audubon Society, Black Hills Audubon
 33 Society, Western Ancient Forest Campaign, Headwaters, Coast Range
 34 Association, Friends of Elk River, Seattle Audubon Society,
 35 Washington Environmental Council hereby appeal to the United
 36 //
 37 //

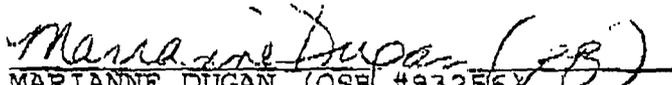
1 States Court of Appeals for the Ninth Circuit from the final
2 order entered in this action on January 10, 1996.

3 DATED this 12th day of January, 1996.

4 

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6 KRISTEN L. BOYLES (WSB# 23806)
7 Sierra Club Legal Defense Fund
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19 Local Counsel for Plaintiffs

20 518notice.mot

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)	No. 95-6384-HO
17	Defendants,)	(Consolidated Case)
18	OREGON NATURAL RESOURCES COUNCIL,)	
	<u>et al.</u>)	
19	<u>Amici</u> /Defendants-Intervenors)	

22 CERTIFICATE OF SERVICE

23 I am a citizen of the United States and a resident of the
 24 State of Washington. I am over 18 years of age and not a party
 25 to this action. My business address is 705 Second Avenue, Suite
 26 203, Seattle, Washington 98104.

1 On January 12, 1996, I served a true and correct copy of
 2 EMERGENCY MOTION FOR A STAY AND INJUNCTION PENDING APPEAL
 3 and NOTICE OF APPEAL by telefax and United States Mail, addressed
 4 as follows:

5 James L. Sutherland
 Assistant U.S. Attorney
 6 701 High St.
 Eugene, OR 97401
 7 FAX: (541) 465-6582

Geoffrey Garver
 Wells Burgess
 Michelle Gilbert
 Dept. of Justice
 Env't & Natural Resources Div.
 General Litigation Section
 601 Pennsylvania Ave. NW,
 8th Floor
 Washington, DC 20044
 FAX: (202) 305-0506

8 Jean B. Williams
 Ellen Kohler
 9 James C. Kilbourne
 Department of Justice
 Env't & Natural Resources Div.
 10 Wildlife & Marine Res. Section
 601 Pennsylvania Ave. NW #5000
 11 Washington, D.C. 20044
 12 FAX: (202) 305-0275

Mark Rutzick
 500 Pioneer Tower
 888 SW Fifth Ave.
 Portland, OR 97204-2089
 FAX: (503) 295-0915

13 Kristine Olson
 U.S. Attorney
 14 888 SW Fifth Ave., Ste 1000
 Portland, OR 97204-2024
 15 FAX: (503) 727-1117

Scott Horngren
 Haglund & Kirtley
 1800 One Main Place
 101 SW Main
 Portland, OR 97204
 FAX: (503) 225-1257

16 Patricia M. Dost
 Schwabe, Williamson & Wyatt
 17 Stes 1600-1800, Pacwest Center
 1211 S.W. Fifth Avenue
 18 Portland, OR 97204-3795
 FAX: (503) 796-2900

19 I, Tina Dickey, declare under penalty of perjury that the
 20 foregoing is true and correct. Executed on this 12th day of
 21 January, 1996, at Seattle, Washington.

22 
 23 Tina Dickey
 24
 25
 26
 27

HAGLUND & KIRTLEY

ATTORNEYS AT LAW

ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204TELEPHONE (503) 225-0777
FACSIMILE (503) 225-1257

January 12, 1996

VIA FAX AND REGULAR MAIL

Ms. Michelle L. Gilbert
Mr. Geoffrey Garver
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
P. O. Box 663
Washington, D.C. 20044

Mr. Jim Sutherland
Assistant U.S. Attorney
701 High Street
Eugene, Oregon 97401

Dear Ms. Gilbert and Messrs. Garver and Sutherland:

I am writing to request that you immediately direct the Forest Service to comply with the District of Oregon's Order filed January 10, 1996 requiring the Forest Service to "immediately award, release, and permit to be completed all sales subject to Section 2001(k)(1) as declared in this Order." Order at 24.

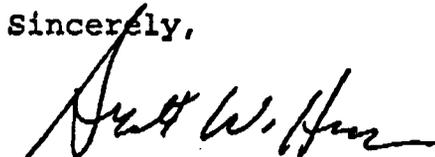
Pete Quast of Roseburg Forest Products contacted Brenda Woodard on the Siskiyou National Forest yesterday to obtain the award of the First and Last Timber Sales which were not subject to a preceding court injunction nor did the defendants oppose the release of these two sales in the litigation. Ms. Woodard said that all the paperwork is complete to make the award. She explained that the only thing standing in the way of award is instructions she was given not to award the sales until next Wednesday after the Justice Department makes a decision on how to proceed. This delay in the award of the First and Last Timber Sales is a direct violation of Judge Hogan's January 10, 1996 Order and we request that you immediately contact your client to direct award of the First and Last Timber Sales by close of

HAGLUND & KIRTLEY
ATTORNEYS AT LAW

Ms. Michelle Gilbert
Mr. Geoffrey Garver
Mr. Jim Sutherland
January 12, 1996
Page 2

business today. Given that all the necessary paperwork to award the First and Last Timber Sales is complete, that the defendants' litigation position did not oppose the release of the First and Last Timber Sales, and that Judge Hogan has ordered the immediate release of these sales, there is no reason for further delay of the award. If the sales are not awarded and we do not hear from you by the end of the day, Scott Timber will seek a contempt order. Thank you for your attention to this matter.

Sincerely,



Scott W. Horngren

cc: Mr. Pete Quast

HAGLUND & KIRTLEY
ATTORNEYS AT LAW

ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204

TELEPHONE (503) 225-0777
FACSIMILE (503) 225-1257

January 15, 1996

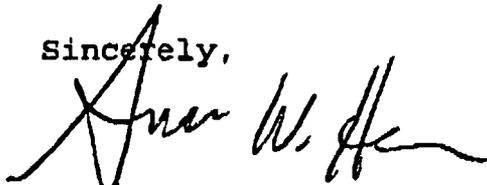
VIA FAX

Ms. Michelle L. Gilbert
Mr. Geoffrey Garver
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
P. O. Box 663
Washington, D.C. 20044

Dear Ms. Gilbert and Mr. Garver:

Enclosed is a draft of a Motion of Contempt which we intend to file unless the Forest Service awards Scott Timber Co. the First and Last Timber Sales. I was able to contact Jim Sutherland on Friday, but he informed me that you have decision-making authority for this case. Since I was unable to contact you on Friday, I will wait until the end of the day, Tuesday, January 16, 1996 to file this contempt motion. As explained in my January 12, 1996 letter to you, there is no reason to withhold award of the First and Last Timber Sales given the judge's decision, the government's litigation position that the sales are released under the Rescissions Act, and given the absence of an injunction against these sales.

Sincerely,



Scott W. Horngren

cc: Mr. Pete Quast
Mr. Jim Sutherland

DRAFT

1 Michael E. Haglund, OSB 77203
 2 Scott W. Horngren, OSB 88060
 3 Shay S. Scott, OSB 93421
 4 HAGLUND & KIRTLEY
 5 Attorneys at Law
 6 1800 One Main Place
 7 101 S.W. Main Street
 8 Portland, Oregon 97204
 9 (503) 225-0777

Attorneys for Plaintiff Scott Timber Co.

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

10	NORTHWEST FOREST RESOURCE)	
11	COUNCIL, an Oregon)	
	corporation,)	
12)	
	Plaintiff,	)	No. 95-6244-HO (Lead)
13		)	No. 95-6267-HO (Consolidated)
	v.	)	No. 95-6384-HO (Consolidated)
14)	
15	DANIEL R. GLICKMAN, in his	)	SCOTT TIMBER CO.'S MOTION
	capacity as Secretary of	)	FOR ORDER OF CONTEMPT
16	Agriculture, BRUCE BABBITT, in)	
	his capacity as Secretary of	)	(Expedited Hearing
17	Interior,	)	Requested)
)	
18	Defendants.		

18 Scott Timber Co. moves for an order holding Defendant
 19 Dan Glickman, Secretary of Agriculture, in contempt of this
 20 Court's Order of January 11, 1996 for his refusal to comply with
 21 the order directing the immediate award of the First and Last
 22 Timber Sales on the Siskiyou National Forest. This Motion is
 23 : : :
 24 : : :
 25 : : :
 26

HAGLUND & KIRTLEY
 ATTORNEYS AT LAW
 ONE MAIN PLACE
 101 S.W. MAIN, SUITE 1800
 PORTLAND, OREGON 97204
 TELEPHONE (503) 225-0777

1 based on the accompanying Memorandum and on the Declarations of
2 Scott W. Horngren and Pete Quast.

3 Dated this _____ day of January, 1996.

4
5
6 Scott W. Horngren
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DRAFT

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 6 1800 One Main Place
 7 101 S.W. Main Street
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 9 (503) 225-0777

Attorneys for Plaintiff Scott Timber Co.

10 IN THE UNITED STATES DISTRICT COURT
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12	corporation,)	
13)	
14	Plaintiff,)	No. 95-6244-HO (Lead)
15)	No. 95-6267-HO (Consolidated)
16	v.	)	No. 95-6384-HO (Consolidated)
17)	
18	DANIEL R. GLICKMAN, in his	)	SCOTT TIMBER CO.'S
19	capacity as Secretary of	)	MEMORANDUM IN SUPPORT OF
20	Agriculture, BRUCE BABBITT, in	)	MOTION FOR ORDER OF CONTEMPT
21	his capacity as Secretary of)	
22	Interior,)	
23)	
24	Defendants.)	

25 Scott Timber Co. seeks an order finding Defendant
 26 Secretary of Agriculture Dan Glickman in contempt of this Court's
 order of January 10, 1996 which directed the immediate award of
 certain United States Forest Service Timber sales, including the
 First and Last Timber Sales on the Siskiyou National Forest. The
 Court's order as to these two sales was direct and unambiguous:

Defendants are enjoined to immediately award,
 release, and permit to be completed all sales
 subject to section 200(k)(1) as declared in
 this order.

1 Order, p.24.

2 As stated in the accompanying Declaration of Pete
3 Quast, the timber manager for Scott Timber Co., he was informed
4 by counsel of the order on January 10, 1996. The next day, he
5 telephoned the Siskiyou National Forest and spoke to Brenda
6 Woodard, the contracting officer responsible for the
7 administration of the First and Last Timber Sales. Mr. Quast
8 requested the immediate award of the sales. Ms. Woodard replied
9 that all the necessary paperwork had been completed, but that she
10 had been instructed not to award the sales while the Justice
11 Department decided "how to proceed" in response to this Court's
12 order of the previous day. Further, as stated in the Affidavit
13 of Scott W. Horngren, counsel for Secretary Glickman was informed
14 of the refusal to comply on January 12 and on January 16, 1996,
15 and offered no substantive response.

16 To prevail on a motion for contempt, a plaintiff must
17 establish acts of contempt by "clear and convincing evidence."
18 Balla v. Idaho State Board of Corrections, 869 F.2d 461, 466 (9th
19 Cir. 1989), United States v. State of Oregon, 782 F.Supp 502, 508
20 (D.Or. 1991). Reasonable doubts are resolved in favor of the
21 non-moving party. Once a prima facie case is established, the
22 non-moving party assumes the burden of showing either substantial
23 compliance or inability to comply. Id.

24 The Declaration of Mr. Quast unequivocally establishes
25 defendant's noncompliance with the Order. Scott Timber Co. has
26

1 requested the award, the paperwork is ready, and the contracting
2 officer is under orders not to proceed. The Order admits of no
3 question on how the Justice Department, Secretary Glickman, or
4 Ms. Woodard are to proceed. They are to award the sales
5 immediately. Their refusal to do so is patent contempt for the
6 Order of this Court. In light of the previous resistance
7 defendants have shown to obeying orders of this Court, it is
8 respectfully submitted that an order finding Secretary Glickman
9 in contempt is fully warranted.

10 Respectfully submitted this _____ day of January, 1996.

11

12

HAGLUND & KIRTLEY

13

14

By _____
Scott W. Horngren
Attorneys for Scott Timber Co.

15

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26

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:

DATE: January 16, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NERC v. Glickman and SAS v. Thomas.
(First and Last Timber Sales)
Attached is a letter from counsel for
purchasers of the First and Last Timber Sale
and a draft motion for contempt seeking
immediate release of these sales.

3/2-347-7600

HAGLUND & KIRTLEY

ATTORNEYS AT LAW

ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204TELEPHONE (503) 225-0777
FACSIMILE (503) 225-1257

January 12, 1996

VIA FAX AND REGULAR MAIL

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Mr. Geoffrey Garver
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
P. O. Box 663
Washington, D.C. 20044

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Assistant U.S. Attorney
701 High Street
Eugene, Oregon 97401

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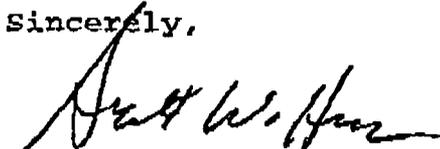
BWH\jwhk7133

HAGLUND & KIRTLEY
ATTORNEYS AT LAW

Ms. Michelle Gilbert
Mr. Geoffrey Garver
Mr. Jim Sutherland
January 12, 1996
Page 2

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Sincerely,



Scott W. Horngren

cc: Mr. Pete Quast

HAGLUND & KIRTLEY

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ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204TELEPHONE (503) 225-0777
FACSIMILE (503) 225-1257

January 15, 1996

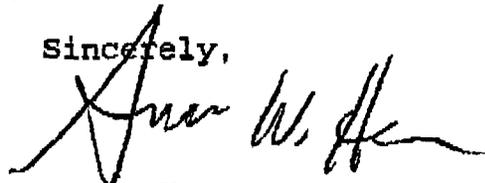
VIA FAX

Ms. Michelle L. Gilbert
Mr. Geoffrey Garver
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
P. O. Box 663
Washington, D.C. 20044

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Sincerely,



Scott W. Horngren

cc: Mr. Pete Quast
Mr. Jim Sutherland

DRAFT

1 Michael E. Haglund, OSB 77203
 2 Scott W. Horngren, OSB 88060
 3 Shay S. Scott, OSB 93421
 4 HAGLUND & KIRTLEY
 5 Attorneys at Law
 6 1800 One Main Place
 7 101 S.W. Main Street
 8 Portland, Oregon 97204
 9 (503) 225-0777

Attorneys for Plaintiff Scott Timber Co.

