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Timber: NFRC v. Glickman [3]

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

DATE: December 7, 1995
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RE: NFRC v. Glickman and Babbitt
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NUMBER OF PAGES: Message and 21 Pages

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MESSAGE:

Attached is copy of industry amici brief in NFRC v. Glickman and Babbitt on the (k)(1) issue. We did not object to the filing of the brief.

Currently, our reply brief is due to be filed on Monday, December 11, 1995. I will circulate a draft for comment as soon as possible. Given the short time for filing a response, the amount of time available for review and comment will be limited. My apologies in advance.

Al Ferlo

Nos. 95-36042 and 95-36038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee,

vs.

DAN GLICKMAN, in his capacity as Secretary of Agriculture, and
BRUCE BABBITT, in his capacity as Secretary of Interior,

Defendants-Appellants.

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION,
U.S. SENATORS LARRY E. CRAIG AND FRANK MURKOWSKI;
U.S. REPRESENTATIVES HELEN CHENOWETH AND LINDA SMITH;
AND OREGON STATE SENATOR ROD JOHNSON
IN SUPPORT OF THE APPELLEE

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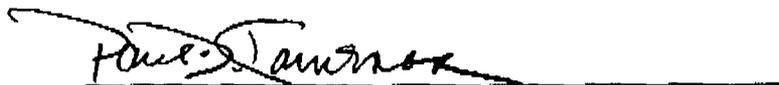
Counsel for Amici Curiae

Date: December 4, 1995

Corporate Disclosure Statement Required by FRAP 26.1

Amicus Curiae Washington Legal Foundation is a non-profit public interest law and policy center that has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted,



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Nos. 95-36042 and 95-36038

UNITED STATES COURT OF APPEALS
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NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee,

vs.

DAN GLICKMAN, in his capacity as Secretary of Agriculture, and
BRUCE BABBITT, in his capacity as Secretary of Interior,

Defendants-Appellants,

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION;
U.S. SENATORS LARRY E. CRAIG AND FRANK MURKOWSKI;
U.S. REPRESENTATIVES HELEN CHENOWETH AND LINDA SMITH;
AND OREGON STATE SENATOR ROD JOHNSON
IN SUPPORT OF THE APPELLEE

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with over 100,000 supporters nationwide, including many in the States of Washington and Oregon which are the areas primarily affected by the subject matter of this case. WLF has regularly appeared as an amicus before the U.S. Supreme Court and lower federal courts, including this one, in environmental cases that raise important issues of constitutional law and statutory interpretation. See, e.g., Babbitt v. Sweet Home Ch. of Commun. for a Great Or., 115 S. Ct. 2407 (1995); City of Chicago v. Environmental Defense Fund, 114 S.

Ct. 1588 (1994); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992); United States v. Montrose Chemical Corporation of California, Nos. 95-55725/55736 (9th Cir.) (appeal pending); Les v. Reilly, 968 F.2d 985 (9th Cir. 1992). In addition, WLF's Legal Studies Division publishes monographs and other materials discussing environmental law and policy questions.

U.S. Senator Larry E. Craig of Idaho is the Chairman of the Forestry, Conservation and Rural Revitalization Subcommittee of the Senate Agriculture, Nutrition and Forestry Committee, and was one of the Members of Congress who sponsored the logging salvage legislation in question. U.S. Senator Frank Murkowski of Alaska is Chairman of the Senate Energy and Natural Resources Committee and was also a sponsor of the legislation. Senators Craig and Murkowski wrote a contemporaneous letter to the appellants when the bill was signed into law underscoring the legislative intent correctly determined by the district court.

U.S. Representative Helen Chenoweth is a duly elected Member of Congress from the 1st District of Idaho and U.S. Representative Linda Smith is a duly elected Member of Congress from the 3d District of Washington. Both Representatives voted for the salvage legislation in question and also share the views of Senators Craig and Murkowski. Oregon State Senator Rod Johnson is a duly elected legislator from District 23 not only shares the views of his congressional colleagues,

but also represents constituents whose livelihood depends on the outcome of this case.

All amici submit that the district court has correctly interpreted the intent of Congress in section 2001(k)(1) in ordering the defendants to award and release timber sales offered in fiscal years 1991-95 in the national forests of Oregon and Washington and the BLM's administrative districts in western Oregon. Amici believe that their participation in this case will assist the Court in resolving the issue before it.

ARGUMENT

CONGRESS INTENDED THAT SECTION 2001(k)(1) OF THE RESCISSIONS ACT WOULD RELEASE ALL TIMBER SALES OFFERED IN FISCAL YEARS 1991-95 UP TO THE DATE OF ENACTMENT OF THE RESCISSIONS ACT IN ALL NATIONAL FORESTS OF OREGON AND WASHINGTON AND BLM DISTRICTS IN WESTERN OREGON.

The first rule of statutory construction is "the fundamental canon that statutory interpretation begins with the language of the statute itself." *Pennsylvania Welfare Dept v. Davenport*, 495 U.S. 552, 557-58 (1990); *U.S. v. Van Den Berg*, 5 F.3d 439, 442 (9th Cir. 1993).

When "the plain language of a statute appears to resolve a dispute, we consider the legislative history to determine only whether there is clearly expressed legislative intention contrary to that language." *Williamson v. C.I.R.*, 974 F.2d 1525, 1531 (9th Cir. 1992) (internal quotations omitted).

In this case the plain language of section 2001(k) resolves the dispute, and the legislative history is not contrary to the plain meaning. Indeed, the most persuasive parts of the legislative history -- especially the Conference Report -- are in full agreement with the district court's plain meaning reading of the statute.

A. . The district court correctly read the plain meaning of the statute.

Section 2001(k)(1) states:

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

Id.

While the defendant agencies claim the statute only requires the award and release of timber sales sold under section 318(b)-(j) in fiscal year 1990, they cannot explain how the words of the statute produce their interpretation. The plain meaning of the statute is that the phrase "subject to section 318" modifies the phrase "any unit of the National Forest System or district of the Bureau of Land Management"

which immediately precedes it in the sentence. There is no intelligible reading of section 2001(k)(1) in which "subject to section 318" modifies "all timber sale contracts" or any part of the sentence except the phrase which immediately precedes the words "subject to section 318." The words simply do not mean what the defendants contend.

The district court correctly read the plain meaning of the statute: it requires the award and release of all timber sale contracts offered or awarded prior to the date of enactment of the Rescissions Act in the geographic area subject to section 318.

The geographic area subject to section 318 is the national forests of Oregon and Washington and six BLM districts in western Oregon. It includes the national forests in eastern Oregon and Washington as well as those in the western region of the two states. Section 318(a) ordered a mandatory timber sale program for fiscal years 1989-90 for those forests. Those forests were "subject to section 318" and the district court correctly ruled these those forests are within the geographic area in which the Rescissions Act operates.

Because the plain reading of the statute is clear, that is the "end of the matter" and the courts are required to defer to the judgment of Congress. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). See also Amoco Production Co. v. Village of Gambell Alaska, 480 U.S. 531, 548 (1987) where the Supreme Court

unanimously reversed a decision of this Court that had enjoined certain oil and gas leases by the Department of Interior because this Court had failed to follow the plain meaning of the relevant statute.

B. The legislative history is consistent with the plain meaning of the statute.

While the plain meaning of the statute supports the district court's decision, the legislative history further bolsters that ruling. Contrary to the suggestion of the appellants, deference to the agency is not warranted in this case where the Court is required to determine the intent of Congress. Cases which raise "an undaunted question of congressional intent" such as this one, are "pure questions" of statutory interpretation that are solely within the province of the courts to decide. NLRB Union v. FLRA, 834 F.2d 191, 198 (D.C. Cir. 1987).

The conference report on the Rescissions Act, H. Rep. 104-124 (May 16, 1995), was approved by both houses of Congress. 141 Cong. Rec. H5013, H5353-54 (daily ed. May 18, 1995) (House approval); 141 Cong. Rec. S7407 (daily ed. May 25, 1995) (Senate approval).

The conference report expressly confirms the district court's reading of the statute:

The bill releases all timber sales which were offered for sale beginning in fiscal year 1990 to the date of enactment which are located in any unit of the National

Forest System or District of the Bureau of Land Management within the geographic area encompassed by Section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act. . . .

141 Cong. Rec. H5050 (daily ed. May 16, 1995) (underscoring added). According to the conference report, the statute releases all timber sales which were offered "beginning in fiscal year 1990 to the date of enactment" that are located "within the geographic area encompassed by Section 318" This is precisely what the district court ruled. The conference report shows that Congress intended the plain meaning of the statute.

"[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984), quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969). "To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent." *In Re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988). Debate on the floor of Congress is "not entitled to the same weight as these carefully considered committee reports." *United States v. International Union*, 352 U.S. 567, 585 (1957). "Committee reports are indeed entitled to greater weight than less formal indicia of Congressional intent such as floor debates." *International Tel. & Tel.*

Corp. v. General Tel. & Electronics Corp., 518 F.2d 913, 921 (9th Cir. 1975).

Among the committee reports, the conference report is the most reliable indication of the intent of Congress:

Because the conference report represents the final statement of the terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.

Dept. of Health & Welfare, State of Idaho v. Block, 784 F.2d 895, 901 (9th Cir. 1986), quoting *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

Other courts of appeals similarly view a conference report as the most reliable indicator of congressional intent.