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 11 FOR THE DISTRICT OF OREGON

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12	corporation,)	
13)	
14	Plaintiff,)	No. 95-6244-HO (Lead)
15)	No. 95-6267-HO (Consolidated)
16	v.	)	No. 95-6384-HO (Consolidated)
17)	
18	DANIEL R. GLICKMAN, in his	)	SCOTT TIMBER CO.'S MOTION
19	capacity as Secretary of	)	FOR ORDER OF CONTEMPT
20	Agriculture, BRUCE BABBITT, in)	
21	his capacity as Secretary of	)	(Expedited Hearing
22	Interior,	)	Requested)
23)	
24	Defendants.)	

18 Scott Timber Co. moves for an order holding Defendant
 19 Dan Glickman, Secretary of Agriculture, in contempt of this
 20 Court's Order of January 11, 1996 for his refusal to comply with
 21 the order directing the immediate award of the First and Last
 22 Timber Sales on the Siskiyou National Forest. This Motion is
 23 : : :
 24 : : :
 25 : : :
 26

HAGLUND & KIRTLEY
 ATTORNEYS AT LAW
 ONE MAIN PLACE
 101 S.W. MAIN, SUITE 1800
 PORTLAND, OREGON 97204
 TELEPHONE (503) 225-0777

1 based on the accompanying Memorandum and on the Declarations of
2 Scott W. Horngren and Pete Quast.

3 Dated this _____ day of January, 1996.

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5 Scott W. Horngren
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DRAFT

1 Michael E. Haglund, OSB 77203
 2 Scott W. Horngren, OSB 88060
 3 Shay S. Scott, OSB 93421
 4 HAGLUND & KIRTLEY
 5 Attorneys at Law
 6 1800 One Main Place
 7 101 S.W. Main Street
 8 Portland, Oregon 97204
 9 (503) 225-0777

Attorneys for Plaintiff Scott Timber Co.

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

10	NORTHWEST FOREST RESOURCE)	
11	COUNCIL, an Oregon)	
12	corporation,)	
13)	
14	Plaintiff,	)	No. 95-6244-HO (Lead)
15		)	No. 95-6267-HO (Consolidated)
16	v.	)	No. 95-6384-HO (Consolidated)
17)	
18	DANIEL R. GLICKMAN, in his	)	SCOTT TIMBER CO.'S
19	capacity as Secretary of	)	MEMORANDUM IN SUPPORT OF
20	Agriculture, BRUCE BABBITT, in	)	MOTION FOR ORDER OF CONTEMPT
21	his capacity as Secretary of)	
22	Interior,)	
23)	
24	Defendants.)	

25 Scott Timber Co. seeks an order finding Defendant
 26 Secretary of Agriculture Dan Glickman in contempt of this Court's
 order of January 10, 1996 which directed the immediate award of
 certain United States Forest Service Timber sales, including the
 First and Last Timber Sales on the Siskiyou National Forest. The
 Court's order as to these two sales was direct and unambiguous:

Defendants are enjoined to immediately award,
 release, and permit to be completed all sales
 subject to section 200(k)(1) as declared in
 this order.

1 Order, p.24.

2 As stated in the accompanying Declaration of Pete
3 Quast, the timber manager for Scott Timber Co., he was informed
4 by counsel of the order on January 10, 1996. The next day, he
5 telephoned the Siskiyou National Forest and spoke to Brenda
6 Woodard, the contracting officer responsible for the
7 administration of the First and Last Timber Sales. Mr. Quast
8 requested the immediate award of the sales. Ms. Woodard replied
9 that all the necessary paperwork had been completed, but that she
10 had been instructed not to award the sales while the Justice
11 Department decided "how to proceed" in response to this Court's
12 order of the previous day. Further, as stated in the Affidavit
13 of Scott W. Horngren, counsel for Secretary Glickman was informed
14 of the refusal to comply on January 12 and on January 16, 1996,
15 and offered no substantive response.

16 To prevail on a motion for contempt, a plaintiff must
17 establish acts of contempt by "clear and convincing evidence."
18 Balla v. Idaho State Board of Corrections, 869 F.2d 461, 466 (9th
19 Cir. 1989), United States v. State of Oregon, 782 F.Supp 502, 508
20 (D.Or. 1991). Reasonable doubts are resolved in favor of the
21 non-moving party. Once a prima facie case is established, the
22 non-moving party assumes the burden of showing either substantial
23 compliance or inability to comply. Id.

24 The Declaration of Mr. Quast unequivocally establishes
25 defendant's noncompliance with the Order. Scott Timber Co. has
26

1 requested the award, the paperwork is ready, and the contracting
2 officer is under orders not to proceed. The Order admits of no
3 question on how the Justice Department, Secretary Glickman, or
4 Ms. Woodard are to proceed. They are to award the sales
5 immediately. Their refusal to do so is patent contempt for the
6 order of this Court. In light of the previous resistance
7 defendants have shown to obeying orders of this Court, it is
8 respectfully submitted that an order finding Secretary Glickman
9 in contempt is fully warranted.

10 Respectfully submitted this _____ day of January, 1996.

11
12 HAGLUND & KIRTLEY

13
14 By _____
15 SCOTT W. HORNGREN
16 Attorneys for Scott Timber Co.

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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: 4

DATE: December 21, 1995

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman (Boulder Krab Sale)
Attached is Scott Timber Co's Notice of
Filing re: Memorandum of Agreement For
Boulder Krab Timber Sale.

1 Haglund, OSB 77203
 2 Scott W. Horngren, OSB 88060
 3 Shay S. Scott, OSB 93421
 4 HAGLUND & KIRTLEY
 5 Attorneys at Law
 6 1800 One Main Place
 7 101 S.W. Main Street
 8 Portland, Oregon 97204
 9 (503) 225-0777

Attorneys for Plaintiff Scott Timber Co.

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

10	NORTHWEST FOREST RESOURCE)	
	COUNCIL, an Oregon	)	No. 95-6244-HO (Lead)
11	corporation,	)	No. 95-6267-HO (Consolidated)
		)	No. 95-6384-HO (Consolidated)
12	Plaintiff,)	
		)	SCOTT TIMBER CO.'S NOTICE OF
13	v.	)	FILING RE: MEMORANDUM OF
		)	AGREEMENT FOR BOULDER KRAB
14	DANIEL R. GLICKMAN, in his	)	TIMBER SALE
	capacity as Secretary of)	
15	Agriculture, BRUCE BABBITT, in)	
	his capacity as Secretary of)	
16	Interior,)	
)	
17	Defendants.)	

18 Scott Timber Co. hereby files a Memorandum of Agreement
 19 dated December 11, 1995 between Scott Timber Co. and the Forest
 20 Service regarding elimination of road construction to Unit 4 of
 21

22 : : :
 23 : : :
 24 : : :
 25 : : :
 26 : : :

1 the Boulder Krab Timber Sale and substitution of helicopter
2 logging. Also Unit 3 will be harvested without specified road
3 construction.

4 Dated this 11th day of December, 1995.

5 HAGLUND & KIRTLEY

6
7 By

Scott W. Horngren
8 Scott W. Horngren
9 Attorneys for Plaintiff
10 Scott Timber Co.

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DEC-11-1995 15:46

ROSEBURG FOREST PRODUCTS

503 679 6540 P.02/02



United States
Department of
Agriculture

Forest
Service

Siskiyou
National
Forest

200 NE Greenfield Road
PO Box 440
Grants Pass, OR 97526-0242

Reply to: 2450

December 11, 1995

Subject: Boulder Krab Timber Sale; Contract No. 074295

To: Files

MEMORANDUM OF AGREEMENT

Between Scott Timber Company and the Forest Service, we have agreed in concept to change the logging systems for harvesting timber Boulder Krab Timber Sale.

We have agreed to the following changes:

1. Units 1 and 4 will both be helicopter yarded. Unit 4 will be changed from skyline yarding to helicopter yarding. The contract bid price will be adjusted to reflect the increase in logging costs.
2. Specified Road 3353-220 seg II will not be constructed to Unit 4. A decrease in Purchaser Credits will be made to reflect this change.
3. Unit 3 was originally designed to have a specified road (Road 3353-222) built. Instead of constructing this road, a larger yarder will be used and a 300 foot long temporary road may need to be built to access the unit. The contract bid price will be adjusted to reflect the increase in logging costs and Purchaser Credits will be decreased.

The signatures below signify the intent of both parties to incorporate these changes into a formal contract modification after the appropriate field and appraisal work have been completed.

Brenda L. Woodard
BRENDA L. WOODARD
Contracting Officer

P. C. Quast
P. C. QUAST
Purchaser Representative

cc: Powers RD



Caring for the Land and Serving People

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
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PLEASE DELIVER TO:

To:	Don Barry	208-4684
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	Chris Nolin	395-4941
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 16

DATE: December 21, 1995

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman (Discovery)
Attached is a Notice of Filing re: Forest Service and BLM discovery responses and the Declaration of Bonnie Phillips-Howard describing the negotiation process under Section 318(f).

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

4 Attorneys for Amici/Defendants-Intervenors

5 MARIANNE DUGAN (OSB# 93256)
6 DEBORAH N. MAILANDER (OSB# 92380)
Western Environmental Law Center
7 1216 Lincoln Street
Eugene, Oregon 97401
8 (503) 485-2471

9 Local Counsel for Amici/Defendants-Intervenors

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

12	NORTHWEST FOREST RESOURCE)	
13	COUNCIL, an Oregon corporation	)	No. 95-6244-HO
		)	(Lead Case)
14	Plaintiff,)	
	v.	)	No. 95-6267-HO
15		)	(Consolidated Case)
16	DAN GLICKMAN, et al.,)	
		)	No. 95-6384-HO
17	Defendants,	)	(Consolidated Case)
18	OREGON NATURAL RESOURCES COUNCIL,	)	NOTICE OF FILING
	et al.)	
19	<u>Amici</u> /Defendants-Intervenors)	

20 Plaintiffs hereby file the declaration of Bonnie Phillips-
21 Howard, which describes the process that led to the termination
22 of 650 million board feet of timber sales under Section 318(f)(1)
23 of Public Law No. 101-121, 103 Stat. 745. At the hearing held on
24 December 13, 1995, questions arose concerning this process and
25 the status of timber sales cancelled pursuant to it. This
26 declaration seeks to clarify any confusion that arose.

27 Plaintiffs are also filing the Federal Defendants' Answers,

1 Responses and Objections to Plaintiffs' First Set of
2 Interrogatories and Requests for Document Production to Secretary
3 Babbitt and Bureau of Land Management (transmitted by facsimile
4 to plaintiffs' counsel on December 11, 1995). The first second
5 page is missing, and the third page overlaps the fourth.
6 Plaintiffs have not yet received a complete copy of the responses
7 by mail, but will provide the Court a copy when they receive
8 them.

9 In response to interrogatory 5(k) on page 25, the Bureau of
10 Land Management ("BLM") uses the term "offer" in connection with
11 the offer of a timber sale contract to qualified bidders in the
12 event that the high bidder is ineligible. In response to
13 interrogatories 5(m) and 7, BLM indicates that its award of a
14 contract is its acceptance of the high bidder's offer. Notably,
15 BLM's answers to plaintiffs' interrogatories do not describe the
16 auction process as an "offer" by the government of a timber sale
17 contract. The use of the term "offer" in the BLM's responses to
18 plaintiffs' interrogatories undercuts the assertion in the
19 government's opposition to plaintiffs' motion for preliminary
20 injunction, which suggests that the auction constitutes a
21 government offer of a timber sale contract.

22 In addition, BLM's responses to plaintiffs' interrogatories
23 indicate that the standard contracts used by BLM contain breach
24 of contract and cancellation clauses that allow contract
25 cancellations and modifications when necessary to protect
26 threatened, endangered, or sensitive species. BLM Response to
27 Interrogatory No. 5(n) & (o). Since Section 2001(k)(1) calls for

1 completion of timber sale contracts pursuant to the originally
2 advertised terms, and the timber sale prospectus and standard
3 contracts are part of those originally advertised terms, these
4 clauses may be invoked to modify and even cancel timber sale
5 contracts subject to Section 2001(k)(1). Similarly, if these
6 clauses were invoked prior to enactment of the Rescissions Act to
7 cancel or modify a timber sale contract, Section 2001(k)(1)'s
8 reference to the originally advertised terms essentially
9 grandfathers in those changes.

10 Moreover, in response to interrogatory no. 5(q), BLM
11 explains that, under contract law principles, BLM permits the
12 high bidder to withdraw its bid, in which case the bid bond is
13 returned, if the bid is not accepted within a reasonable period
14 of time, normally 90 days. BLM describes other situations in
15 which the bid bond of a the high bidder may be returned, only one
16 of which involves a BLM decision that proceeding with the
17 contract is not in the best interests of the government. Id. No.
18 5(q)(3).

19 Plaintiffs are also filing copies of Forest Service Standard
20 Form 2400-17 for certain timber sales. In response to
21 plaintiffs' request for production of documents, the Forest
22 Service provided copies of Standard Form 2400-17 for some, but
23 not all, of the timber sales at issue in this case. This form is
24 a report on a particular timber sale that contains entries for
25 the forest, ranger district, acreage in the sale, bid date, bids
26 received, high bidder, and contract date, if any. The forms
27 released in discovery appear generally to have been generated at

1 the time of an auction for the timber sales, and rarely were
2 updated to reflect events that occurred subsequently.

3 Some of these forms reflect a contingency that prevented the
4 award of the sale at the time of the auction. Exhibit A. For
5 example, the form for the Bugout timber sale on the Wallowa-
6 Whitman National Forest notes that the award of the contract was
7 withheld for consultation on threatened salmon. In the December
8 8, 1995 reply memorandum to NFRC's third motion for summary
9 judgment and motion for clarification, the federal defendants
10 attached as Exhibit C to the Tenth Declaration of Jerry L. Hofer
11 the timber sale prospectus for the Bugout timber sale, which
12 informed the potential bidders prior to the auction that the sale
13 was in consultation over its effects on chinook salmon listed as
14 threatened under the Endangered Species Act. Specifically, the
15 prospectus states:

16
17 [T]his sale will be auctioned, but NOT awarded until
18 consultation has been completed. The result of
19 consultation may require that changes be made before
20 the timber sale can be awarded. The high bidder will
21 have the opportunity to agree to the changes prior to
22 executing the contract. If the high bidder does not
23 agree to the changes, the Forest Service will reject
24 all bids and may reoffer the sale. . . . If consultation
25 indicates that the project cannot proceed, all bids
26 will be rejected.
27

1 The prospectus also referred to the bidders to the timber sale
2 contract provision that permits modifications and cancellation
3 because of a sale's effects on threatened or endangered species.

4 The BLM has not yet provided plaintiffs the timber sale
5 prospectuses in discovery. However, since the government has
6 represented that it informs all prospective bidders that the
7 government has the right to reject all bids and cancel a timber
8 sale for environmental reasons, and since it provided more
9 specific notice of the pending consultation and contingent nature
10 of the auction for the Bugout sale, it is fair to assume that
11 such notice is routinely provided at the time of the auction for
12 known contingencies.

13 Since administrative appeals generally must be filed before
14 the time an auction is held, and litigation under Section 318 had
15 to be commenced before the auction, the potential bidders likely
16 received notice of these contingencies with respect to the
17 Section 318 sales challenges within 15 days of the advertisement
18 -- Cowboy, Nita, South Nita, First, Last, Garden, Boulder Krab,
19 and Elk Fork and the sales subject to administrative appeals --
20 Blue Ford, Stagecoach, Bald, Eagle Ridge Houselog, and Humpy
21 Mountain -- as well as any others that had known specific
22 contingencies at the time of the auction.

23 Standard Form 2400-17 notes such contingencies for the
24 following timber sales: Allen (award withheld for consultation
25 on salmon); Bald (appeal); Banty Salvage (appeal); Berry Bushel
26 (legal challenge under Section 318); Bugout Salvage (award
27 withheld for consultation on salmon); Cantrell (same); Cowboy

1 (lawsuit); Enola (appeal); Gatorson (appeal); Head (litigation);
2 Holdaway 2 (appeal); Horn Salvage (award withheld for
3 consultation on salmon); Johnson Salvage (appeal); Mister Rogers
4 (litigation); Nicholson Salvage 1 (fish and wildlife
5 consultation); Park Salvage (award withheld for consultation on
6 salmon); Prong Salvage (award withheld for consultation on
7 salmon); RD Salvage (award withheld for consultation on salmon);
8 Rocky (award pending decision by Fish and Wildlife); Stagecoach
9 (appeal); Sulphur (legal challenge under Section 318); Sweet Pea
10 (award withheld for salmon consultations); Tanhorse (appeal);
11 Tanya (same); Tenmile 808 (temporary restraining order -- spotted
12 owl litigation); Tiptop (appeal); Tower Salvage (appeal); West
13 Boundary (award withheld due to request for advisory hearing);
14 Willy (appeal).

15 Standard Form 2400-17 also notes contingencies that arose
16 with respect to the high bidder. Exhibit C. Thus, several
17 contracts were not awarded pending an equal employment
18 opportunity compliance review, see, e.g., Caraco Cat & Clear
19 Creek, and others were not awarded pending a review of the high
20 bidder's financial qualifications. See, e.g., Off Broadway.

21 Finally, Standard Form 2400-17 reflects that the Forest
22 Service cancelled the following timber sales: Blue Ford
23 ("cancelled due to appeal"); Boulder Krab ("All bids rejected per
24 RF decision to withdraw the sale"); Cowboy ("cancelled & returned
25 bid bonds, never awarded"); Elk Fork ("All bids rejected per RF
26 decision to withdraw the sale"); Garden (all bids rejected);
27 Holdaway 2 (rejected bids because spotted owl habitat area);

1 Locust (sale cancelled); Nita (cancelled per Seattle Audubon
2 lawsuit); South Nita (same); reproduced in Exhibit B.

3 Interestingly, the Forest Service used the terms cancelled and
4 withdrawn to reflect the action that it took with respect to
5 certain timber sales -- Blue Ford, Boulder Krab, Cowboy, Elk
6 Fork, Locust, Nita and South Nita.

7 Plaintiffs will be seeking additional information in
8 discovery to ascertain the originally advertised terms for the
9 various timber sales that were cancelled or modified prior to
10 July 27, 1995. Since Section 2001(k)(1) requires completion of
11 timber sale contracts under those originally advertised terms,
12 this information will assist the parties and the Court in
13 determining the extent to which contract modifications and
14 cancellations continue to have legal effect under Section
15 2001(k)(1).

16 DATED this 18th day of December, 1995.

17 

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19 KRISTEN L. BOYLES (WSB# 23806)
20 Sierra Club Legal Defense Fund
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22 Seattle, Washington 98104
23 (206) 343-7340

24 Attorneys for Plaintiffs

25 

26 MARIANNE DUGAN (OSB #93256)
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Local Counsel for Plaintiffs

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4 Attorneys for Amici/Defendants-Intervenors

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9 Local Counsel for Amici/Defendants-Intervenors

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

12	NORTHWEST FOREST RESOURCE)	
13	COUNCIL, an Oregon corporation)	No. 95-6244-HO
)	(Lead Case)
14	Plaintiff,)	
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16	DAN GLICKMAN, <u>et al.</u> ,)	
)	No. 95-6384-HO
17	Defendants,)	(Consolidated Case)
)	
18	OREGON NATURAL RESOURCES)	DECLARATION OF BONNIE
	COUNCIL, <u>et al.</u>,	)	PHILLIPS-HOWARD
19	<u>Amici</u> /Defendants-Intervenors)	

21 I, Bonnie Phillips-Howard, hereby declare and state as
22 follows:

23 1. I live in Stanwood, Washington, and I am currently Vice
24 President and Conservation Chair for the Pilchuck Audubon
25 Society. In 1989, I served as President of this organization.
26 In spring of 1989, I became the Washington State Chair of the
27 Ancient Forest Alliance, an alliance of over 100 environmental

1 organizations working for protection of ancient forests in the
2 Pacific Northwest.

3 2. Pilchuck Audubon Society, a chapter of the National
4 Audubon Society, with about 1500 members primarily in Snohomish
5 County and Camano Island, has made the protection of ancient
6 forests a high priority every year since 1987. Our primarily
7 focus has been the Mt. Baker-Snoqualmie National Forest, but we
8 have also been involved in many state, regional and national
9 efforts.

10 3. In 1987-1990, we mapped old growth on the Mt.
11 Baker-Snoqualmie National Forest as part of National Audubon
12 Society's Adopt-a-Forest program, and throughout the years have
13 regularly held conferences and workshops to train and inform
14 citizens on getting involved in their National Forests.

15 4. We have many cooperative programs with the U.S. Forest
16 Service. In 1991, we began a model Eyes on Wildlife program with
17 the Mt. Baker-Snoqualmie and Olympic National Forest, Black Hills
18 Audubon Society and the Washington State Department of Fish and
19 Wildlife, and in 1994, we received a National Achievement Award
20 from the U.S. Forest Service for our effort. We have other
21 ongoing partnership efforts such as jointly sponsoring a yearly
22 Festival of the River on the Stillaguamish River, and our
23 successful Trees for Life program.

24 5. Pilchuck Audubon Society believes in cooperation
25 whenever possible, but there are times when we feel agencies are
26 in violation of environmental laws, and challenging this through
27 administrative appeals and litigation may be our only recourse.

1 Pilchuck Audubon Society has been a plaintiff on all the spotted
2 owl lawsuits against both the U.S. Forest Service and the U.S.
3 Fish and Wildlife Service. We have also been plaintiffs on the
4 marbled murrelet listing petition and resultant litigation.

5 6. Because of our long term involvement in the Mt.
6 Baker-Snoqualmie National Forest, we became familiar with all of
7 the timber sales on this Forest that were enjoined by Judge
8 William Dwyer in February of 1989. I, and Pilchuck Audubon
9 Society, tried to convince Members of Congress not to pass
10 Section 318, a rider to the Appropriations Bill that would undo
11 Judge Dwyer's injunction and take away citizen rights to
12 challenge illegal forest management practices.

13 7. Unfortunately, we lost that effort, and in October,
14 1989, Section 318 was signed and became law. Section 318
15 mandated intensive logging of the western ancient forests. It
16 was a very bitter pill for citizens who worked to protect ancient
17 forests to swallow. Many of these areas have become familiar and
18 beloved throughout the years. The scientific understanding was
19 such at the time that scientists, agency resource personnel,
20 political decision makers and citizens were just beginning to
21 understand the needs of plant and animal species who depend on
22 ancient forests. The following year, 1990, scientists stunned
23 the Pacific Northwest with release of a report that showed the
24 critical importance of preserving large blocks of the remaining
25 ancient forests to protect the northern spotted owl. Every
26 agency-led scientific report since that time has documented
27 further the need to protect much, or all, of the remaining

1 habitat for old-growth dependent species.

2 8. Section 318(f)(1) required the Forest Service to provide
3 the plaintiffs in Seattle Audubon Society v. Robertson a list of
4 sales prepared for offer in fiscal year 1989 that contained at
5 least 40 acres of suitable spotted owl habitat. These were the
6 sales that had been enjoined by Judge Dwyer. Within 14 days
7 after receipt of that list, we were required by Section 318(f)(1)
8 to reach an agreement with the Forest Service releasing 1.1
9 billion board feet. If we did not reach such an agreement, the
10 Forest Service would decide on its own which sales would go
11 forward.

12 9. Shortly after enactment of Section 318, Senator Brock
13 Adams' (D-WA) Seattle and Washington, D.C. staff called a number
14 of environmental representatives, including me, to a meeting. We
15 were told that although we would be forced to release 2/3 of the
16 volume under injunction, we would be allowed to choose the 1/3
17 amount of volume which was most valuable for the northern spotted
18 owl, and those timber sales would no longer be viable and those
19 ancient forests would be saved.

20 10. As one of the plaintiffs representatives, I was
21 directly and intimately involved in the selection of the sales
22 that would be released. I, and Pilchuck Audubon Society, were
23 assigned to review the 23 sales on the Mt. Baker-Snoqualmie
24 National Forest, and to rank/rate these sales as to their
25 importance to the survival of the northern spotted owl. Other
26 plaintiffs were reviewing timber sales on the other Washington
27 State and Oregon "spotted owl" forests. We were not requested to

1 make any additional determinations (that is, we did not evaluate
2 their importance for salmon, or other plant or wildlife species).
3 Throughout this process, we struggled to obtain sufficient
4 information from the Forest Service on which to base our
5 decisions.

6 11. These decisions were very hard for me, and for other
7 members of Pilchuck Audubon Society, to make. One of the
8 motivating factors for us during this time was the understanding
9 that the sales we did not release would never be logged.

10 12. On early November 6, 1989, several plaintiff
11 representatives and attorneys from the Sierra Club Legal Defense
12 Fund gathered at the offices of the Oregon Natural Resources
13 Council in Portland to evaluate the ranking of all the sales, and
14 come up with final determinations of choices. We worked until
15 about 3:00 a.m. on November 7, 1989, and then gathered several
16 hours later to attend the final negotiations with the U.S. Forest
17 Service, at Regional headquarters in Portland. Deputy Regional
18 Forester John Lowe conducted those negotiations with our
19 attorneys. Several plaintiff representatives, including me, were
20 present. Afterwards we held a press conference at which I was in
21 tears. The long drive back to Stanwood, Washington left me
22 heartbroken for what we were forced to do.

23 13. It is hard to understand these difficult choices unless
24 you walk these forests and develop a deep love for the big trees,
25 the clear streams and the rich plant and animal life that live
26 here. Ancient forests provide a solace that cities cannot
27 provide. Being in the middle of an ancient forest, and later

1 visiting that forest and experiencing all the trees gone, the
 2 streams silted up, the ground hard and disfigured, is very
 3 difficult. When an individual, and an organization, works for a
 4 long time trying to protect land, and then Congress forces them
 5 to choose which forests must be logged, this is the most
 6 difficult decision to make. In all the years before and since I
 7 worked on protecting ancient forests, this was the most difficult
 8 and stressful time for me.

9 14. The day after I arrived home, articles began appearing
 10 in the Seattle papers about one of the sales we released--that
 11 sale was called Sugar Bear, and it was within the City of
 12 Seattle's municipal water supply in the Cedar River watershed.
 13 We were criticized for releasing that sale because of the effects
 14 it would cause to a large urban area dependent on that watershed
 15 for clear water. Yet we were told we were to make decisions
 16 based on northern spotted owls.

17 15. We always knew that logging the 103.93 million board
 18 feet of old growth we released on the Mt. Baker Snoqualmie -- 16
 19 timber sales in all -- would harm watersheds, salmon, and other
 20 old-growth dependent wildlife and plant species, and would even
 21 harm the northern spotted owl. Yet we knew if we didn't make
 22 these decisions, there would be no way to save the sales Congress
 23 told us we could save forever. That is why, and only why, we
 24 ever agreed to spend the time and create the heartbreak, that
 25 this negotiation caused.