Railway Labor Executives Ass'n v. I.C.C., 735 F.2d 691, 701 (2d Cir. 1984); *Kuehner v. Heckler*, 778 F.2d 152, 160-61 (3d Cir. 1985); *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), cert. denied sub nom. *Staton v. Lukhard*, 479 U.S. 868 (1986); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993); *Sierra Club v. Clark*, 755 F.2d 608, 615 (8th Cir. 1985); *RJR Nabisco, Inc. v. U.S.*, 955 F.2d 1457, 1463 (11th Cir. 1992); also see *Ecee, Inc. v. Fed. Energy Reg. Comm'n*, 645 F.2d 339, 359 (5th Cir. 1981).

This court has stated: "[t]he expressed understanding of the Conference Committee, commended to the full Congress in the Conference Report and subsequently adopted, is not lightly to be disregarded" *League To Save Lake Tahoe, Inc. v.*

Trounday, 598 F.2d 1164, 1172 (9th Cir.), cert. denied 444 U.S. 943 (1979).

Where a conference report conflicts with the report adopted by a single house of Congress, the conference report prevails. *Dept. of Health & Welfare, State of Idaho v. Block*, 784 F.2d at 901 (upholding conference report interpretation of statute over conflicting view expressed in House report); *State of Cal. v. Kleppe*, 604 F.2d 1187, 1196 (9th Cir. 1979) (same).

A conference report is even more controlling when it is "supported by other evidence" in the legislative history. *League To Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d at 1172. Here the Senate report agrees with the conference report that the Rescissions Act "release[s] a group of sales that have already been sold in the region affected by section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act." S. Rep. 104-17 (March 24, 1995) (underscoring added).

In addition, Representative Charles Taylor, the author of the bill (known in the House as section 307), stated on the floor of the House:

Previously-offered timber sales in the Northwest cannot be operated due to administrative delays and reviews. Many of these sales were mandated by Congress in Section 318 of the Department of Interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. 101-121; others were offered in fiscal year 1991 and some more recently. . . .

Subsection 307 (i)(1) frees up all these sales. . . . It applies to all national forests and BLM districts that were subject to Section 318 of the Department of interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. 101-121

141 Cong. Rec. H3233 (daily ed. March 15, 1995). A sponsor's explanation of a bill provide "an authoritative guide to the statute's construction," *Rice v. Rehner*, 463 U.S. 713, 728 (1983), and deserves substantial weight in interpreting the statute. *Church of Scientology v. U.S. Department of Justice*, 612 F.2d 417, 424 n.13 (9th Cir. 1979).

Against these persuasive and consistent explanations of the statute, the defendants and their *amici* can point to no member of Congress in either house, supporter or opponent (including the Congressional opponents of the Rescissions Act who support the defendants as *amici*), who ever stated that fiscal year 1991 through 1995 sales were excluded from the statute, or that the statute only released 1990 sales, or only released section 318 sales.

Rather, defendants base their legislative history argument solely on a negative inference they would draw from some floor statements and on the initial House report that did not specifically mention the fiscal year 1991 through 1995 timber sales, and only mentioned section 318 sales. From the absence of reference to 1991-95 sales in these statements, defendants and their *amici* argue that Congress intended section 2001(k) to exclude the 1991-95 sales.

Courts do not rely upon negative inferences from statements in legislative history to vary the plain meaning of a statute. The fact that legislative history only refers to one problem "does not create a negative inference limiting the amendment to this specific problem." *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 867 (1983) (legislative history focusing solely on exempting federal obligations from state income tax did not limit plain language of statute exempting federal obligations from all state taxes); *United States v. Turkette*, 452 U.S. 576, 591 (1981) (fact that legislative history referred solely to preventing infiltration of legitimate business by organized crime does not require negative inference that statute does not reach criminal enterprises).

The Congressional *amici* also seek to discount Representative Taylor's floor statement on March 15, 1995 by noting that part of it was revised and extended rather than spoken. Their criticism is misplaced.

Such revised and extended remarks are routine in congressional debate,¹ and in fact three of the Congressional *amici* themselves (Reps. Miller, Studds and Vento) submitted revised and extended comments in opposition to the Taylor amendment.

¹ Until recently the Congressional Record did not distinguish prepared and extended remarks from spoken remarks, and there was no way for courts to determine reliably what words were spoken and what words were written.

141 Cong. Rec. H3233 (Miller), H3235 (Studds), H3240 (Vento) (daily ed. March 15, 1995).

There is no rule of statutory interpretation that gives less weight to revised and extended floor statements than to spoken words. In *State of Cal. v. Kleppe*, 604 F.2d 1187, this court ruled that written statements "not spoken in debate but printed in the Congressional Record . . . do carry weight" where the statements are from an author of the bill or a member of the conference committee. *Id.* at 1197. Similarly, in *NLRB v. St. Francis Hospital*, 601 F.2d 404 (9th Cir. 1979), the court gave weight to the Senate sponsor's remarks made after the Senate had voted on the bill but before conference committee action on the bill. *Id.* at 415 n.12.

Indeed, the prepared nature of written remarks may make them more reliable than spoken statements on the floor of Congress, "where grammatical formalities are not always observed." *Church of Scientology v. U.S. Department of Justice*, 612 F.2d at 425; see *North Haven Board of Education v. Bell*, 456 U.S. 512, 525-27 (1982) (relying on author's floor statement "some of which were prepared rather than spontaneous remarks").

It is never possible for a court to determine either the size or attentiveness of the congressional audience for written or spoken remarks on the floor of Congress. Spoken remarks can be made to an empty chamber; written remarks can be widely read and considered. The difficulty of ascertaining

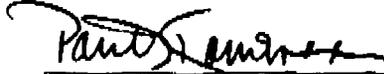
the motivation, accuracy, significance and impact of individual floor statements is the reason courts give more weight to printed committee reports than to individual legislators' remarks. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring) (floor statements are "not always distinguished for candor or accuracy"); *In Re Kelly*, 841 F.2d at 912; *International Tel. & Tel. Corp. v. General Tel. & Electronics Corp.*, 518 F.2d at 921.

What matters about Rep. Taylor's floor statement is not how he presented it, but what he said. "[U]nless we are willing to decide that the explanation of the statute provided by one of its principal sponsors was, for some reason, flatly wrong," courts will follow the authoritative statements of a bill's sponsor. *INS v. Phinpathya*, 464 U.S. 183, 203-04 (1984) (Brennan, J., concurring).

CONCLUSION

Amici respectfully urge the Court to affirm the order of the district court.

Respectfully submitted,



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Counsel for Amici

Date: December 4, 1995

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing brief of amici curiae the Washington Legal Foundation, et al., were served by first-class mail, postage pre-paid, this 4th day of December, 1995, to the following counsel:

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MESSAGE: Attached is a copy of a "Motion for Leave to File Separate Briefs, and Alternative Motion for Leave to File a Single 45 Page Brief Out of Time" which NFRC filed with the 9th Cir. yesterday. Apparently, the 9th Cir. rejected NFRC's attempt to file separate briefs on the merits of the government's appeal, and on the appeal by SCLDF from the denial of intervention. (A copy of the intervention brief will be sent later today by fax. If you prefer not to receive it, please let me know - its about 30 pages. We will not be taking a position on the intervention appeal). I am assuming that the Court will allow the two separate briefs to be filed, and am preparing the reply brief based on that assumption. I hope to have a draft reply brief for review and comment by Thursday.

Nos. 95-36042 and 95-36038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff-Appellee,

vs.

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Defendants-Appellants,

and

OREGON NATURAL RESOURCES COUNCIL, et al.,

Applicants For Intervention-Defendant-Intervenor-Appellants

APPELLEE'S MOTION FOR LEAVE TO FILE SEPARATE BRIEFS,
AND ALTERNATIVE MOTION FOR LEAVE TO FILE
A SINGLE 45 PAGE BRIEF OUT OF TIME

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OF Attorneys for Plaintiff-
Appellee Northwest Forest
Resource Council

Appellee Northwest Forest Resource Council ("NFR") moves for leave to file two separate briefs in the two appeals that have been consolidated (No. 95-36038 and No. 95-36042). NFR has prepared the two briefs, served them on the parties and they have been received in the clerk's office of this court. This appeal is calendared for oral argument in Portland on January 8, 1995.

The appellant Secretaries' appeal relates to the injunctive order issued by the district court on October 17, 1995 ordering them to award and release certain timber sales pursuant to section 2001(k) of the 1995 Rescissions Act, Pub. L. 104-19. The other appeal is from the district court's partial denial of intervention by Oregon Natural Resource Council ("ONRC") and other environmental groups.

The appellant Secretaries filed their brief on the merits appeal on November 13. On the same day, ONRC filed an *amicus* brief on the merits appeal, and filed a separate brief on its intervention appeal. In addition, some members of Congress filed a separate *amicus* brief.

Evidently, there was a procedural problem with ONRC filing an *amicus* brief and a brief as a party, and ONRC has moved for leave to file both briefs.

NFR, as appellee, responded to over 80 pages of merits arguments, and also responded to ONRC's arguments in its separate brief on intervention. To do so, NFR prepared one 33 page brief on the merits appeal, and a separate 24 page brief on the intervention appeal.