26 16. After our agreement was signed, I received a number of
 27 requests from the media who wanted me to visit a sale which we

1 released and talk about how I felt. I refused to do this until
2 the summer of 1990, when a radio reporter convinced me to visit
3 Higgins timber sale, on Higgins Mountain in the Darrington Ranger
4 District. That sale was 17.2 million board feet, the largest
5 sale we released on this Forest. I went with the District
6 Ranger, Fred Harnisch, and the reporter to the site and watched
7 the logging trucks roll down. This was a very difficult time for
8 me.

9 17. After the interview, I was disturbed for a number of
10 days. Because of that, I took some time off to visit the sales
11 we had saved. I needed to know that all of this was worth it,
12 that making these hard decisions gave us something. I went to
13 visit Flash Gordon, which is a timber sale in the Stillaguamish
14 Watershed, in the Darrington Ranger District. This sale was
15 critical for spotted owls, and contained some wonderful old
16 growth. I sat amidst the forest and thanked God allowing these
17 trees to be saved.

18 18. I have been suffering from a medical problem for over
19 10 years which has required that I use a wheel chair more and
20 more. In 1990, when I went to visit the clearcutting of Higgins
21 and the splendor of Flash Gordon, this was one of the last times
22 I was able to actually walk through the forest. I treasure those
23 memories of the forests in the Flash Gordon timber sale.
24 Congress promised us that Flash Gordon, and all of the other
25 sales we saved in 1989, would never be logged. I want future
26 generations to experience the wonder of these ancient forest
27 areas that we thought we had saved.

1 Pursuant to 28 U.S.C. § 1746, I declare under penalty of
2 perjury that the foregoing is true and correct.

3 Executed this 13 day of December, 1995.

4 *Bonnie Phillips-Howard*
5 Bonnie Phillips-Howard

6 61DEC.DPN

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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
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NUMBER OF PAGES: 7

DATE: December 13, 1995

FROM: Lisa Holden, (202) 305-0474

MESSAGE: NFRC v. Glickman (Malt timber sale).
Attached is Western Timber Company's Reply
Memorandum in support of its Motion to
Clarify the court's October 17, 1995 order.

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5 Of Attorneys for Plaintiff-Intervenor
 Western Timber Co.
 6
 7

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

10	NORTHWEST FOREST RESOURCE)	
	COUNCIL, an Oregon)	
11	corporation,	)	No. 95-6244-HO
)	
12	Plaintiff,	)	REPLY MEMORANDUM IN
		)	SUPPORT OF WESTERN
13	v.	)	TIMBER'S MOTION TO
		)	CLARIFY
14	DAN GLICKMAN, et al.,)	
)	
15	Defendant.)	
)	

17 The language of Section 2001(k) -- and of the Court's
 18 Order interpreting it -- is plain and unambiguous:

19 Section 2001(k)(1) of Pub. L. 104-19 requires
 20 defendants Glickman and Babbitt by October 25, 1995,
 21 to award, release and permit to be completed in fiscal
 22 years 1995 and 1996, with no change in originally
 23 advertised terms, volumes, and bid prices, all timber
 24 sale contracts offered or awarded prior to July 27,
 1995 in any national forest in Oregon and Washington
 or BLM district in Western Oregon, except for sale
 units in which a threatened or endangered bird species
 is known to be nesting.

25 Order (October 17, 1995). The Malt Timber Sale, offered February
 26 22, 1989, is a timber sale offered or awarded prior to July 27,

1 1995 in a national forest in Oregon. No threatened or
2 endangered bird species is known to be nesting in the Malt Sale.
3 See, Harral Affidavit ¶ 5. Section 2001(k) and this Court's
4 Order require defendant Glickman to release the Malt Sale to
5 Western Timber.

6 ARGUMENT

7 A statute is interpreted and applied according to its
8 plain meaning. Chevron U.S.A. Inc. v. Natural Resources Defense
9 Council, Inc., 467 U.S. 837, 843 (1984). The Court cannot omit
10 or add to the plain meaning of the statute. In re Borba, 736
11 F.2d 1317, 1320 (9th Cir. 1984). Both defendants and intervenor
12 Pilchuck Audubon Society ask the Court to change the plain
13 meaning of the statute by adding a start date defining the
14 earliest offered sale to which Section 2001(k) applies. The
15 plain language of Section 2001(k)(1) encompasses "all timber
16 sale contracts offered or awarded before" the date of enactment
17 and contains no start date. "To attempt to decide whether some
18 date other than the one set out in the statute is the date
19 actually 'intended' by Congress is to set sail on an aimless
20 journey," and the Court must read the statute literally. United
21 States v. Locke, 471 U.S. 84, 93 (1985).

22 I. Defendants Ask the Court to Add the Words "Except for 23 Pre-Section 318 Sales" to Section 2001(k)(1).

24 Defendants argue that "Section 2001(k)(1) should not
25 be read to apply to pre-Section 318 sales." Defendants'
26 Response to Motion for Preliminary Injunction, p. 9. What

1 defendants mean by this argument is unclear: Defendants argue
2 on appeal from this Court that Section 2001(k) applies only to
3 sales "subject to Section 318," the provisions of which
4 expressly apply to sales offered in fiscal year 1989.¹ See,
5 Section 318(f), Pub. L. 101-121. If, by the term "pre-Section
6 318 sales," defendants mean sales offered prior to the
7 enactment of Section 318 on October 23, 1989, defendants run
8 afoul of their own interpretation of Section 2001(k)'s "subject
9 to section 318" language. If, instead, defendants use the term
10 "pre-Section 318 sales" to refer to sales offered prior to the
11 sales that were the subject of Section 318 (that is, fiscal year
12 1989 and 1990 sales), the Malt Sale (a fiscal year 1989 sale) is
13 not a "pre-Section 318 sale," and defendants must agree that
14 Section 2001(k) requires release of the Malt Sale.²

15 The Court has already ruled that the "subject to
16 Section 318" language in Section 2001(k)(1) defines the
17 geographic range to which the Section applies, not the specific
18 sales to be released. Order (September 13, 1995). Similarly,
19 the "subject to Section 318" language does not define a time
20 frame for sales to be released. The Court cannot accept

21
22 ¹In fact, as a fiscal year 1989 sale considered for release
23 under Section 318(f)(1), the Malt Sale is a sale "subject to
24 Section 318." Even if the Court were to completely reverse its
earlier rulings and endorse defendants' position that Section
2001(k)(1) applies to sales "subject to Section 318," defendants
would be required to release the Malt Sale.

25 ²To the extent that defendants argue that return of a bid bond
26 is an independent basis for release, the Malt Timber Sale
qualifies. See Harral Affidavit, Exhibit 2 (Forest Service letter
dated November 8, 1989 returning bid bond).

1 defendants' tortured construction of Section 2001(k)(1) unless
2 it adds words to a statute it has already found to be plain and
3 unambiguous.

4 II. Pilchuck Audubon Society Asks the Court to Rewrite
5 Section 2001(k)(1) to Require Release of Sales
6 "Offered or Awarded Before that Date But After October
7 23, 1989."

8 Intervenor Pilchuck Audubon Society tells the Court
9 that Section 2001(k)(1) does not "apply to timber sale contracts
10 offered or awarded prior to October 23, 1989." Memorandum in
11 Support of Plaintiff's Motion for a Preliminary Injunction, p.
12 26. Plaintiff reasons that, because Section 2001(k)(1) "defines
13 the sales that must be released by an express reference to
14 Section 318," Section 2001(k) does not apply to sales offered
15 prior to the enactment of Section 318. The Court has already
16 ruled, however, that the language "subject to Section 318" in
17 Section 2001(k)(1) defines the geographic range to which it
18 applies, not the sales to which it applies. Order (September
19 13, 1995).³

20 ³Pilchuck Audubon Society argues that the legislative history
21 to Section 2001(k) supports an October 23, 1989 start date. The
22 Court must apply the plain meaning of Section 2001(k), absent
23 clearly expressed legislative intent to the contrary. U.S. v. Ron
24 Pair Enterprises, Inc., 489 U.S. 235, 243 (1989); Goodwin v. United
25 States, 935 F.2d 1061, 1065 (9th Cir. 1991). Here, evidence of
26 Congressional intent is at best inconclusive. In a letter written
the day President Clinton signed Section 2001 into law, the most
influential members of Congress involved in the passage of the bill
told defendant Glickman that the bill requires release of "all
previously offered or awarded timber sales, including Section 318
sales as well as all sales offered or awarded in other years (such
as Fiscal Years 1991-95) that are not subject to Section 318."
Plaintiff's Memorandum (#32), Exhibit 4. The plain language of
Section 2001(k) controls.

1 Pilchuck Audubon Society further argues that
2 application of Section 2001(k)(1) to sales considered but not
3 selected for release under Section 318(f)(1) would cause Section
4 2001(k) to "clash" with Section 318. But Section 318(f)(2)
5 provides only that sales not selected for release under Section
6 318(f)(1) "shall not be offered for sale in fiscal year 1990,"
7 not that these sales can never be released according to their
8 original terms. More importantly, Section 2001(k)(1) provides
9 that all sales offered prior to July 27, 1995 shall be released
10 "notwithstanding any other provision of law." No "clash"
11 exists. Congress has directed the Forest Service to release
12 these sales.

13 III. Release of the Malt Sale is Not an Absurd Result.

14 Defendants and Intervenor Pilchuck Audubon Society
15 argue that reading Section 2001(k) according to its plain
16 language would produce "absurd" results, requiring the release
17 of sales "going back to the beginning of time" and "giv[ing]
18 away the nation's forests at bargain basement, even depression
19 era prices." Defendants' Response to Motion for Preliminary
20 Injunction, p. 9; Memorandum in Support of Plaintiff's Motion
21 for Preliminary Injunction, p. 27.

22 In fact, Western Timber seeks the release of just one
23 sale, a fiscal year 1989 sale of the same vintage as many of
24 those defendants concede they must release. The Forest Service
25 itself apparently believes that only 121 million board feet of
26 "non-Section 318" volume remains outstanding, comprised of sales

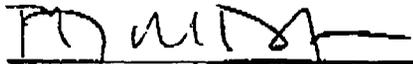
1 prepared in fiscal years 1989 through 1995. Prausa Declaration,
2 ¶ 5 (September 8, 1995). Given that much of the 1.1 billion
3 board feet of "Section 318" volume Congress ordered released in
4 1990 has been tied up and may never be released (see, e.g. Hofer
5 Declaration (September 29, 1995)), it is certainly not absurd
6 for Congress in enacting Section 2001(K) to have ordered release
7 of one-tenth of that volume, or of the Malt Timber Sale, at 12
8 million board feet a mere one-hundredth of that volume.

9 **CONCLUSION**

10 Section 2001(k)(1) and this Court's prior Orders
11 require defendant Glickman to release the Malt Timber Sale to
12 the high bidder, Western Timber. Western Timber respectfully
13 requests that the Court enforce its Orders and instruct
14 defendant Glickman to release the Malt Sale.

15 Respectfully submitted,

16 SCHWABE, WILLIAMSON & WYATT

17
18 By: 

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21 Of Attorneys for
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23 Western Timber Co.
24
25
26

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NUMBER OF PAGES: *26*

DATE: December 11, 1995

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

MESSAGE: NFRC v. Glickman, 95-6244

Attached is Federal Defendants' Reply to NFRC's Reply Memo in Support of 3rd Motion for Summary Judgment & in Support of Motion for Further Clarification or Enforcement of Court's 10/17 Injunction. The attachments are available upon request.

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 FOR THE DISTRICT OF OREGON

13	NORTHWEST FOREST RESOURCE)	
14	COUNCIL,)	
)	
	Plaintiff,)	Civil No. 95-6244-HO
15)	
	v.)	
16		)	DEFENDANTS' REPLY TO
17	DAN GLICKMAN, in his capacity as	)	NFRC'S REPLY MEMORANDUM
18	Secretary of Agriculture, and	)	IN SUPPORT OF THIRD
19	BRUCE BABBITT, in his capacity as	)	MOTION FOR SUMMARY
20	Secretary of Interior,	)	JUDGMENT AND IN SUPPORT
		)	OF MOTION FOR FURTHER
	Defendants.	)	CLARIFICATION OR
		)	ENFORCEMENT OF COURT'S
		)	OCTOBER 17 INJUNCTION

21 The defendants hereby reply to NFRC's November 28,
 22 1995, Reply Memorandum in Support of Third Motion for Summary
 23 Judgment and in Support of Motion for Clarification or
 24 Enforcement of the Court's October 17 Injunction. In its reply,
 25 NFRC raised for the first time issues relating to certain
 26 categories of timber sales that the defendants contend are not
 27

1 required to be awarded or released under Section 2001(k)(1).
2 This reply addresses only those new categories, as to which
3 defendants have not yet had an opportunity to address the merits.

4 Pursuant to Section 2001(k)(1) and this court's October
5 17 order, the defendant agencies have released approximately 68
6 sales. In its December 28 reply, at this late point in this
7 litigation, NFRC argues that eleven additional sales must
8 proceed. The newly raised categories include (1) three sales for
9 which, prior to enactment of Section 2001(k)(1), the high bidder
10 informed either the Forest Service or BLM that it was no longer
11 interested in being awarded the sale; (2) sales for which, after
12 enactment of Section 2001(k)(1) was enacted, the high bidder went
13 out of business, or claims to have gone out of business,¹ or was
14 otherwise unable to accept the sale; and (3) sales that are
15 impossible to award, release or permit to be completed on their
16 original terms.²

17 _____
18 ¹ Incredibly, Rogge Timber is so eager for three of the
19 sales at issue here -- the ALLEN, PRON SALVAGE and EAGLE RIDGE
20 HOUSELOG sales -- to be awarded that, at different times
21 depending on what status was most beneficial to Rogge at the
22 time, it has informed the Forest Service that it is both solvent
and insolvent. See Decl. of Jerry Hofer, attached hereto. The
Forest Service considers Rogge to be unable to meet the
conditions necessary to be awarded the sale or to transfer the
sale to a third party.