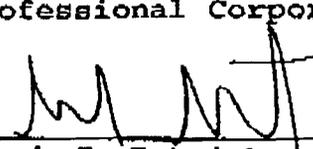
The clerk's office has informed NFRC that this procedure was in error, and that NFRC should have filed one brief on the two consolidated appeals, which was required to be 35 pages in length unless the court granted permission to file a longer brief.

NFRC regrets its misunderstanding about the briefing procedure on the two appeals. Given the short time until the argument, NFRC respectfully asks the court to allow it to file the two separate briefs it has already sent to the court. This is the fastest and most economical way for NFRC to correct its error and to comply with the rules of the court.

If the court is not inclined to permit the filing of two briefs, NFRC would then ask the court for leave to file, out of time, a single 45 page brief that addresses both consolidated appeals.

Dated this 5th day of December, 1995.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: 

Mark C. Rutzick
Alison Kean Campbell

Attorneys for Plaintiff-
Appellee Northwest Forest
Resource Council

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MOTION FOR LEAVE TO FILE SEPARATE BRIEFS, AND ALTERNATIVE MOTION FOR LEAVE TO FILE A SINGLE 45 PAGE BRIEF OUT OF TIME on:

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U.S. Department of Justice
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Room 2339
Land & Natural Resources Division
Washington, D.C. 20530
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Patti A. Goldman
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104
(206) 343-1526 (fax)

on December 5, 1995, by facsimile and by delivering to said attorneys via Federal Express true copies thereof, certified by me as such, contained in sealed envelopes, prepaid, addressed to said attorneys at said attorneys' last known addresses, and deposited with Federal Express in Portland, Oregon, on said day, and on:

Scott Horngren
Haglund & Kirtley
Attorneys at Law
One Main Place
101 S.W. Main, Suite 1800
Portland, Oregon 97204
225-1257 (fax)

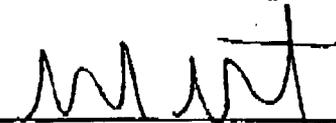
on December 5, 1995, by mailing to said attorney a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at

C:\CAPTION\NO2\95-36042.FXF

said attorney's last known address, and deposited in the post office at Portland, Oregon, on said day.

Dated this 5th day of December, 1995.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

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

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

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CONFIRMATION NUMBER (202) 272-8056

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NUMBER OF PAGES: 4

DATE: December 6, 1995

FROM: Paula Clinedinst, Paralegal, 305-0431

MESSAGE: NERC v. Glickman, 95-6244

Attached is a letter sent to Geoff Garver from Patti Goldman, Sierra Club Legal Defense Fund. It raises the issue of communication between federal agency employees and the public.



Sunrise, Mt. McKinley

Ansel Adams

SIERRA CLUB LEGAL DEFENSE FUND, INC.

The Law Firm for the Environmental Movement

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December 5, 1995

VIA TELEFAX

Geoffrey Garver
Dept. of Justice
Environment & Natural Resources Division
General Litigation Section
601 Pennsylvania Ave. NW, 8th Floor
Washington, DC 20044
FAX: (202) 305-0506

Dear Jeff:

As you know, my clients have repeatedly been frustrated in their attempts to obtain information from government agencies about that status of particular timber sales under the logging rider to the Rescissions Act. On several occasions, Forest Service and Fish and Wildlife Service employees, who previously have been willing to discuss these matters with my clients, have cut off discussions allegedly because of the pending litigation. Often, the federal employees have indicated that they were refusing to provide information on the directions or strong advice of their superiors or their attorneys.

This course of action is unacceptable. The logging rider is far bigger than the pending litigation. As you read this letter, logging is underway on several sales and plans are materializing for additional logging. The actions on-the-ground are taking pace at such a frenzied pace that it is impossible for one individual, particularly a lawyer far removed from the forests at issue, to keep track of all the developments.

This has proven to be the case in practice. Often, my clients and associates have obtained far more accurate and timely information than you seem to have available to you. For example, this weekend, you informed me that unit 4 of the Boulder Knob sale was not yet released and would not be logged until January. Yet, yesterday, Scott Timber Company's attorney represented to the Oregon District Court that logging was scheduled to commence on unit 4 this Thursday.



Geoffrey Garver
December 5, 1995
Page 2

It would be far more productive for you to permit your clients to provide information directly to my clients. Having the attorneys act as the intermediaries has only delayed and diminished the quality of the information flow. It has also compounded my clients distrust of and frustration with the agencies implementing the logging rider.

On an even more serious note, we believe that the apparent directions to agency personnel to cut off communications with our clients are blatantly illegal. Under the First Amendment, my clients have a constitutional right to petition their government. That is precisely what they are doing both in and out of court in advocating that certain timber sales should not be released and logged under the logging rider.

As part of their right to petition the government, my clients are entitled to challenge what they believe are illegal public land management activities in court. However, by cutting off communications with my clients, the government is penalizing my clients for exercising this right. They are obtaining less information on a less timely basis as a result of petitioning and suing the government.

My clients also have a fundamental right to obtain information about logging activities on federal public lands. Most of this information is a matter of public record available at Forest Service offices or available under the Freedom of Information Act. Forest Service employees are public servants whose job often includes communicating with the public about activities in our national forests.

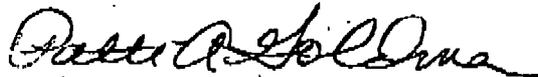
Not only does the apparent gag order defy these legal principles, but it also clashes with the overall philosophy of public land management and this Administration's commitment to open government and public participation. In many situations, it will also deny conservationists information that is available to the timber industry, since timber companies are having countless meetings with Forest Service personnel regarding particular timber sales and, indeed, have been invited to assist with implementation of the rider even though they too are in litigation over the rider.

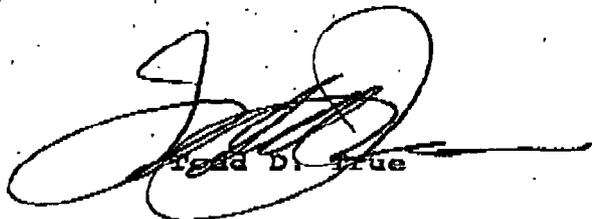
While this issue has come to the fore in the context of this litigation, it is a larger issue that threatens to create a longstanding rift between the conservation community and the federal agencies. For this reason, we ask that the Department of

Geoffrey Garver
December 5, 1995
Page 3

Justice establish a policy of allowing open communications with Forest Service personnel and the public concerning the status of timber sales under the logging rider.

Sincerely,


Patti A. Goldman


Todd D. True

cc: Ellen Athas
Katy McGinty
Peter Coppelman
Lois Schiffer
Dan Glickman
Bruce Babbitt

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NUMBER OF PAGES: 6

DATE: December 4, 1995

FROM: Paula Clinedinst, Paralegal, 305-0431

MESSAGE: NFRC v. Glickman, 95-6244

Attached is Federal Defendants' Motion to File Response to NFRC's Reply or in the Alternative to Strike New Issues Relating to 10 New Sales.

see Swarth P. 2

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 9 Telephone: (202) 272-8338

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	DAN GLICKMAN, is his capacity)	(lead case)
16	as Secretary of Agriculture;)	Civil No. 95-6267-HO
17	BRUCE BABBITT, in his capacity as)	(consolidated case)
18	Secretary of Interior,)	DEFENDANTS' MOTION TO
19	Defendants.)	FILE RESPONSE TO NFRC'S
20		REPLY OR IN THE
21		ALTERNATIVE TO STRIKE
22		NEW ISSUES RELATING TO
23		10 NEW SALES

20 Defendants hereby request a reasonable opportunity to file a
 21 response to NFRC's Reply Memorandum in Support of Third Motion
 22 for Summary Judgment and in Support of Motion for Further
 23 Clarification or Enforcement of the Court's October 17,
 24 Injunction. In the alternative, defendants move to strike
 25 material relating to new issues raised in the reply.

26 In its "reply," plaintiff Northwest Forest Council (NFRC)

1 raises numerous new issues relating to 10 new sales not ever
 2 mentioned in either NFRC's third motion for summary judgment
 3 (seeking release of 24 sales originally offered pursuant to
 4 Section 318) or NFRC's motion for further clarification (seeking
 5 clarification that three sales that had been enjoined or subject
 6 to prior litigation fall under the terms of the Court's October
 7 17 injunction). This attempt to bring in these new issues
 8 relating to new sales by way of a reply memorandum is contrary to
 9 the Court's minute order setting the briefing schedule and
 10 hearing date in this matter "on whether sales enjoined or
 11 withdrawn in the face of litigation in other courts are within
 12 section 2001(k)." See November 7, 1995 Minutes Order. This
 13 minute order reflects the express agreement of the parties
 14 discussed on November 7. The issues raised by NFRC as to these
 15 10 sales are not related to the question of how section 2001(k)
 16 affects sales that were the subject of prior court proceedings,
 17 but are new issues improperly raised on reply.¹

18 As NFRC is aware, many of the issues raised by NFRC's
 19 "reply" are part of an action recently brought by Pilchuck
 20 Audubon Society, et al. v. Glickman, et al., (Civil No. 95-06384-
 21 TC). These issues have now been set for hearing on Pilchuck's

22 _____
 23 ¹ Moreover, there is no justification for NFRC raising
 24 these issues in this manner. The status of these 10 sales were
 25 reported to the Court in filings dated October 25 and November 1,
 26 1995. NFRC, however, never filed a motion seeking their release
 and never stated that it intended to raise these sales by way of
 a "reply" brief in connection with the parties' agreed upon
 briefing schedule in this matter.

*what new is this?
 what sales?*

1 motion for preliminary injunction for December 12, 1995 before
 2 this Court. Defendants are preparing a response to that motion
 3 for a preliminary injunction, in which they will address many of
 4 these issues. Accordingly, defendants request the opportunity to
 5 respond to these new issues relating to the 10 sales after
 6 responding to Pilchuck's motion for a preliminary injunction, or
 7 by Friday, December 8. This is only 10 days after the filing of
 8 NFRC's reply. In the alternative, defendants move to strike the
 9 issues relating to the 10 sales as not part of this proceeding,
 10 and request that a briefing schedule and a hearing date be set to
 11 address these issues.

12 Dated this 1st day of December 1995.

13 Respectfully submitted,

14 KRISTINE OLSON
United States Attorney

15 LOIS J. SCHIFFER
16 Assistant Attorney General

17 

18 MICHELLE L. GILBERT
 19 EDWARD BOLING
 20 JEAN WILLIAMS
 21 ELLEN KOHLER
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28 FEDERAL DEFENDANTS'
NOVEMBER 1, 1995 REPORT - 4

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 1, 1995, she caused one copy of the foregoing FEDERAL DEFENDANTS' REQUEST TO FILE RESPONSE TO NFRC'S REPLY to be served by facsimile and by first class mail, postage prepaid upon the counsel of record hereinafter named:

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Michelle L. Gilbert

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NUMBER OF PAGES: 39

DATE: November 22, 1995

FROM: Michelle Gilbert (202) 272-8339

MESSAGE: NFRC v. Glickman, 95-6244

Attached is a copy of defendants Opposition to NFRC'S Supplemental Memorandum in Support of its Third Motion for Summary Judgment and NFRC'S Motion for Further Clarification

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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)

14 Plaintiff,)

15 v.)

16 DAN GLICKMAN, et al.,)

17 Defendants,)

18 OREGON NATURAL RESOURCES COUNCIL,)
 19 et al.)

20 Amici/Defendants-Intervenors)
 21)
 22)
 23)
 24)
 25)
 26)
 27)

No. 95-6244-HO
(Lead Case)

No. 95-6267-HO
(Consolidated Case)

OPPOSITION TO NFRC'S
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF ITS THIRD
MOTION FOR SUMMARY
JUDGMENT AND NFRC'S
MOTION FOR FURTHER
CLARIFICATION

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CASES

<u>Alaska Wilderness Recreation & Tourism Association v. Morrison,</u> 67 F.3d 723 (9th Cir. 1995)	22
<u>American Foreign Service Association v. Garfinkel,</u> 490 U.S. 153 (1989)	27
<u>Apache Survival Coalition v. United States,</u> 21 F.3d 895 (9th Cir. 1994).	21
<u>Ashwander v. TVA,</u> 297 U.S. 288	18
<u>Clark v. Coye,</u> 60 F.3d 600 (9th Cir. 1995).	16
<u>Croman Corporation v. United States,</u> 31 Fed. Cl. 741 (1994)	26, 28
<u>Donovan v. Sureway Cleaners,</u> 656 F.2d 1368 (9th Cir. 1981)	16
<u>Hayburn's Case,</u> 2 Dall. 409 (1792)	23
<u>INS v. Chadha,</u> 462 U.S. 919 (1983)	19
<u>Leavenworth Audubon v. Ferraro,</u> 881 F. Supp. 1482 (W.D. Wash. 1995)	14
<u>Leman v. Krentler-Arnold Hinge Last Co.,</u> 284 U.S. 448 (1932)	16
<u>Marbury v. Madison,</u> 1 Cranch 137 (1803)	19
<u>Oregon Natural Resources Council v. Grossarth,</u> No. 89-6451- O (D. Or. Jan. 15, 1991), <u>aff'd</u> , 979 F.2d 1377 (9th Cir. 1992)	15
<u>Pennsylvania v. Wheeling & Belmont Bridge Co.,</u> 54 U.S. (13 How.) 518 (1852)	21
<u>Pilchuck Audubon Society v. Glickman,</u> No. 95-6384-TC (W.D. Wash. 1995)	1
<u>Plaut v. Spendthrift Farm, Inc.,</u> 115 S. Ct. 1447 (1995)	20, 23

Rescue Army v. Municipal Court of Los Angeles,
331 U.S. 549 (1947) 18

Robertson v. Seattle Audubon Society,
503 U.S. 429, 112 S. Ct. 1407 (1992) 20, 21

Seattle Audubon Society v. Evans,
No. 89-160-WD (W.D. Wash.) 1

Seattle Audubon Society v. Robertson,
No. 90-35519 (9th Cir. Aug. 27, 1990) 6

Smith v. United States Forest Service,
33 F.3d 1072 (9th Cir. 1994) 12

Springer v. Government of the Philippine Islands,
277 U.S. 189 (1928) 19

System Federation No. 91, Railway Employees'
Department, AFL-CIO v. Wright,
364 U.S. 642 (1961) 16

United States v. Klein,
80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871). 19, 20

United States v. Swift & Co.,
286 U.S. 106 (1932) 16

STATUTES

Fiscal Year 1995 Emergency Supplemental Appropriations
for Disaster Relief and Rescissions Act,
Pub. L. No. 104-19 1

Interior and Related Agencies Appropriations Act
of 1990, Pub. L. No. 101-121, Tit. III, 103,
Stat. 745-750 (1989) 3

MISCELLANEOUS

H. Rep. No. 104-71, 104th Cong., 1st Sess. 22
(Mar. 8, 1995) 30

S. Rep. No. 104-17, 104th Cong. 1st Sess. 123
(Mar. 24, 1995) 30

141 Cong. Rec. H3233 (Mar. 15, 1995) 30, 31

141 Cong. Rec. at S4881 (Mar. 30, 1995) 31

H. Conf. Rep. No. 101-264, 101st Cong., 1st Sess.
87 (1989) 7, 10, 29, 30

The Federalist, No. 48 (E. Earle ed. 1937)
(J. Madison) 19

Fed. R. Civ. P. 60(b) 16, 17

1 INTRODUCTION

2 This brief lays out the factual and legal issues underlying
3 several motions and filings before this Court. It addresses 11
4 specific timber sales that were enjoined or withdrawn in court
5 proceedings prior to passage of the Fiscal Year 1995 Emergency
6 Supplemental Appropriations for Disaster Relief and Rescissions
7 Act, Pub. L. No. 104-19 ("Rescissions Act"). The fate of these
8 sales is being raised in several legal proceedings, as described
9 below:

10 On October 30, 1995, Northwest Forest Resource Council
11 ("NFRC") (plaintiff in No. 95-6244-HO) filed a motion
12 for further clarification of this Court's October 17,
13 1995 to specifically encompass three sales -- the
14 Gatorson sale on the Colville National Forest and Tip
and Tiptop on the Wenatchee National Forest -- which
were enjoined by other federal courts when the
Rescissions Act was enacted.

15 On that same date, NFRC filed a supplemental memorandum
16 in support of its third motion for summary judgment
17 arguing that Section 2001(k)(1) of the Rescissions Act
18 requires the release of eight Section 318 sales that
had been enjoined by courts or withdrawn in the face of
court proceedings -- Cowboy, Nita, South Nita, Last,
and First on the Umpqua National Forest and Garden, Elk
Fork, and Boulder Krab on the Siskiyou National Forest.

19 Previously, on October 3, 1995, Pilchuck Audubon
20 Society, Portland Audubon Society, Oregon Natural
Resources Council, Lane County Audubon Society,
21 Washington Environmental Council, later joined by
Seattle Audubon Society had filed a motion in the
22 Western District of Washington seeking to clarify and
enforce court orders previously issued in Seattle
23 Audubon Society v. Evans, No. 89-160-WD, regarding six
Section 318 sales. On November 3, 1995, Judge Dwyer
24 stayed that motion pending further rulings by this
Court.

25 Several of these organizations and others have filed
26 another lawsuit that challenges the release of
previously cancelled sales under Section 2001(k) of the
27 Rescissions Act. Pilchuck Audubon Society v. Glickman,
No. 95-6384-TC (filed Nov. 7, 1995). They have asked

1 that the new case be consolidated with this one, and no
2 party has objected. They are filing a motion for a
3 preliminary injunction along with this brief and are
4 asking that it be heard on December 12, 1995. The
5 motion for a preliminary injunction challenges the
6 release of cancelled sales under Section 2001(k)(1),
7 which includes the 11 sales cancelled as a result of
8 court proceedings.

9 While the plaintiffs in Smith v. Forest Service,
10 Leavenworth Audubon Adopt-A Forest v. Ferraro, and
11 Friends of Elk River v. Forest Service, No. 90-969-PA
12 (March 1991), have not filed motions to enforce the
13 orders issued in those cases, they will notify the
14 courts that issued those orders of the pendency of
15 these issues before this Court.

16 Before the Rescissions Act was enacted, federal courts
17 determined that these 11 sales could not go forward in their
18 original form. The cases were closed, and the Forest Service,
19 the environmental plaintiffs, and the timber industry had adapted
20 their courses of action to the courts' rulings.