23 ² NFRC also seeks release of a sale, HOLDAWAY 2, for which,
24 after enactment of Section 2001(k)(1), the high bidder informed
25 the Forest Service that it was no longer interested in being
26 awarded the sale. However, this is not a Section 2001(k)(1) sale
27 after all. Given the short deadlines involved and some confusion
regarding this sale, see Declaration of Jerry Hofer, at ¶¶ 15, 16
(Dec. 8, 1995), the sale was inadvertently included in a list of
(continued...)

28 DEFENDANTS' REPLY TO NFRC'S REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 2

1 The first category, where the apparent high bidder
2 rejected the sale before July 27, 1995, does not fall under
3 Section 2001(k)(1) at all, because Congress excluded such sales
4 with one exception that does not apply to them. For sales in the
5 second category, although Section 2001(k)(1) applies, it does not
6 require the agencies to look past the high bidder in acting to
7 meet the statute's requirements. Having "acted to award" the
8 sales to the high bidder, the agencies have done all that the
9 statute requires. Regarding the third category, the language of
10 Section 2001(k)(1) makes clear that Congress could not have
11 intended its provisions to apply to sales that are impossible to
12 award, release and allow to be completed "with no change in
13 originally advertised terms, volumes, and bid prices."
14 Accordingly, Section 2001(k)(1) does not apply to any of the
15 sales at issue.

16 I. FACTUAL BACKGROUND

17 To put the sales at issue, an understanding of the
18 timber contracting process as it relates to those sales is the
19 starting point. Next, a summary of the sales at issue here is
20 provided.

21
22 ²(...continued)

23 Section 318 sales for release under Section 2001(k). In fact,
24 this sale was offered on February 2, 1989, prior to enactment of
25 Section 318, and for that reason does not fall under Section
26 2001(k)(1). NFRC has never explicitly argued that Section
27 2001(k)(1) applies to sales offered before October 23, 1989. A
second sales, also named HOLDAWAY 2, was offered under Section
318, but the high bidder did not satisfy financial requirements
and the Forest Service accordingly did not proceed with the sale.

28 DEFENDANTS' REPLY TO NFRC'S REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 3

1 A. The Timber Sale Process

2 The basic statutory authority for the disposal of
3 timber and other forest products from National Forest System
4 Lands is found in the National Forest Management Act of 1976. 16
5 U.S.C. § 472a et seq. The NFMA provides that "the Secretary of
6 Agriculture, under such rules and regulations as he may
7 prescribe, may sell, at not less than appraised value, trees,
8 portions of trees, or forest products located on National Forest
9 System lands." Id. The NFMA generally requires that all timber
10 sales be advertised and competitively bid and further prescribes
11 some of the terms to be included in the contract. 16 U.S.C. §
12 472a(b), (c), and (d). The Forest Service has implemented this
13 timber sale authority in 36 CFR Part 223. Although the timber
14 sale authority in the NFMA is independent of Section 2001(k), it
15 provides the basic processes that are referenced in Section
16 2001(k).

17 All Forest Service timber sales with a value in excess
18 of \$10,000 must be advertised prior to sale, according to
19 specific requirements. See 36 CFR § 223.82. Although the
20 advertisement of timber is not equivalent to an offer of the
21 timber, it is an integral part of the process leading to award of
22 a sale. The Forest Service in its advertisement informs
23 interested parties that the government is seeking to sell timber,
24 but specifically reserves its right to enter into a contract that
25 will confer the greatest advantage to the government. See,
26 Cutler-Hammer v. United States, 194 Ct. Cl. 758, 441 F. 2d 1179
27

1 (1971). Thus, the stage at which a timber sale is "offered" is
2 the point at which the Forest Service opens the bids of parties
3 responding to the advertisement.

4 However, no contract is formed by virtue of a bidder
5 placing the highest bid at a timber sale. The Forest Service
6 regulations state that "[t]he sale of advertised timber shall be
7 awarded to the responsible bidder submitting the highest bid that
8 conforms to the conditions of the sale as stated in the
9 prospectus unless . . . [d]etermination is made to reject all
10 bids." 36 CFR § 223.100. Whether the high bidder is responsible
11 is determined in accordance with 36 CFR § 223.101. Thus, it is
12 after the responsibility determination that the Forest Service is
13 prepared to award the sale to the highest bidder. If a high
14 bidder rejects a sale, the Forest Service can completely cancel
15 the sale, or it can offer it to another bidder or readvertise it.

16 BLM has similar procedures leading up to the award of a
17 sale. See 43 U.S.C. § 1181a, 1700 et seq; 43 CFR Part 5000. See
18 also Declaration of Lyndon Werner, passim (Dec. 8, 1995). Under
19 BLM procedures, once a high bidder is identified, the bid
20 deposits of the unsuccessful bidders are returned to them,
21 normally at the auction. Decl. of Lyndon Werner, at ¶ 3. The
22 high bidder's bid bond may be returned (1) if, after 90 days, the
23 high bidder elects to withdraw its bid; (2) if BLM determines
24 that the high bidder is unqualified; (3) if the BLM determines
25 that the sale should not go forward, and all bids should be
26 rejected. Id. at ¶ 4. If a high bidder withdraws its bid or is
27

1 declared ineligible, BLM may offer the contract to other
2 qualified bidders, although if more than 90 days has passed, the
3 sale is readvertised and reoffered if BLM decides to proceed with
4 the sale. Id. at ¶ 8.

5 **B. Summary of the Sales at Issue**

6 The newly raised categories of sales fall into the
7 categories below.

8 **1. Sales rejected by the high bidder before July 27, 1995.**

9 The sales in this category are the HIACK THIN, OLALLA
10 WILDCAT and TWIN HORSE sales.

11 The BLM offered the OLALLA WILDCAT sale on April 24,
12 1990. After being offered, the sale was submitted for formal
13 consultation on the Northern Spotted Owl. On October 24, 1990,
14 Lone Rock Timber Co., the high bidder, informed BLM that it was
15 revoking, withdrawing and cancelling its bid on the sale, and it
16 requested the return of its bid bond. At that point, BLM was
17 free to re-offer the sale to another bidder, as it did with the
18 ROCKY GLADE, a sale for which the high bidder had also rejected
19 the sale. The sale was not re-offered and was dropped from BLM's
20 timber sale program. Decl. of Lyndon Werner, at ¶ 6, 7, 11.

21 The BLM offered the TWIN HORSE sale on July 27, 1990.
22 In the fall of 1990, Douglas County Lumber, the high bidder,
23 informed BLM that it no longer wished to accept the sale and
24 asked for the return of its bid bond. BLM then returned the bid
25 bond to Douglas County. As with OLALLA WILDCAT, after Douglas

26
27

28 DEFENDANTS' REPLY TO NFRCS REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 6

1 County Lumber's bid bond was returned, BLM was free to offer the
2 sale to other bidders. Decl. of Lyndon Werner, at ¶¶ 6, 7, 11.

3 The OLALLA WILDCAT and TWIN HORSE sales differ from
4 most other sales that were similarly delayed, in that most high
5 bidders did not seek return of the bid bond. Decl. of Lyndon
6 Werner, at ¶ 12. Indeed, most high bidders preserved any rights
7 they had to the sales by engaging in consultation processes with
8 the BLM and the U.S. Fish and Wildlife Service, and expressing
9 continued interest in the sales. Id.

10 The HIACK THIN sale was bid on December 12, 1993. The
11 sale was appealed and on September 14, 1994, the Chief of the
12 Forest Service affirmed the Regional Forester's decision
13 upholding the decision on the sale. After award to the high
14 bidder on October 11, 1994, on October 28, the high bidder
15 notified the Forest Service that they were "unwilling to accept"
16 award due to delays, and requested withdrawal of their bid and
17 return of their bid guarantee. See Tenth Declaration of Jerry
18 Hofer at ¶ 14. On November 4, 1994, the Forest Service withdrew
19 the award and returned the bid guarantee as per the high bidder's
20 request. Id.

21 Thus, these sales differ from sales for which the
22 Forest Service and BLM told willing purchasers that the sale was
23 being withdrawn and then returned the high bidder's bond and
24 rejected all other bids. For the HIACK THIN, OLALLA WILDCAT and
25 TWIN HORSE sales, once-willing purchasers changed their minds for
26 economic or other reasons and expressed their intention to
27

1 repudiate the contract. Thus, under normal Forest Service and
2 BLM procedures, these sales would be re-offered, not be re-
3 awarded -- especially not to a high bidder that had expressly
4 rejected the sale.

5 **2. Sales under Section 2001(k)(1) for which the high
6 bidder was unable to accept the award.**

7 The sales in this category include the EAGLE RIDGE
8 HOUSELOG, ALLEN, PRONG SALVAGE and HORN SALVAGE. The high bidder
9 for the EAGLE RIDGE HOUSELOG, ALLEN and PRONG SALVAGE sales was
10 Rogge Timber Co. The Forest Service has determined that Rogge
11 Timber Co. is insolvent and unable to accept award of these
12 sales. See Hofer Decl. and attachments.

13 The HORN SALVAGE sale was originally offered on. The
14 high bidder on the Horn Salvage sale was Kinzua Corp. However,
15 as of August 8, 1994, the Forest Service determined that Kinzua
16 was no longer in business or able to meet the requirements of a
17 responsible bidder. See Hofer Dec. at ¶ 19..

18 **3. Sales that are impossible to award on their original
19 terms.**

20 The sales in this category that are at issue here are
21 the STAGECOACH, BALD and BUGOUT SALVAGE sales. All three are
22 Forest Service sales.

23 The EAGLE RIDGE HOUSELOG, BALD and STAGECOACH sales
24 were all covered by the same environmental assessment and
25 Decision Notice. See Hofer Dec. at ¶¶ 6 - 13. Following an
26 appeal of the Decision Notice on these sales, the Forest Service
27 upheld the appeal and rejected all bids on December 11, 1991. In

1 1995, before enactment of Section 2001, the Forest Service had
2 commenced implementing a new sale named the Curley sale, in the
3 same area. Id. at 9. As a result, the boundaries of the
4 majority of sales' original units have been torn out and the
5 original sale units and trees to be cut cannot be specifically
6 delineated as originally configured. Id. at ¶ 10, 6.

7 The bid date for the BUGOUT sale was October 29, 1992.
8 Hofer Dec. at ¶ 11. Because of consultation requirements, the
9 prospectus for advertisement of the sale provided that the sale
10 would be "auctioned but not awarded until consultation has been
11 completed . . . if the consultation process is not completed
12 within 6 months of the auction date, all bids will be rejected."
13 Id. at ¶ 11. Ultimately, the sale could not be awarded and the
14 Forest Service rejected all bids on February 23, 1995. Id. at ¶
15 12. Accordingly, during 1995 and before date of enactment of
16 section 2001, the Forest Service prepared and marked a new sale
17 called "MAC" timber sale in that area, changing the marking of
18 trees to be cut. Id. at ¶ 13.

19 II. ARGUMENT

20 Section 2001(k) (1) does not require the award or
21 release of any of the sales at issue here. Where the apparent
22 high bidder rejected a timber sale or went out of business before
23 July 27, 1995, the sale does not even fall under Section
24 2001(k) (1) at all. Congress excluded cancelled or withdrawn
25 sales from Section 2001(k) (1), with one exception that does not
26 apply to these sales. Where the Forest Service or BLM acted to
27

1 award the sale to the high bidder after July 27, 1995, but the
2 high bidder rejected the sale or was out of business, Section
3 2001(k)(1) applies but does not require the agencies to look past
4 the high bidder in acting to meet the statute's requirements.
5 Finally, the language of Section 2001(k)(1) makes clear that
6 Congress could not have intended its provisions to apply to sales
7 that are impossible to award, release and allow to be completed
8 "with no change in originally advertised terms, volumes, and bid
9 prices." Thus, Section 2001(k)(1) does not apply to those sales.

10 Interpretation of Section 2001(k)(1) to these sales
11 requires application of the implied repeal doctrine. Although
12 Section 2001(k)(1) applies "notwithstanding any other provision
13 of law," the implied repeal doctrine should be applied here
14 because Section 2001(k)(1) borrows terms and procedures from the
15 very statutory scheme with which it conflicts. Under that
16 doctrine, a statute is read to repeal conflicting provisions of
17 earlier law only to the extent of the conflict, and only to the
18 minimum extent necessary. Full effect can be given to the
19 language of Section 2001(k)(1) without requiring release of these
20 sales under its provisions.

21 **A. The Implied Repeal Doctrine Requires That Section 2001(k)(1)**
22 **Be Read to Minimize the Implied Repeal of Forest Service and**
BLM Procedures as Applied to the Sales at Issue.

23 Requiring the Forest Service and BLM to award and
24 release the sales at issue here would be significantly
25 inconsistent with the agencies' usual contracting procedures
26 their and normal discretion with respect to the "award" and
27

28 DEFENDANTS' REPLY TO NFRC'S REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 10

1 "release" of such sales. However, Section 2001(k)(1) is subject
2 to a construction that will avoid that inconsistency. Under the
3 implied repeal doctrine, a later statute repeals an earlier
4 provision only to the minimum extent necessary. See In re The
5 Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (quoting Radzanower
6 v. Touche Ross & Co., 426 U.S. 148, 154 (1976). Accordingly,
7 although Congress specified that Section 2001(k)(1) applies
8 "notwithstanding any other provision of law," the court should
9 not read into Section 2001(k)(1) an implied repeal of these
10 provisions unless no other construction is possible. See In re
11 The Glacier Bay, 944 F.2d at 581-82 (invoking the implied
12 doctrine to interpret the phrase "notwithstanding any other
13 provision of law"); cf. E.P. Paup Co. v. Director, 999 F.2d 1341,
14 1348-49 (9th Cir. 1993) (finding that "the phrase 'notwithstanding
15 any other provision of law' is not necessarily preemptive" where
16 legislative history reveals no intent to preempt).