21 After describing the circumstances surrounding the judicial
22 death knell tolled for each of these sales, this brief explains
23 that interpreting the logging rider to resurrect these sales in
24 their original, illegal forms would violate the doctrine of
25 separation of powers. Since there is no indication that Congress
26 understood or intended Section 2001(k) to create such a
27 constitutional confrontation, it should be construed in
accordance with its most logical meaning not to encompass timber
sales that were enjoined by courts or withdrawn in the face of
court proceedings in a way that facilitated final judicial
disposition of a case.

1 BACKGROUND

2 Four separate judicial proceedings led to the demise of
3 these timber sales in their original pre-logging rider forms.
4 Each of these proceedings is described in turn.

5 I. SEATTLE AUDUBON SOCIETY V. EVANS

6 In 1990, a group of environmental organizations challenged
7 several timber sales offered under Section 318 of the Department
8 of the Interior and Related Agencies Appropriations Act of 1990,
9 Pub. L. No. 101-121, Tit. III, 103, Stat. 745-750 (1989)
10 ("Section 318") (Exhibit 1). Section 318 prescribed some minimal
11 requirements for timber sales offered during fiscal year 1990.
12 More specifically, Section 318 required the Forest Service to
13 minimize fragmentation of ecologically significant old-growth
14 forest stands. Section 318(b)(2).

15 A. The Six Sales

16 Section 318's fragmentation requirements formed the basis of
17 the plaintiffs' challenge to six timber sales at issue here.
18 Five of the sales -- Cowboy, Nita, South Nita, First, and Last
19 timber sales, were on the Tiller Ranger District of the Umpqua
20 National Forest, and one -- the Garden timber sale -- was on the
21 Siskiyou National Forest. On motions for summary judgment, the
22 following undisputed facts emerged.

23 The Cowboy sale comprised 219 acres of ecologically
24 significant old-growth, including over 203 acres of spotted owl
25 habitat. The Forest Service's own biologist recommended
26 significant modifications to reduce fragmentation in spotted owl
27

1 habitat, but the Forest Service refused to modify the sale.

2 Order at 25-26 (May 11, 1990) ("First Order") (Exhibit 2).

3 Together, the Nita and South Nita sales would have logged
4 295 acres of ecologically significant old-growth, which the
5 Forest Service concluded would result in a highly fragmented
6 landscape. Order at 4 (signed Sept. 29, 1990; entered Oct. 1,
7 1990) ("Second Order") (Exhibit 3).

8 The First timber sale would have logged 142 acres of
9 ecologically significant old-growth, which the Forest Service
10 characterized as "high quality spotted owl habitat" where
11 "priority should be given to protecting this area for its
12 attributes of high owl densities, extensive block of high quality
13 habitat and potential as a SOHA [spotted owl habitat area]
14 network expansion site." First Biological Evaluation at 3
15 (Exhibit A to SAS' Mem. in Support of Motion for Summary Judgment
16 and Permanent Injunction Against First Timber Sale (Sept. 17,
17 1990)). Although a Forest Service wildlife biologist recommended
18 dropping three of the five sale units to reduce fragmentation,
19 the Forest Service refused to do so. Id. at 4; Mem. at 3
20 (Exhibit 4).

21 The bulk of the Last timber sale likewise was located in an
22 ecologically significant old-growth grove of the Tiller Ranger
23 District, a large continuous block of unfragmented old-growth
24 that enjoyed high owl densities. A Forest Service wildlife
25 biologist recommended dropping four of the seven sale units, but
26 only one sale unit was dropped because it was located within 1/2
27 mile of a spotted owl pair. Last Biological Evaluation at 4-5

1 and Last Timber Sale Modification and Implementation Record
2 (Exhs. A & B to SAS' Memorandum in Support of Motion for Summary
3 Judgment and Permanent Injunction Against the Last Timber Sale
4 (Sept. 5, 1990)) (Exhibit 5).

5 The sixth timber sale -- the Garden timber sale on Siskiyou
6 National Forest -- would have logged 137 acres of old-growth
7 forest. It was undisputed before the district court that the
8 Garden sale would have fragmented a contiguous block of
9 ecologically significant old-growth in an area then proposed for
10 complete preservation. The Siskiyou National Forest had proposed
11 the Garden timber sale to meet its Section 318 timber quotas
12 without looking beyond the sale planning area for any other
13 potential sales that would have less egregious effects on
14 ecologically significant old-growth stands because it wanted to
15 have those other sales available for future years. Order on
16 Cross-Motions for Summary Judgment Re: Garden Timber Sale at 4-6
17 (Oct. 19, 1990) (Exhibit 6).

18 All of these sales are located in late successional old-
19 growth reserves that cannot be logged under the President's
20 Northwest Forest Plan. The record of decision for the
21 President's Northwest Forest Plan expressly provides that timber
22 sales enjoined prior to the effective date of the President's
23 Plan (i.e., April 13, 1994) were not reviewed or assumed to be
24 logged under that Plan; instead, they could proceed, if at all,
25 only if they could be brought into compliance with the Plan.
26 Record of Decision for Amendments to Forest Service & Bureau of
27 Land Management Planning Documents Within the Range of the

1 Northern Spotted Owl at 14 (April 13, 1994) (Exhibit 15). It
2 does not appear that the President's Northwest Forest Plan
3 envisioned that sales that had previously been withdrawn in the
4 course of court proceedings, like the Last and First timber
5 sales, would be logged, but the plaintiffs in Pilchuck Audubon
6 are seeking to confirm this in discovery.

7 B. The Western District's Decisions And Orders With
8 Respect To These Six Timber Sales

9 The environmental plaintiffs filed timely challenges to each
10 of these six timber sales under Section 318, contending that the
11 sales violated Section 318's fragmentation provisions. On May
12 11, 1990, the court held that the agency had failed to adhere to
13 section 318's forest-wide fragmentation mandate in relation to
14 the Cowboy timber sale. Exhibit 2, at 27. The court, therefore,
15 enjoined the Forest Service from offering, awarding, or operating
16 the Cowboy sale until the agency brought it into compliance with
17 Section 318. Id. at 30.

18 The Ninth Circuit affirmed, agreeing with the district court
19 that "the requirements of Section 318 have not been met," because
20 the Forest Service had failed to determine whether the Cowboy
21 sale (and its inevitable fragmentation of ecologically
22 significant old-growth) was necessary. Seattle Audubon Society
23 v. Robertson, No. 90-35519 (9th Cir. Aug. 27, 1990) (Exhibit 7).
24 Moreover, the Court of Appeals concluded that "Section
25 318(B)(2)'s requirement that fragmentation be minimized is a
26 substantive limit on USFS timber sale decision, not a set of
27 procedures . . ." Id. at 3.

1 On October 1, 1990, the court enjoined the Nita and South
2 Nita sales until the agency demonstrated that it could not
3 feasibly conduct non-fragmenting sales elsewhere in the Umpqua
4 National Forest. Second Order at 6-7. The court likewise found
5 that the Garden timber sale violated Section 318's fragmentation
6 requirements. Accordingly, the district court enjoined the
7 Forest Service from advertising, offering, awarding, or operating
8 these sales until it ensured that fragmentation of ecologically
9 significant old-growth would be minimized. Exhibit 6.

10 In the face of this flurry of rulings condemning the Forest
11 Service's quota-driven timber sales on the Tiller ranger
12 district, the Forest Service withdrew the First and Last timber
13 sales. Accordingly, the district court struck plaintiffs'
14 motions for summary judgment and permanent injunction as to these
15 sales as moot. Order at 1-2 (Oct. 16, 1990) ("Third Order")
16 (Exhibit 8).

17 After Section 318 expired, the plaintiffs asked the court to
18 rule on further motions for summary judgment as to these sales
19 under the National Environmental Policy Act ("NEPA") and the
20 National Forest Management Act ("NFMA"). Because Section 318 no
21 longer governed sales that had been withdrawn and not re-offered
22 during fiscal year 1990, such sales become subject to the full
23 panoply of environmental laws. See H. Conf. Rep. No. 101-264,
24 101st Cong., 1st Sess. 87 (1989) ("[s]ales offered under this
25 section but not awarded and withdrawn after October 1, 1990 under
26 normal Forest Service or BLM procedures may not be re-offered in
27 subsequent fiscal years under the terms of this section.") The

1 district court refused to decide these motions because it
2 concluded that the controversy had become moot. More
3 specifically, four of the sales had been enjoined, the Forest
4 Service had withdrawn the other two, and "[n]othing in the record
5 suggests that the Forest Service plans to go forward with these
6 sales. There is accordingly no case or controversy as to them."
7 Order at 12 (Mar. 7, 1991) ("Fourth Order") (Exhibit 9).
8 Ultimately, the court entered final judgment closing the case.
9 Order (April 1992).

10 In Seattle Audubon Society v. Evans, the Western District of
11 Washington determined that none of these six sales could go
12 forward in their original form. Indeed, if the Forest Service
13 had tried to resurrect these sales in their original form, the
14 court's prior decisions would have been a bar under the doctrine
15 of res judicata. The only way that the Forest Service could
16 proceed with these sales would have been to start over with a new
17 decision subject to the then-existing environmental laws.
18 However, the Forest Service never tried to pursue these sales
19 after Section 318 expired.

20 Under current environmental laws, these sales cannot go
21 forward. Because these sales are all located in late
22 successional reserves which cannot be logged under the
23 President's Northwest Forest Plan (also known as "Option 9"),
24 they cannot proceed under current environmental standards.

25 II. FRIENDS OF ELK RIVER V. FOREST SERVICE

26 In September 1990, the Forest Service advertised the Elk
27 Fork and Boulder Krab timber sales in the North Fork of the Elk

1 River on the Siskiyou National Forest. Together, the two sales
2 would clearcut more than 220 acres and generate almost 8.5
3 million board feet.

4 The North Fork of the Elk River is a large unbroken and
5 undisturbed old-growth stand in the Copper Mountain roadless
6 area. It is de facto a pristine wilderness area adjacent to the
7 Grassy Knob Wilderness Area. Most of the trees are 4-6 feet in
8 diameter and more than 250 years old; some trees are over 6 feet
9 in diameter. The trees are very healthy and have the potential
10 to become majestic, giant trees that could live to be more than
11 1000 years old. In contrast, many other trees in the Elk River
12 have been damaged by fire and have less potential to continue to
13 age and grow. Declaration of Jim Rogers ¶¶ 4, 7 (filed
14 unsigned).^{1/}

15 In 1988, the Elk River had been designated as a wild and
16 scenic river to protect the fisheries and water quality. Id. ¶
17 5. After that designation, a Forest Service fisheries scientist
18 found that the North Fork of the Elk River produces more salmon
19 than any river of its size outside of Alaska. He recommended
20 keeping the North Fork intact and free of logging. Id. ¶¶ 4, 9.

21 In September 1990, Friends of Elk River, Oregon Natural
22 Resources Council, and other environmental and sports fishing
23 organizations challenged these sales in the District of Oregon.
24 Id. ¶ 8. In the lawsuit, the environmental plaintiffs claimed,

25
26 ^{1/} The Rogers Declaration has been approved by Mr. Rogers, but,
27 due to a death in the family, he has been unable to sign it.
Declaration of Patti Goldman (Nov. 20, 1995), in Pilchuck
Audubon.

1 based on the assessment of the Forest Service's own fisheries
2 scientist, that these sales would adversely impact the fisheries
3 and water quality of the Elk River. Ultimately, the Forest
4 Service agreed and cancelled the sales. Id. ¶ 9.

5 On March 20, 1991, the plaintiffs entered into a stipulation
6 with the Forest Service in which the Forest Service assured that
7 it had rejected all bids and that it would not proceed with these
8 timber sales in the future without a new NEPA review, a new
9 decision notice, and a new auction. Exhibit 10. Based expressly
10 on that stipulation, U.S. District Judge Owen Panner dismissed
11 the lawsuit without prejudice and ordered the government to pay
12 the plaintiffs' attorneys' fees and costs. Exhibit 11.

13 Since the sales were cancelled, the Forest Service has
14 abandoned all plans to log these sale areas. Both sales are
15 located in late successional reserves and a key watershed
16 designated in Option 9. Rogers Declaration ¶ 16. Therefore,
17 they cannot be logged under current environmental standards. Id.
18 Moreover, since the Forest Service withdrew the sales, it has
19 closed and obliterated the road that would have led to the
20 Boulder Krab sale area. Id. ¶ 17. It has also reconstructed the
21 old hiking trail that would have been converted into the principal
22 logging road for the Boulder Krab sale. Id. ¶ 18.

23 In the summer of 1992, a marbled murrelet nest was located
24 near the Boulder Krab site in the same contiguous old-growth
25 stand where the Boulder Krab sale area is located. Id. ¶¶ 11-14.
26 Since marbled murrelets use a stand for nesting and show high
27 fidelity to a stand, the best scientific evidence would support a

1 finding that marbled murrelets are nesting in the Boulder Krab
2 sale area. Id. ¶ 14. However, because the Forest Service never
3 intended to proceed with these sales, it has not conducted
4 surveys to confirm nesting in the Boulder Krab or Elk Fork sale
5 areas.

6 On November 3, 1995, the Forest Service awarded these sales
7 to the high bidders from the 1990 auctions. However, the award
8 letters indicated that if a court determines that these sales are
9 not subject to Section 2001(k), then the award and any contract
10 will be null and void. Letters to Scott Timber Company and CLR
11 Timber Holdings, Inc. from Brenda Woodard, Contracting Officer
12 (Nov. 3, 1995) (Exhibits 12; 13). The Forest Service has refused
13 to ensure that no on-the-ground activities take place prior to a
14 judicial determination that these sales, in fact, fall within
15 Section 2001(k). Declaration of Patti Goldman (Nov. 20, 1995),
16 in Pilchuck Audubon.

17 A. Smith v. Forest Service

18 During the 1990s, the Forest Service planned and then
19 decided not to go forward with the Gatorson timber sale on the
20 Colville National Forest several times. In 1990, the Forest
21 Service both decided and then withdrew its decision to proceed
22 with the sale. Later in 1990, the Forest Service again decided
23 to sell the Gatorson sale, and in March 1991, the Forest Service
24 auctioned the sale, but it withdrew the decision authorizing the
25 sale before making an award. In 1992, the Forest Service again
26 authorized the sale and again withdrew that decision. In the
27 fall of 1992, the Forest Service once again decided to go forward

1 with the Gatorson sale, and after it denied an administrative
2 appeal, it awarded the contract to Vaagen Timber Products on
3 March 19, 1993.

4 The sale would log more than 13 million board feet from the
5 western portion of a 8000-acre unique, undeveloped roadless
6 tract. The geography of the area is a mix of steep granitic
7 cliffs and ridges that often drop precipitously into the South
8 Fork of Boulder Creek. The forests, a mix of cedar, Douglas fir,
9 larch, engleman spruce, and ponderosa pine, include some of the
10 last, large stands of untouched, old-growth forests remaining on
11 the Colville National Forests. This area constitutes one of the
12 last refuges for solitude-seeking wildlife species, such as
13 cougar, black bear, and wolves.

14 Mitchell Smith, who lives in a cabin near the sale area and
15 who regularly hunts, fishes, and hikes there, filed a lawsuit in
16 1993 in the Eastern District of Washington (where both Mr. Smith
17 and the forest are located) challenging the decision to proceed
18 with this sale. In 1994, the Ninth Circuit held that the Forest
19 Service could not go forward with the Gatorson timber sale on the
20 Colville National Forest without first considering the effects of
21 logging on the existing roadless area. Smith v. United States
22 Forest Service, 33 F.3d 1072 (9th Cir. 1994). On remand, the
23 district court granted judgment to the plaintiffs and remanded
24 the sale to the defendants for proceedings in accordance with the
25 Ninth Circuit's opinion. Smith v. United States Forest Service,
26 No. 93-178-JLQ (E.D. Wash. March 30, 1995) (Exhibit 14).

1 During the pendency of the Smith case, the Forest Service
2 amended the Colville National Forest Plan. After the district
3 court's remand, the Forest Supervisor determined that the
4 original Gatorson sale does not comply with the amended forest
5 plan. Accordingly, the sale has been suspended. Declaration of
6 Robert Williams ¶ 5 (Oct. 13, 1995).

7 B. Leavenworth Audubon Adopt-A-Forest v. Ferraro

8 In 1993, the Forest Service decided to proceed with the Tip
9 and Tiptop timber sales on the Wenatchee National Forests. In
10 September 1993, the sales were advertised. On February 15, 1994,
11 the Tiptop sale was awarded to St. Joe Lumber Company, and on
12 March 9, 1994, the Tip sale was awarded to Long View Fibre
13 Company.

14 The sales are in late successional old-growth comprised of
15 ponderosa pine and Douglas fir, a typical mix for old-growth
16 stands east of the Cascade crest. The project area contains
17 numerous tributaries to Peshastin Creek, which supports wild,
18 resident populations of trout and anadromous populations of
19 steelhead and salmon. All of these fish species have been
20 adversely affected by past logging and roadbuilding. The bull
21 trout is eligible for listing as threatened under the Endangered
22 Species Act and it is a sensitive and management indicator
23 species under the Wenatchee Forest Plan. As such, the Forest
24 Service must survey and monitor bull trout to ensure that
25 logging, roadbuilding, and other forest activities are not
26 harming aquatic resources.

1 In July 1994, Leavenworth Audubon Adopt-a Forest, Alpine
2 Lakes Protection Society, North Central Washington Audubon, Knut
3 and Ann Aagard, and four other individuals filed a lawsuit in the
4 Western District of Washington challenging the Tip and Tiptop
5 timber sales.^{2/} The plaintiffs argued that the Forest Service
6 had failed to ensure that the sales would not adversely affect
7 streams and aquatic species that depend on them.

8 In March 1995, Judge Coughenour of the Western District of
9 Washington enjoined the Tiptop and Tip timber sales because the
10 Forest Service failed to ensure that the sales would protect the
11 viability of bull trout -- a species eligible for listing under
12 the Endangered Species Act and failed to assess the effects of
13 the 1994 summer wildfires on watershed conditions. Leavenworth
14 Audubon v. Ferraro, 881 F. Supp. 1482 (W.D. Wash. 1995). In
15 issuing this injunction, the court concluded that:

16 The Tiptop [and Tip] timber sale[s] may irreparably
17 harm the viability of the bull trout, a sensitive
18 species, and a management indicator species under the
19 Forest Plan. The sale may also irreparably harm the
20 detrimental soil condition of the Ruby Creek drainage.
21 . . . [T]he likely irreparable environmental harm is
22 grave when compared to the adverse monetary impact the
23 defendants may suffer.