17 The Ninth Circuit in In re Glacier Bay acknowledged
18 case law giving the phrase "notwithstanding any other provision
19 of law" broad preemptive effect, but applied the implied repeal
20 doctrine notwithstanding that phrase because of an inherent
21 conflict in the law at issue. See In re Glacier Bay, 944 F.2d at
22 582. Specifically, while the law at issue applied
23 "notwithstanding the provisions of any other law," it also
24 referred to "other applicable laws" in describing how its
25 provisions were to be implemented. Likewise, by referring to
26 "award" and "release" of timber sale contracts, the "originally
27

1 advertised terms" of pending sales, and "the return of the bid
2 bond," Section 2001(k)(1) borrows terms and procedures from the
3 very statutory scheme -- i.e., the National Forest Management Act
4 and its implementing regulations -- that it purports to modify or
5 override.³

6 The potential for conflicts due to Congress' reliance
7 on these terms, which have meaning only in the context of the
8 process of which they are a part, is real. For example, the
9 Forest Service's bid form instructs bidders that, as part of the
10 award process, "[t]he Government may, when in its interest,
11 reject any or all bids." Similarly, the prospectus for the
12 BUGOUT timber sale at issue here conditioned the award of the
13 sale on the results of the Endangered Species Act consultation
14 for the sale, and reserved the Forest Service's authority to
15 completely cancel the sale. See id. at ¶. Did Congress intend
16 these aspects of the award process to apply under Section
17 2001(k)(1)? Moreover, the agencies require purchasers to meet
18 certain financial requirements to be eligible to be awarded a
19 sale. Does "award" under Section 2001(k)(1) include those
20

21 ³ Defendants do not argue here that the implied repeal
22 doctrine would have to be applied with respect to every statute
23 to which the phrase "notwithstanding any other provision of law"
24 might apply. See Pilchuk Audubon Society v. Glickman, Federal
25 Defendants' Response to Motion for Preliminary Injunction, at 25-
26 26 (Dec. 5, 1995). Rather, a term such as "award" carries with
27 it under the statute-based process authorizing the Forest Service
and BLM to "award" sales a set of procedures. Thus, the implied
repeal doctrine is unavoidable in determining the extent to which
the normal procedures for awarding, releasing and permitting to
be completed Section 2001(k)(1) sales.

28 DEFENDANTS' REPLY TO NFRS'S REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 12

1 requirements, even if determining whether they are met takes more
2 than 45 days? Must the Forest Service now award sales to high
3 bidders that are not financially solvent, contrary to normal
4 award requirements? Because of these and other inherent
5 conflicts between Section 2001(k)(1) and the statute-based
6 process on whose terms it relies, the court should apply the
7 implied repeal doctrine to determine the extent to which the
8 usual process for awarding timber sales does not apply.

9 **B. Section 2001(k)(1) Does Not Apply if the High Bidder**
10 **Rejected or Became Unable to Accept the Sale Prior to July**
11 **27, 1995.**

12 With one narrow exception, Section 2001(k)(1) does not
13 apply to timber sales that were cancelled or withdrawn prior to
14 enactment of the Rescissions Act on July 27, 1995. Section
15 2001(k)(1) clearly covers cancelled or withdrawn timber sales
16 that were awarded or for which that the Forest Service or the
17 Bureau of Land Management had rejected all bids prior to
18 enactment of Section 2001(k)(1). However, Section 2001(k)(1)
19 clearly excludes all other timber sales that had been cancelled
20 or withdrawn at the time Section 2001(k)(1) was enacted,
21 including sales withdrawn or cancelled at the request of the
22 apparent high bidder, or because the apparent high bidder was no
longer willing or able to proceed with the sale.

23 **1. The language of Section 2001 supports defendants'**
24 **interpretation as to cancelled or withdrawn sales.**

25 Section 2001(k)(1) implicitly excludes timber sale
26 contracts that were cancelled or withdrawn when the 1995 logging
27

1 rider was enacted, with one exception. The exclusion from
2 Section 2001(k)(1) of sales that were withdrawn or cancelled,
3 except as narrowly provided, comports with a reading of the
4 statute as a whole. In particular, in Section 2001(k)(1),
5 Congress directs the Forest Service and BLM to "act to award,
6 release, and permit to be completed" the specified "offered or
7 awarded" sales. This language differs from the language used in
8 Section 2001(b)(1) -- "the Secretary concerned shall prepare,
9 advertise, offer, and award contracts . . . for salvage timber
10 sales" --- and in Section 2001(d) -- "the Secretary concerned
11 shall expeditiously prepare, offer, and award [Option 9] timber
12 sale contracts." This distinction can only mean that in Section
13 2001(k)(1), Congress expected generally that the covered sales
14 were already prepared and offered, and were awaiting award to
15 willing high bidders. Thus, cancelled or withdrawn sales, for
16 which offers were no longer outstanding and new auctions would be
17 required under BLM and Forest Service procedures, were not
18 generally included under Section 2001(k)(1).

19 Congress included one exception to the general
20 exclusion from Section 2001(k)(1) of withdrawn or cancelled
21 sales. Specifically, Congress provided in Section 2001(k)(1)
22 that "[t]he return of the bid bond shall not alter the
23 responsibility of the Secretary concerned to comply with this
24 paragraph." Read in context, the "return of the bid bond"
25 provision requires the Forest Service and BLM to "act to award,
26 release, and permit to be completed in fiscal years 1995 and
27

1 1996" intact timber sales for which the agency concerned rejected
2 all bids and returned the bid bond of a willing high bidder.
3 However, by including the "return of the bid bond" provision,
4 Congress also implicitly affirmed the exclusion from Section
5 2001(k)(1) of all withdrawn or cancelled sales that do not fit
6 under that provision -- including sales withdrawn or cancelled at
7 the request of the apparent high bidder, or because the apparent
8 high bidder was no longer willing or able to proceed with the
9 sale.

10 The "return of the bid bond" provision has meaning only
11 if Section 2001(k)(1) is read to generally exclude cancelled or
12 withdrawn sales, except for those covered by the provision. If
13 cancelled or withdrawn sales are not excluded from the phrase
14 "all timber sale contracts offered or awarded" before enactment
15 of the statute, the "return of the bid bond" provision has no
16 meaning, because Congress would have had no need to include
17 explicitly sales for which the Forest Service or BLM returned the
18 bid bond. Further, the principle *exceptio firmit regulam in*
19 *casibus non exceptis* -- an exception affirms the rule in cases
20 not excepted, see Black's Law Dictionary 502 (5th ed. 1979) --
21 supports this interpretation. Congress obviously intended the
22 "return of the bid bond" provision to carve out a sole exception
23 to a general rule: the implicit and logical exclusion from
24 Section 2001(k)(1) of sales that were "dead" by the time Section
25 2001 was enacted.

26
27

28 DEFENDANTS' REPLY TO NFRC'S REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 15

1 NFRC contends that when Congress applied Section
2 2001(k) (1) to "all" timber sale contracts offered or awarded
3 under the prescriptions of the paragraph, it really meant all
4 sales. The only exception, says NFRC, is for sales falling under
5 Section 2001(k) (2). Further, the NFRC continues, because
6 Congress included an explicit exception in Section 2001(k) (2), it
7 necessarily rejected all implicit exceptions.

8 In making this argument, the NFRC confuses an exception
9 from a statute with an exclusion. While Section 2001(k) (2)
10 applies to sales that fall under Section 2001(k) (1), and
11 therefore creates an exception to the requirements of Section
12 2001(k) (1), withdrawn or cancelled sales do not fall under
13 Section 2001(k) (1) in the first place. This distinction is more
14 than semantic. Because withdrawn or cancelled sales, except
15 those for which BLM or the Forest Service rejected all bids and
16 returned the high bidder's bid bond, were excluded from Section
17 2001(k) (1), they do not trigger the replacement timber provision
18 in Section 2001(k) (3).

19 Thus, NFRC's *expressio unius est exclusio alterius*
20 argument does not apply to withdrawn or cancelled sales excluded
21 from Section 2001(k) (1). Indeed, that principle -- an explicit
22 exception excludes all other exceptions -- applied to the "return
23 of the bid bond" provision further compels the conclusion that

1 the provision provides the only exception to the exclusion of
2 "dead" sales from Section 2001(k)(1).⁴

3 2. The legislative history of Section 2001(k)(1) supports
4 defendants' interpretation regarding sales where the
5 high bidder is unwilling or unable to accept the sale.

6 Because the "return of the bid bond" provision may be
7 less than clear, particularly in light of other parts of the
8 statute indicating an intention not to include cancelled or
9 withdrawn sales in Section 2001(k)(1), it is appropriate to
10 examine the legislative history to discern its meaning. Id. at
11 228-29.

12 Every reference in the legislative history to the
13 meaning of the "return of the bid bond" provision in Section
14 2001(k)(1) indicates that Congress was concerned only with sales
15 for which the Forest Service or BLM rejected all bids and
16 accordingly returned the bid bond of the high bidder. These are
17 the sales for which a willing purchaser -- the high bidder -- had
18 expectations of being awarded the sale, but environmental or
19 other issues related to the sale impeded award of the sale.⁵

20 ⁴ This interpretation does not deprive the phrase "all
21 timber sale contracts offered or awarded before [enactment]" of
22 meaning. It merely gives "all timber contracts" a present tense
23 construction, such that it refers only to "timber sale contracts"
24 that were actually viable at the time Section 2001 was enacted,
25 with the exception of sales to which the "return of the bid bond"
26 provision applies.

27 ⁵ Neither this argument, nor Section 2001(k)(1) --
28 including the "return of the bid bond" provision -- apply at all
29 to sales enjoined for violations of Section 318, the statute that
30 authorized their very existence. Such sales, which include the
31 NITA, SOUTH NITA, GARDEN and COWBOY sales, are at issue in
32 (continued...)

1 Accordingly, the Forest Service or BLM cancelled or withdrew the
2 sale and returned the bid bonds. Congress did not mean to
3 include under Section 2001(k) (1) sales that were cancelled at the
4 request of the high bidder when the high bidder was no longer
5 willing or able to proceed with the sale.

6 First, wherever the effect of rejection of bids and
7 return of the high bidder's bid bond on release of timber sales
8 under Section 2001(k) (1) is discussed in the legislative history,
9 only the Forest Service or BLM's affirmative rejection of bids is
10 contemplated. Explaining an early version of Section 2001(k) (1)
11 that included the "return of the bid bond" provision, Rep. Taylor
12 noted that "in some cases the agencies rejected bids well after
13 the auction due to administrative reviews and delays and changing
14 standards." Cong. Rec. at H3233 (Mar. 15, 1995) (remarks of Rep.
15 Taylor) (emphasis added). Subsequently, the "return of the bid
16 bond" provision was explained repeatedly to include "all sales
17 offered, awarded, or unawarded, whether or not bids have
18 subsequently been rejected by the offering agency." Cong. Rec.
19 at H5050 (May 16, 1995) (emphasis added); see also Cong. Rec. at
20 H3233 (Mar. 15, 1995) (remarks of Rep. Taylor); Sen. R. 104-17 at
21 123 (Mar. 24, 1995); Conference Rep. 104-124, at 137 (May 16,

22

23

24 ⁵(...continued)
25 motions pending in NFRC v. Glickman that are scheduled for
26 hearing on December 12. To the extent they are considered
27 cancelled sales, defendants agree that they are excluded from
Section 2001(k) (1). Because those sales were effectively found
to be void *ab initio*, they were as good as if never offered.

28 DEFENDANTS' REPLY TO NFRC'S REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 18

1 1995).⁶ The very use of the term "rejected" demonstrates that
2 Congress intended to include sales that the Forest Service or BLM
3 did not want to go forward, not sales that the high bidder, for
4 its own reasons, decided not to pursue.

5 The distinction between a sale withdrawn by the Forest
6 Service or BLM and one rejected by the apparent high bidder is
7 critical. In sales to which defendants concede Section
8 2001(k)(1) applies, the withdrawal of the sale, along with the
9 rejection of the bids and return of the high bidder's bid bond,
10 coincided with a decision to reverse course on the sale based on
11 environmental reasons. In many of these cases, the high bidder
12 persisted in pursuing the sale. These sales have been released.
13 By contrast, the high bidders for the OLALLA WILDCAT, TWIN HORSE
14 and HIACK THIN sales rejected the sales prior to any agency
15 decision not to proceed with the sale. Thus, unlike sales for
16 which a willing high bidder remained in the picture, the agencies
17 were free to award the sale to the next high bidder or to end the
18 sale altogether. The high bidders for OLALLA WILDCAT, TWIN HORSE
19 and HIACK THIN sales removed themselves from contention for those
20 sales long ago, and ceded any rights they had to those sales to

21
22 ⁶ See also H.Conf. Rep. No. 101-264, 101st Cong., 1st Sess.
23 87 (1989). This report, which accompanied Section 318, states
24 that "~~sales offered under this section but not awarded and~~
25 ~~withdrawn after October 1, 1990 under normal Forest Service~~
26 ~~procedures may not be re-offered in subsequent years under the~~
27 ~~terms of this section.~~" This language demonstrates that when
the Forest Service or BLM withdraw an offer by rejecting all
bids, the sale ceases to exist and must ordinarily be re-offered
at a new auction to go forward. See Fifth Declaration of Jerry
L. Hofer, at ¶ 4 (Nov. 15, 1995).

1 other bidders. Section 2001(k)(1) does not re-establish any such
2 rights now.

3 Second, the legislative history illustrates Congress's
4 paramount concern with avoiding governmental liability for
5 failure to proceed with binding timber sales. Because the
6 government would face liability only for contracts that the it
7 repudiated, Congress clearly did not intend Section 2001(k)(1) to
8 apply to sales that were cancelled at the purchaser's request.
9 Concern over the government's potential liability is reflected
10 early on in development of the statute. Referring to unreleased
11 Section 318 sales, the House Report on H.R. 1159 notes that
12 "[r]elease of these sales will remove tens of millions of dollars
13 of liability from the government for contract cancellation." H.
14 Rep. 104-71, at 15 (Mar. 8, 1995). See also Cong. Rec. at H3233
15 (Mar. 15, 1995) (releasing these sales will "sav[e] the government
16 over one hundred million dollars in buyout claims"). This
17 concern was shared in the Senate and remained a concern
18 throughout development of the legislation, as reflected by the
19 remarks of the legislation's key sponsor in the Senate. See Sen.
20 R. 104-17 at 123 (Mar. 24, 1995) ("Release of these sales will
21 remove tens of millions of dollars of liability from the
22 government for contract cancellation."); Cong. Rec. at S10465
23 (July 21, 1995) (same) (remarks of Sen. Gorton).

24 Finally, the legislative history describes Section
25 2001(k)(1) sales as sales whose release "has been held up in part
26 by extended subsequent review by the U.S. Fish and Wildlife
27

1 Service." Unlike a sale where willing purchasers, whether or not
2 their bid bonds had been returned, remained in the picture, the
3 OLALLA WILDCAT, TWIN HORSE and HIACK THIN sales were not sales
4 that were "held up" when Congress deliberated on and enacted this
5 legislation. Although those sales may have experienced delays,
6 once the high bidders rejected them, they were not "held up"
7 anymore. Instead, they were dead, and the agencies were free to
8 completely cancel them or to offer them to other bidders.
9 Congress did not have these sales in mind in enacting Section
10 2001(k) (1).

11 **C. Section 2001(k) (1) Does Not Require Release of a Sale if the**
12 **High Bidder Rejected or Became Unable to Accept the Sale**
After to July 27, 1995.

13 The language and history of Section 2001(k) (1) make
14 clear that the only purchasers that Congress was concerned with
15 in moving stalled timber sales were the high bidders for those
16 sales. Where the Forest Service or BLM attempted to award a sale
17 under Section 2001(k) (1) to a high bidder who was no longer
18 willing or able to accept the sale, they had no further
19 obligation to proceed with the sale. Accordingly, the court
20 should reject NFR's claim that the Forest Service must take
21 additional action to proceed with the EAGLE RIDGE HOUSELOG,
22 ALLEN, PRONG SALVAGE and HORN SALVAGE sales.

23 ~~Section 2001(k) contains only two references to~~
24 ~~purchasers, both of which can only mean the high bidder. Section~~
25 ~~2001(k) (1) mentions the high bidder explicitly, in prescribing~~
26 ~~that the "the return of the bid bond of the high bidder" does not~~
27

1 | excuse the agencies from complying with its provisions. In
2 | Section 2001(k) (1), Congress instructed the agencies that if they
3 | cannot meet the mandate of Section 2001(k) (1) within 45 days,
4 | "the Secretary concerned shall provide the purchaser an equal
5 | volume of timber" Given the 45-day time limit, the only
6 | purchaser to which Congress could have possibly thought it would
7 | be feasible to award delayed sales was the original high bidder.

8 | The legislative history confirms the focus on the high
9 | bidder. In the only meaningful discussion on this issue in the
10 | legislative history, it was explained that sales under Section
11 | 2001(k) (1) "will go forward regardless of whether the bid bond
12 | from the high bidder has been returned, provided it is
13 | resubmitted before the harvesting begins." Cong. Rec. at H5050
14 | (May 16, 1995) (emphasis added). In that sentence, "it" can only
15 | mean the bid bond from the high bidder. In addition, the House
16 | report accompanying a prior version of Section 2001(k) (1)
17 | described the covered sales as ones "that have already been
18 | sold," a characterization that would not apply to a sale that the
19 | high bidder rejected. See H. Rep. 104-71, at 15 (Mar. 8, 1995).

20 | Requiring the Forest Service and BLM to look past the
21 | high bidder and offer these sales to the next highest bidder
22 | would amount to a repeal of the agencies' normal procedures for
23 | these sales. Given the focus in the statute and the legislative
24 | history on the high bidder, the court should not read into
25 | Section 2001(k) (1) an implied repeal of these provisions. Cf. In
26 | re The Glacier Bay, 944 F.2d 577, 581-82 (9th Cir. 1991) (invoking
27 |

1 the implied doctrine to interpret the phrase "notwithstanding any
2 other provision of law"); see also E.P. Paup Co. v. Director, 999
3 F.2d 1341, 1348-49 (9th Cir. 1993) (finding that "the phrase
4 'notwithstanding any other provision of law' is not necessarily
5 preemptive" where legislative history reveals no intent to
6 preempt).

7 Under the implied repeal doctrine, a later statute
8 repeals an earlier provision only to the minimum extent
9 necessary. See In re The Glacier Bay, 944 F.2d at 581 (quoting
10 Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976)). Here,
11 Section 2001(k)(1) clearly repeals the agencies' normal
12 discretion to withdraw a sale before it is awarded. However,
13 once the agencies have "acted to award" the sale to the high
14 bidder, nothing in the statute contains no clear requirement that
15 the agencies must then award the sale to the next highest bidder.
16 Accordingly, the court should not repeal the agencies' usual
17 discretion to withdraw a sale if the high bidder is unwilling or
18 unable to accept it.

19 **D. Section 2001(k)(1) Does Not Apply to Sales that Are**
20 **Impossible to Award, Release or Permit to be Completed With**
No Change in the Original Terms, Bid Prices or Volumes.

21 The STAGECOACH, BALD and BUGOUT sales no longer existed
22 at the time the Rescissions Act was enacted. Their original
23 markings have been obliterated, and it is no longer possible to
24 precisely determine their boundaries and former configurations.
25 Prior to July 27, 1995, the Forest Service had decided to proceed
26 no further with these sales at any future time. Accordingly, the
27

1 agency tore down the boundaries and markings that inherently
2 defined the sales, all before Congress enacted Section 2001. The
3 agency then marked and put into place new sales to replace them.
4 Thus, the three sales cannot be reconfigured in accordance with
5 their original terms. It is inconceivable to imagine that
6 Congress intended to include in sales that can no longer possibly
7 be awarded, released and permitted to be completed "with no
8 change in originally advertised volumes, and bid prices."

9 The court should avoid construing Section 2001(k)(1) to
10 give it an absurd result. Nothing in its language or legislative
11 history suggests that Congress intended to include under Section
12 2001(k)(1) sales that are no longer impossible to award as on
13 their original terms. This is especially the case for sales that
14 were merely reconfigured and prepared for re-offer, albeit on
15 different terms. Indeed, it is difficult to understand why NFRC
16 should be concerned about sales for which timber, after all, will
17 still be placed on the market.

18 **CONCLUSION**

19 For the foregoing reasons, the court should deny NFRC's
20 implied motion for summary judgment seeking the award and release
21 of the sales at issue.

22

23 Respectfully submitted this 8th day of December, 1995.

24

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DEFENDANTS' REPLY TO NFRC'S REPLY MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION -- 24

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT & NATURAL RESOURCES DIVISION
 APPELLATE SECTION
 WASHINGTON, D.C. 20530
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MESSAGE: ATTACHED IS OUR DRAFT REPLY BRIEF ON THE (K) (1) ISSUE NOW BEFORE THE 9TH CIR. IT IS DUE TO BE FILED ON MONDAY, DECEMBER 11, 1995. NO EXTENSIONS ARE POSSIBLE. THERE IS A 15 PAGE ON THE BRIEF. PLEASE PROVIDE COMMENTS BY NOON, DECEMBER 11, 1995. IN ORDER TO SAVE TIME, IT WOULD BE BEST IF EACH AGENCY COULD PROVIDE A SINGLE SET OF COMMENTS ON THE BRIEF, IF POSSIBLE.

I AM IN THE PROCESS OF FILLING IN RECORD CITES. ALSO, PROOFREADING IS NOT YET COMPLETE.

THE CASE WILL BE ARGUED IN PORTLAND ON JANUARY 8, 1996. WE ARE THE LAST CASE OF THE DAY, AND COURT STARTS AT 1:30. IT WILL MOST LIKELY BE AROUND 7:00 PM EST BEFORE OUR CASE IS CALLED. WE WILL LEARN THE IDENTITY OF THE PANEL ONE WEEK PRIOR TO THE ARGUMENT.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36042, 95-36038

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee

v.

DAN GLICKMAN and BRUCE BABBITT,

Defendants-Appellants

and

OREGON NATURAL RESOURCES COUNCIL, et al.,

Applicants For Intervention-
Defendant-Intervenor-Appellants

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

REPLY BRIEF OF APPELLANTS, DAN GLICKMAN AND BRUCE BABBITT

STATEMENT

The issue in this appeal is deceptively simple -- what did Congress mean when it used the term "subject to Section 318" in Section 2001(k) (1) of the 1995 Rescissions Act (the 1995 Act). Is it merely, as NFRC and the timber industry amici^{1/} claim, a shorthand geographic description which draws within the reach of Section 2001(k) (1) any timber sale ever offered by the federal

^{1/} The timber industry amici include Senators Craig and Murkowski, Representatives Chenoweth and Linda Smith, and Oregon State Representative Johnson. The three primary Congressional sponsors of Section 2001(k) (1) have not joined in the timber industry amici brief.

- 2 -

government, prior to July 27, 1995, in any national forest in Washington and Oregon and any of six BLM management districts in western Oregon. Or, have the Secretaries of Agriculture and the Interior (the Secretaries) properly interpreted the meaning of that phrase to mean the release of a set of sales "that have already been sold under the provisions of Section 318 of the fiscal year 1990 Interior and Related Agencies Appropriations Act." (Statement of Senator Gorton, 141 Cong. Rec. S 10,464).

Resolution of this issue will determine if over 240 million board feet of old-growth trees will continue to be harvested throughout Washington and Oregon. Should the Secretaries prevail, Section 2001(k)(1) will still result in the release, in one form or another, of over 400 million board feet timber embodied in the remaining Section 318 sales - an amount of timber which even NFRC admits (NFRC Br. at 8) is covered by the statute as interpreted by the Secretaries. The timber volume represented by that discrete set of Section 318 sales will, under any party's interpretation of Section 2001(k)(1) of the Rescissions Act, be released for harvesting.^{2/} Thus, what is at stake in this appeal is approximately 240 million additional board-feet of old

^{2/} While much of the timber released will be the timber originally specified in the initial offerings under Section 318, some of the volume will be in the form of replacement timber pursuant to Section 2001(k)(3). How much replacement timber will be needed depends upon the district court's resolution to NFRC's challenge to the Secretaries' interpretation of the term "known to be nesting" found in Section 2001(k)(2). The district court heard oral argument on the parties' cross-motions for summary judgment on that issue on November 7, 1995. The issue is now under submission.

- 3 -

growth timber, located on over 4,000 acres of land located throughout Oregon and Washington which the district court's order pulls into the scope of sales required to be released under Section 2001(k)(1). Much of the 240 million board feet is concentrated in western Oregon and Washington, within the range of the two threatened bird species which depend upon large areas of old growth forest for their continued existence -- the Northern Spotted Owl and the marbled murrelet.

ARGUMENT

SECTION 2001(k)(1) RELEASES ONLY TIMBER SALES PREVIOUSLY OFFERED OR AWARDED UNDER SECTION 318

A. Introduction. -- NFRC primary argument in support of the district court's expansive interpretation of Section 2001(k)(1) is that the plain language of Section 2001(k)(1) requires release of any timber sale offered in any National Forest in Washington and Oregon or BLM district in western Oregon. (NFRC Br. ***). It then claims, without any support, that when Congress included the phrase "subject to Section 318" in Section 2001(k)(1) it was merely describing a geographic area to be covered by Section 2001(k)(1). NFRC then argues that the general reference to Section 318 is actually a specific reference to Section 318(a). (NFRC Br. 22). NFRC's arguments must be rejected because they

(1) do not give effect to the accepted meaning of "Section 318";
(2) are not supported by the legislative history as a whole; and
(3) lead to absurd results.

B. The Plain language of the statute supports the Secretaries' interpretation. -- As we noted in our opening brief,

- 4 -

14-22, to the extent that any "plain language" argument can be made concerning the phrase "subject to Section 318" the plain language supports the Secretaries' interpretation. First, as we note in our opening brief (Br. 15), the words "subject to" mean "liable, subordinate, subservient, inferior, obedient to; governed or affected by; * * * ." Black's Law Dictionary, 1594 (4th ed. 1966). See also Cambridge Capital Corp. v. Halcon Enterprises, Inc., 842 F. Supp. 499, 503 (S. D. Fla. 1993) (interpreting the phrase "subject to" as "governed, affected or limited by."); Amoco Production Co. v. United States, 17 Ct. Cl. 590, 594 (1984) (same). Thus, the release of sales required by Section 2001(k)(1) must be somehow "governed, affected or limited by" Section 318. NFRC's interpretation of the phrase fails to afford this plain meaning to the phrase "subject to," by turning the entire phrase "subject to Section 318" into a "simple" geographic description.

Second, it is clear that the term "Section 318" is commonly known as a timber sale program which had both well defined geographic and temporal limitations. Simply put, "Section 318" refers to a discrete set of previously offered or awarded timber sales within the thirteen national forests in Washington and Oregon known to contain the northern spotted owl, and the six BLM districts in western Oregon.

This commonly accepted meaning for "Section 318" was solidified by the Supreme Court's 1992 interpretation of Section 318. The Court stated that in enacting Section 318, Congress

- 5 -

established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain. By its terms, it applied only to the thirteen national forests in Oregon and Washington and [BLM] districts in western Oregon known to contain northern spotted owls.