24 Id. at 1493-94. The matter was remanded to the Forest Service,
25 for proceedings consistent with the district court's decision.^{3/}

26 2/ Knut and Ann Aagaard are property owners who own land
27 adjacent to the Wenatchee National Forest and who depend on
streams that run through the sale area for clean water were among
the plaintiffs in that case.

3/ NFRC has limited its papers to the 11 sales discussed in the
text. Other sales may also have been withdrawn or enjoined in
the face of court proceedings. For example, ONRC and Portland
Audubon Society had challenged the Auger Creek sale on the

1 ARGUMENT

2 This brief first cautions that the courts that issued the
3 injunctions and other court orders at issue should properly
4 decide the vitality of those prior orders in light of a new
5 statute. However, if this Court addresses the timber sales
6 enjoined or withdrawn in the face of court proceedings, it must
7 face the serious separation of powers violation that would flow
8 from a construction of Section 2001(k)(1) that undoes prior court
9 orders. Fortunately, the plain meaning of Section 2001(k)(1)
10 naturally extends only to offers that remained viable when the
11 new logging rider was enacted. Accordingly, this Court (or other
12 courts that reach the issue) can avoid a major constitutional
13 confrontation.

14
15
16
17
18 Fremont National Forest in 1989 because it would log the last
19 remnants of the area's natural ecosystem before the Forest
20 Service decided whether to preserve this rare, pristine site as a
21 Research Natural Area. After the Forest Service cancelled the
22 sale, this Court and the Ninth Circuit held that the lawsuit
23 challenging the sale had become moot and that any resurrection of
24 the sale would constitute a new sale that could only be
25 challenged in a new lawsuit based on a new administrative record.
26 Oregon Natural Resources Council v. Grossarth, No. 89-6451-HO (D.
27 Or. Jan. 15, 1991), aff'd, 979 F.2d 1377 (9th Cir. 1992). The
Forest Service has since established an Auger Creek Research
Natural Area, which, along with other current environmental
standards, precludes logging the old Auger Creek timber sales.
Under the prior court decisions, the Forest Service cannot
resurrect the old versions of the Auger Creek timber sale, but
may proceed with the sale, if at all, only in accordance with
current environmental standards. See also Exhibit 1 to Fifth
Declaration of Jerry L. Hofer (Nov. 15, 1995) (identifying three
sales enjoined in Siuslaw Task Force v. U.S. Forest Service, No.
83-1153-MA).

1 I. THE COURT SHOULD DECLINE TO DECIDE THE FATE OF SALES
2 ENJOINED OR WITHDRAWN IN CLOSED CASES THAT WERE BEFORE
3 OTHER COURTS

4 This Court is being asked to determine the effect of Section
5 2001(k) on timber sales that had previously been challenged in
6 other courts in cases that were closed before the logging rider
7 became effective. The courts that entered the orders at issue
8 are the courts that have the power to enforce or modify those
9 orders in light of changed circumstances. System Federation No.
10 91, Railway Employees' Department, AFL-CIO v. Wright, 364 U.S.
11 642, 647 (1961) (court issuing injunction has continuing
12 supervision over it which includes the power to modify it in
13 light of changed circumstances); United States v. Swift & Co.,
14 286 U.S. 106, 114 (1932) (court issuing injunction has power to
15 modify it in light of changed circumstances); Leman v. Krentler-
16 Arnold Hinge Last Co., 284 U.S. 448, 452 (1932) (court issuing
17 injunction has jurisdiction to hear motion to enforce injunction
18 and such a motion is part of original case, not an independent
19 one); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1373 (9th Cir.
20 1981) (a motion to enforce an injunction is part of the original
21 cause of action). Indeed, the Federal Rules of Civil Procedure
22 establish a procedure for parties to seek modification or relief
23 from court orders. Fed. R. Civ. P. 60(b). Even where it is
24 argued that a new statute requires release from or modification
25 of an injunction, the court that issued the injunction has the
26 power to make that determination. See Clark v. Coye, 60 F.3d 600
27 (9th Cir. 1995) (district court should have determined whether
existing injunction retained vitality in light of new state law).

1 With respect to the Elk Fork and Boulder Krab timber sales,
2 it is the District of Oregon that dismissed the prior court case
3 based expressly on the parties' settlement stipulation.
4 Therefore, it is this Court that has the power to enforce that
5 settlement stipulation.^{4/}

6 However, the Eastern and Western Districts of Washington
7 issued the orders regarding the other sales. The Forest Service
8 is currently enjoined from proceeding with the Gatorson, Tip, and
9 Tiptop sales under their original terms. Even if this Court
10 decides the extent to which Section 2001(k) requires the release
11 of these sales, the Forest Service could not go forward with them
12 without seeking relief from the injunctions pursuant to Fed. R.
13 Civ. P. 60(b) from the courts that issued the injunctions. This
14 would place those courts in the unseemly position of second-
15 guessing the decision previously made by this Court.

16 While the injunctions and other orders in Seattle Audubon
17 Society v. Evans were issued some time ago, they still have res
18 judicata effect, and thus dictate the extent to which the Forest
19 Service may resurrect old, illegal timber sales. Again, it is
20 the court that issued the injunctions and prior orders that
21 should determine whether those orders must be modified or
22 enforced in light of changed circumstances.^{5/}

23
24 4/ The plaintiffs in that prior action who are also plaintiffs
25 in Pilchuck Audubon are notifying Judge Panner of the pendency of
this motion.

26 5/ While Judge Dwyer has stayed the motions to clarify and
27 enforce pending before him, he did so on the understanding that
this Court would be deciding the same issues on November 7, 1995.
Moreover, he denied the motion to transfer the motion to clarify

1 For prudential reasons as well, it makes more sense for the
2 courts that heard the prior challenges to decide the extent to
3 which Section 2001(k) undoes prior court orders. In each
4 instance, the court hearing the case issued at least one order
5 prohibiting the sale from going forward in its original form. As
6 a result of those decisions, the sale could not legally proceed
7 without a new decision that complied with applicable
8 environmental laws.

9 Whether these sales must nonetheless be released in their
10 original form depends both on the reach of Section 2001(k), the
11 significance of the prior court orders, and the constitutional
12 doctrine of separation of powers. Construing the logging rider
13 to mandate the release of old timber sales that have been barred
14 by now-closed court proceedings threatens a major separation of
15 powers confrontation. Courts often construe statutes to avoid
16 constitutional violations; indeed, they are admonished to do so.
17 Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549
18 (1947); Ashwander v. TVA, 297 U.S. 288, 346-48 (Brandeis, J.,
19 concurring in part). Here, such a construction depends on the
20 context and import of the prior court rulings. The courts that
21 heard the original lawsuits are in a better position to
22 understand the meaning of the decisions reached in those cases,
23 to ascertain the extent to which the new logging rider conflicts
24 with those final decisions, and to discern whether the prior
25 proceedings make Section 2001(k) inapplicable to these sales.

26
27 _____
and enforce to this Court.

1 For these reasons, this court should refrain from deciding the
2 effect of Section 2001(k) on timber sales that were enjoined or
3 withdrawn as a result of court proceedings before other courts.

4 II. INTERPRETING THE 1995 LOGGING RIDER TO RESURRECT TIMBER
5 SALES ENJOINED OR WITHDRAWN IN COURT PROCEEDINGS WOULD
6 VIOLATE THE DOCTRINE OF SEPARATION OF POWERS

7 A. Separation Of Powers Principles Prevent
8 Congress From Legislatively Revising Closed
9 Cases.

10 The U.S. Constitution divides the delegated powers of the
11 federal government into three defined categories: legislative,
12 executive, and judicial. INS v. Chadha, 462 U.S. 919, 951
13 (1983). As a general rule, no branch of the federal government
14 may exercise the functions of another branch. Springer v.
15 Government of the Philippine Islands, 277 U.S. 189, 201-02
16 (1928); The Federalist No. 48, at 308 (E. Earle ed. 1937) (J.
17 Madison) ("none of [the branches] ought to possess, directly or
18 indirectly, an overruling influence over the others, in the
19 administration of their respective powers").

20 Article III of the Constitution assigns an independent and
21 nonpolitical judiciary the task of interpreting and applying the
22 law to particular cases and controversies. As Marbury v.
23 Madison, 1 Cranch. 137, 177 (1803), established, "[i]t is
24 emphatically the province and duty of the judicial department to
25 say what the law is" in particular cases.

26 Two separation of powers principles have evolved to protect
27 the judicial sphere from political interference by Congress.
First, Congress may not prescribe a rule of decision or direct
certain factfindings for a pending case. United States v. Klein,

1 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871); Robertson v. Seattle
2 Audubon Society, 503 U.S. 429, 112 S.Ct. 1407 (1992). Second,
3 Congress may not legislatively revise the final judicial
4 resolution of a case. Plaut v. Spendthrift Farm, Inc., 115 S.
5 Ct. 1447 (1995). Both of these safeguards ensure that parties to
6 court proceedings will have their disputes resolved through
7 judicial processes without legislative meddling.