Robertson v. Seattle Audubon Society, 503 U.S. 429, 433 (1992).

The Court also noted that the ability to offer sales under Section 318 expired "automatically on September 30, 1990, the last day of Fiscal Year 1990, except that timber sales offered under §318 were to remain subject to its terms for the duration of the applicable sales contracts." Ibid. (emphasis added)

It is against this well-settled and well-defined scope of Section 318 that Congress enacted, and the President signed, the 1995 Rescissions Act containing Section 2001(k)(1). Giving effect to the common, plain meaning of the all the parts of the phrase "subject to Section 318," the Secretaries started a process designed to release the discrete set of Section 318 sales which had been previously offered or awarded, as required by Section 2001(k)(1). Thus, as the Supreme Court stated in Cannon v. University of Chicago, 441 U.S. 667, 697-698 (1979), in interpreting Section 2001(k)(1), this Court should presume "our elected representatives, like other citizens, know the law" and ~~the Court is "especially justified in presuming both that those~~ representatives were aware of the prior interpretations of [Section 318] and that that interpretation reflects their intent with respect to [Section 2001(k)(1)] * * *." See also, Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2257 (1994).

- 6 -

NFRC, and the district court, however, effectively ignore^{3/} the Supreme Court's previous interpretation of the scope of Section 318. Neither NFRC nor the district court acknowledge the limited temporal and geographical domain described in Section 318 and discussed by the Supreme Court in Seattle Audubon. Indeed, as we noted in our opening brief (Br. 18), the district court itself stated that "there is no 'description' of lands set forth in Section 318." (E.R. 64). NFRC's brief fails to offer any explanation for how the district court could conclude that Section 318, which contains at least two separate "geographic descriptions" of land, does not describe any geographic area. Where, as here, the Supreme Court directly ruled on the geographic scope and temporal limits of a statute in question, the Court's conclusion is binding on all other federal courts. The NFRC's argument and the district court's conclusion to the contrary cannot stand.

Also, the district court never addressed the temporal limitation inherent in Section 318. In fact, the court indicated that the only temporal limitation to timber sales within Section 2001(k) (1) would be July 27, 1995, the date of enactment of the statute. (E.R. cite to October 17 order requiring reports to the court.) The court recently confirmed that it would consider

^{3/} While NFRC does in fact cite to Seattle Audubon, it has chosen to rely only on the "headnotes" portion of the decision, not the text of the actual opinion. As the Supreme Court has made clear, reliance on the headnotes prepared by the reporter of decisions is misplaced. United States v. Detroit Lumber Co., 200 U.S. 321, 337 (1906). The brief filed by timber industry amici never once cites Seattle Audubon.

- 7 -

sales offered prior to the enactment of Section 318, when it approved intervention in this case by a timber company seeking release of a sale offered in 1989, prior to the effective date of Section 318. (Supp. E.R. *** - minute order allowing intervention.)

Moreover, NFRC's attempt to rely on the broader geographic description contained in Section 318(a) undercuts its argument that the meaning of Section 2001(k)(1) is plain on its face. Section 2001(k)(1) does not reference Section 318(a) or in fact any other subsection of Section 318. Section 2001(k)(1) contains only a general reference to "Section 318." While Section 318(a) describes a general timber harvesting goal for the region, the remaining portions of Section 318 describe, in great detail, a timber sale program for the "owl forests." See Section 318(b) - (g). Indeed, many of the provisions of Section 2001(k) are similar to the provisions found in those portions of Section 318.^{4/} Given the similarities of the substantive portions of the two statutes, and the Supreme Court's clear statement of the scope of Section 318 in Seattle Audubon as being limited to sales offered during Fiscal Year 1990 in the thirteen national forests and six BLM districts "known to contain the northern spotted owl," ~~there can be little doubt that "subject to Section 318" as used in Section 2001(k)(1), refers to the limited timber sale program established in Section 318(b) - (g), rather than the~~

^{4/} Compare e.g., Section 318(g)(1) with 2001(b)(*) (limiting scope of judicial review); and Section 318(d) with Section 2001(**) (limiting ***).

- 8 -

timber sale goals established in Section 318(a). The district court's contrary conclusion must be rejected. NFRC's statement (NFRC Br. ***) that there "was no simpler way for Congress to describe" the area covered by Section 2001(k)(1) reflects either a profound misunderstanding of Section 318 as a whole as well, or a lack of knowledge of the definitive judicial interpretations of Section 318. Thus, NFRC's attempt to expand the geographic and temporal reach Section 2001(k)(1) through a myopic reading of Section 318 is meritless.

B. Legislative history of the Section 2001(k)(1) as a whole supports the Secretaries' interpretation. -- Contrary to the bold assertions of both NFRC and the timber industry amici, the legislative history does not offer a monolithic support for their "plain meaning" interpretation of Section 2001(k)(1). As we demonstrated in our opening brief, the legislative history is anything but monolithic. Neither NFRC nor the timber industry amici point to any specific reference in the legislative history which supports their claim that Congress as a whole had expressed an intent to rely on Section 318(a) to the exclusion of the more limited geographic and temporal scope of Section 318 as defined by the Court in Seattle Audubon. Indeed, a fair reading of the several committee reports and floor debates on the issue fully supports the Secretaries' interpretation of the scope of Section 2001(k)(1).

For example, after the President vetoed the initial rescissions bill, Representative Taylor, the primary sponsor of

- 9 -

the legislation in the House of Representatives, clearly indicated his understanding that what was to become Section 2001(k)(1) was intended to cover "the Section 318 timber * * *." He also stated that the timber in question "has been waiting since 1990, over 5 years * * * and it has already been approved to move, but it has been held up for over 5 years * * *." 141 Cong. Rec. 5558. Taylor's repeated reference to the five year "waiting" period, and his statement that Section 2001(k)(1) was intended to cover "the Section 318 Timber" are the among the clearest examples that the timber sales covered by Section 2001(k)(1) are the discrete group of sales, previously offered in 1989 and 1990, in the thirteen national forests and six BLM districts known to contain the northern spotted owl, under the timber sale program authorized by Congress in Section 318.

Senator Gorton, prior to signing the post-enactment letter upon which NFRC and the timber amici so heavily rely, also confirmed that Section 2001(k)(1) was limited to the sales previously offered or awarded under Section 318(b) - (g). He stated that Section 2001(k)(1) was intended to "release a group of timber sales that have already been sold under the provisions of Section 318 of the fiscal year 1990 Interior and related Agencies Appropriations Act." 141 Cong. Rec. S 10,464. Senator Hatfield also made clear that Section 2001(k)(1) was intended to release sales that were previously offered under Section 318, referred to as the "Northwest Timber Compromise Amendment of 1989." 141 Cong. Rec. S 4881.

- 10 -

Further confirmation of the intent to limit Section 2001(k)(1) to the previously offered or awarded 318 sales is evidenced by the amount of timber both Senators Hatfield and Gorton predicted would be released by the measure. Senator Hatfield asserted that Section 2001(k)(1) would release 375 million board feet of timber. Ibid. Senator Gorton estimated that Section 2001(k)(1) would release "roughly 300 million board feet of timber sales which have been held up due to agency gridlock over the marbled murrelet." 141 Cong. Rec. S 10,464. Neither Senator's estimate was accurate, however. As NFRC itself claims (Br. 8) Section 2001(k)(1) requires the release over 400 million board feet of timber sales previously offered under Section 318. As interpreted by NFRC and the district court, however, Section 2001(k)(1) will release over 650 million board feet of timber. This nearly 100 per cent increase in the amount of timber released by Section 2001(k)(1) under NFRC's interpretation is not supported by the estimates of the prime sponsors of the measure in the Senate. Finally, the 318 sales have now, for the most part^{5/}, been released. Section 2001(k)(1) requires no more, and the district court erred in holding otherwise.

NFRC's and amici also rely extensively on the conference report to support their broad interpretation of Section

^{5/} There are currently pending before the district court several motions addressing various Section 318 sales which have not yet been released. The district court will hear argument on these sales on December 12, 1995.

- 11 -

2001(k)(1). This reliance is misplaced for two reasons. First, as we noted in our opening brief (Br. 26) the Conference Report contains the same ambiguous reference to Section 318 as does Section 2001(k)(1). The Report does not purport to rely on the geographic description contained in Section 318(a) - it again simply refers to Section 318 as a whole. Second, the language of the Report contradicts the language of the Section 2001(k)(1) itself. The Report eliminates the language "subject to" and replaces it with "within the geographic area encompassed by Section 318 * * *." When the Report is at odds with the language of the statutory language itself, the Report is entitled to little, if any weight. See Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Concurring opinion of Justice Scalia).

Moreover, the Conference Report, which was ordered to be printed on May 16, 1995, actually predates the enactment of the final legislation (July 27, 1995) after the President's veto (June 7, 1995). Despite the existence of the Report and the apparent inconsistency between the language of the Report and the language of the bill under consideration, Congress did nothing to conform the terms of the bill to the language of the Report. Indeed, Senator Gorton, speaking to the Senate on July 21, 1995, ~~about the changes to Section 2001 after the veto of the initial~~ legislation, continued to describe the scope of Section 2001(k)(1) as limited to the "release of a group of sales that have already been sold under the provisions of Section 318 of the fiscal year 1990 Interior and Related Agencies Appropriations

- 12 -

Act." 141 Cong. Rec. S 10464. Thus, up to six days prior to the enactment of the legislation, one of the prime sponsors of the bill in the Senate continued to refer to the scope of Section 2001(k)(1) as covering nothing other than the group of sales previously offered or awarded under Section 318.

Finally, the reliance that both NFRC and the timber amici place on the post-enactment letter sent by six members of Congress is misplaced for two simple reasons. First, because the letter is "not a statement [made] during the legislative process, but after the statute became law" it is entitled to no weight. The letter "is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of * * * informed person[s] on an issue about which other may (or may not) have thought differently." Heintz v. Jenkins, 115 S. Ct. 1489, 1492 (1995). Second, the letter continues the inherent ambiguity in geographic scope of Section 2001(k)(1) by continuing to make only a general reference to Section 318. By refusing to specify either the broader areas covered by Section 318(a) or the more precisely geographic scope covered by Section 318(b) - (g), the letter provides no real guidance to Congressional intent.

C. Absurd results flowing from the district court's determination to interpret "subject to Section 318" as a mere geographic description of the area in which sales are to be released. -- In our opening brief we argued (Br. **) that the court's interpretation of "subject to Section 318" as a mere

- 13 -

geographic description would lead to an absurd result of requiring the release of timber sales that were never subject to Section 318, because they occurred either prior to or after the effective date of the statute. The legislative history confirms that one of the consistent motivations behind the formulation of what came to be Section 2001(k)(1), was to eliminate the lengthy delay in completing the timber sales previously offered or awarded Section 318 timber sales in Washington and Oregon. For example, Senator Gorton referred to "gridlock" and sales having been "held up" because of "extended subsequent review by the U.S. Fish and Wildlife Service." 141 Cong. Rec. S 10,464 - 10,465. See also, H.R. Rep. 104-124 104th cong. 1st Sess. 137 (same); 141 Cong. Rec. S 4875 (Senator Gorton, discussing Section 2001(k)(1) states "many of the sales directed by this Congress pursuant to [Section 318] have been held up by subsequent environmental actions."); 141 Cong. Rec. H 5558 - 5559 (Statement by Rep. Taylor discussing the "5 year" delay in harvesting Section 318 sales).

Subsequent actions in the district court by NFRC and others seeking to enforce the injunction issued on October 17, 1995, confirms our argument that the district court's interpretation will lead to absurd results. First the Forest Service and the BLM have spent scarce resources ferreting out timber sales which had been offered prior to the enactment of Section 318 -- in some cases reaching back to sales that occurred in the early 1980's but were for some reason never allowed to be

- 14 -

harvested. (See affidavit of ****, C.R. *** and included in the Federal Appellant's Supplemental Excerpts of Record (Supp. E.R.) at **). Despite NFRC's disclaimer (NFRC Br. 13 n.6) that it was not seeking release of those pre-Section 318 sales, the district court's order and injunction clearly includes those sales.

Indeed, the district court has now allowed a timber company to intervene in this action in an attempt to require release of a timber sale which was offered prior to the enactment of Section 318. (Federal Appellants' Supp. E.R. at *** Attach minute order.)

Also, the same district court which issued the rulings on appeal here, has issued an order in related litigation^{§/} that requires the release of two timber sales, both of which were developed under the newly adopted Northwest Forest Plan (otherwise referred to as Option 9). The government had offered those sales in 1994 as two of the first to occur under Option 9. Bids had been accepted and contracts awarded. When the release of the sales were challenged, the government argued that they should be released, relying in part on Section 2001(d)^{2/} of the Rescissions Act. NFRC, however, intervened in that action, arguing that the sales were covered under the district court's ~~September 13, 1995 opinion and October 17, 1995 injunction on~~ appeal in this case. In an order dated December 6, 1995, the

^{§/} ONRC v. Thomas, Civ. No. 95-6272-HO. A copy of the court's December 5, 1995 opinion is attached to this brief as addendum A.

^{2/} We describe Section 2001(d) at page 3 of our opening brief.

- 15 -

district court found that the sales were covered under the scope of Section 2001(k)(1), even though they had been prepared under Option 9 in 1994 and were otherwise covered by Section 2001(d). Thus, it no longer requires speculation to determine that the expansive interpretation advocated by NFRC and adopted by the district court leads to an absurd result. The district court's recent ruling validates that argument. The court has allowed what was intended to be a quick fix provided by Section 2001(k)(1) to allow the release of long-delayed timber sales to overtake and effectively repeal Section 2001(d)'s assigned role in expediting timber sales under Option 9. The court reached this absurd result, despite the government's reliance on Section 2001(d) of the Rescissions Act to support the continued harvesting on those two timber sales.