8 The seminal case elaborating on the prohibition on Congress
9 prescribing a rule of decision for a pending case is United
10 States v. Klein. In that case, an individual sought to recover
11 property seized during the Civil War under a statute that
12 permitted recovery upon proof of loyalty. The property owner had
13 received a presidential pardon, which the Supreme Court had
14 previously held to be conclusive proof of loyalty. Accordingly,
15 the Court of Claims awarded recovery. However, while the case
16 was on appeal, Congress passed a law providing that receipt of a
17 presidential pardon was conclusive proof of disloyalty, requiring
18 dismissal of cases seeking property recovery. 20 L.Ed. at 520-
19 24.

20 The Supreme Court held this statute unconstitutional because
21 it "prescribe[d] a rule for decision of a cause in a particular
22 way." Id. at 525. The statute entered judicial terrain
23 forbidden to the legislature because, under it, "the court is
24 forbidden to give the effect to evidence which, in its own
25 judgment, such evidence should have, and is directed to give it
26 an effect precisely contrary." Id.

1 Other cases draw a line between permissible lawmaking that
2 may affect pending cases on the one hand and legislative actions
3 that impermissibly intrude into the judicial function on the
4 other. In Robertson v. Seattle Audubon Society, the Supreme
5 Court upheld the provision of Section 318 that directed that
6 management of national forests according to other Section 318
7 provisions "is adequate consideration for the purpose of meeting
8 the statutory requirements that are the basis for" cases then
9 pending before the Western District of Washington. Section
10 318(b)(6)(A). Pointing to Section 318's environmental
11 restrictions and procedures governing timber sales, the Court
12 concluded that Section 318 "compelled changes in law, not
13 findings or results under old law." 112 S. Ct. at 1413; see also
14 Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.)
15 518 (1852) (Congress changed operative legal framework by
16 designating a bridge as a postal road, a designation
17 traditionally made by Congress); Apache Survival Coalition v.
18 United States, 21 F.3d 895 (9th Cir. 1994) (because Congress
19 established new requirements for a telescope project that
20 replaced laws underlying pending court case, it did not exceed
21 its legislative authority).

22 Recently, the Ninth Circuit applied Robertson to refuse to
23 allow a budget rider to change the court's decision in a case
24 brought under the National Environmental Policy Act. The Court
25 held that a rider providing that a certain environmental impact
26 statement shall be deemed sufficient did not override the Ninth
27 circuit's prior decision that the environmental impact statement

1 was, in fact, not sufficient. According to the Ninth Circuit,
2 the rider did not remove the basis for the court's decision by
3 changing the underlying law. Alaska Wilderness Recreation &
4 Tourism Association v. Morrison, 67 F.3d 723 (9th Cir. 1995).
5 More specifically, the court stated that the rider offered no new
6 statutory basis on which to analyze the effect of the
7 cancellation of a pre-existing timber sale contract on the
8 environmental impact statement process. Nor was there any
9 indication that Congress had eliminated the core requirements of
10 an environmental impact statement. Simple passage of a statute
11 does not, regardless of content, change the law for the future in
12 a way that excuses congressional interference with pending
13 litigation.^{6/}

14 The second separation of powers principle is even more on
15 point here. Under that principle, Congress may not, even by
16 passing a statute, direct the courts to change the result or
17 findings made in a case that has been finally resolved by the
18 courts. This principle ensures that "the impartial application
19 of rules of law, rather than the will of the majority, must
20 govern the disposition of individual cases and controversies.
21 Any legislative interference in the adjudication of the merits of
22

23 ^{6/} In the proceedings before Judge Dwyer, the industry
24 intervenors (represented by the same counsel as NFRC) argued that
25 the phrase "notwithstanding any other provision of law"
26 constitutes such a change in the underlying law. However, it is
27 inconceivable that the Ninth Circuit would have reached a
different result in Alaska Wilderness Recreation & Tourism if
those magic words had been used. Instead, the Ninth Circuit
looked beneath the attempt to dictate a different result in court
to the substance of the statutory change.

1 a particular case carries the risk that political power will
2 supplant evenhanded justice, whether the interference occurs
3 before or after entry of final judgment. Plaut v. Spendthrift
4 Farm, Inc., 115 S. Ct. at 1476 (dissent).

5 Last term in Plaut v. Spendthrift Farm, Inc., the Supreme
6 Court held that Congress may not retroactively command the
7 federal courts to reopen final judgments. According to the
8 Court, the Framers decried the practice common in colonial
9 legislatures of setting aside final judgments and ordering new
10 trials and other legislative corrections of final judgments.
11 Id. at 1453. Once the courts issue a final judgment in a case,
12 "a judicial decision becomes the last word of the judicial
13 department with regard to a particular case or controversy, and
14 Congress may not declare by retroactive legislation that the new
15 law applicable to that very case was something other than what
16 the courts said it was." Id. at 1457; see also Hayburn's Case, 2
17 Dall. 409, 411 (1792) (opinion of Wilson, and Blair, J.J., Peters,
18 D.J.) ("revision and control" of Article III judgments is
19 "radically inconsistent with the independence of that judicial
20 power which is vested in the courts"); id. at 413 (opinion of
21 Iredell, J., Sitgreaves, D.J.) ("no decision of any court of the
22 United States can, under any circumstances, . . . be liable to a
23 revision, or even suspension, by the [l]egislature itself, in
24 whom no judicial power of any kind appears to be vested"). It
25 did not matter in Plaut that the statute at issue reopened an
26 entire class of closed cases; the statute still constituted

1 impermissible legislative interference with judicial decisions.

2 Id. at 1457.

3 B. Construing Section 2001(k) To Release Timber
4 Sales Enjoined Or Withdrawn In Court
5 Proceedings Would Violate The Doctrine Of
6 Separation Of Powers.

7 Reading section 2001(k)(1) to force the Forest Service to
8 sell old timber sales in the very form that was previously
9 enjoined or withdrawn in court proceedings would intrude
10 impermissibly into judicial prerogatives. Each of these sales
11 had been challenged in court for violating applicable
12 environmental laws. In each case, either because of court
13 holdings that the sales violated applicable environmental laws or
14 because the government mooted the challenge by withdrawing the
15 challenged sales, the court determined that the sales could not
16 go forward in their original form; they could only proceed with a
17 new agency decision in compliance with then-applicable
18 environmental laws.

19 Under the doctrine of separation of powers, Congress cannot
20 make the enjoined sales legal under the laws applicable when they
21 were originally proposed. Judge Dwyer held that the Cowboy,
22 Garden, Nita and South Nita sales violated Section 318's
23 fragmentation requirements, the Ninth Circuit affirmed that
24 decision with respect to the Cowboy sale, and the Forest Service
25 never appealed the rulings on the Nita, South Nita, and Garden
26 sales. The courts definitively and finally decided years ago
27 that these four sales violated Section 318. Similarly, the Ninth
Circuit definitively established that the Forest Service violated

1 applicable environmental laws in proceeding with the Gatorson
2 sale, and Judge Coughenour likewise determined conclusively that
3 the Forest Service acted illegally in going forward with the Tip
4 and Tiptop sales. As a result of these holdings, the courts
5 enjoined the Forest Service from proceeding with these sales in
6 their original form.

7 Congress cannot resurrect old timber sales in the very form
8 that the courts have found to be unlawful. That type of
9 congressional revision of judicial decisions is prohibited under
10 the doctrine of separation of powers.

11 This same logic precludes reading Section 2001(k)(1) to
12 encompass the First, Last, Elk Fork, and Boulder Krab timber
13 sales that were irrevocably withdrawn by the federal agencies as
14 a result of court challenges. After Judge Dwyer enjoined four
15 timber sales, and in the face of motions seeking injunctions
16 against two more, the Forest Service realized that the two sales
17 faced a similar fate. Rather than wait for the court to rule,
18 the Forest Service withdrew the sales and made it clear to the
19 court that it had no intention with proceeding with the sales
20 under Section 318.

21 Based on those actions and representations, Judge Dwyer
22 found that the government was not proceeding with the sales and
23 held that plaintiffs' challenges to those sales were moot. If
24 Section 2001(k)(1) is construed to require the First and Last
25 timber sales to go forward, it would clash directly with Judge
26 Dwyer's factual determination that they had been cancelled and
27 would not proceed. Because the sales had become a nullity, this

1 cannot lawfully be offered for sale under current environmental
2 standards. The eight Section 318 sales, located in late
3 successional old-growth reserves, cannot be logged under Option
4 9. In addition, the injunctions issued in Smith and Leavenworth
5 Audubon have continuing effect. The Forest Service can proceed
6 with these sales only if the courts modify their injunctions to
7 permit the sales to proceed. Accordingly, the courts' previous
8 orders preclude the Forest Service from resurrecting these 11
9 sales under Section 2001(k); if the Forest Service resurrects
10 these sales, it must do so in compliance with the legal
11 requirements imposed by the courts.

12 III. THE 1995 LOGGING RIDER DOES NOT COMPEL THE RE-OFFER OF
13 THESE SIX SALES

14 where a construction of a statute might collide with the
15 doctrine of separation of powers, the Courts are admonished to
16 decide first whether the statute is "susceptible of a reconciling
17 interpretation" that does not create such a collision. American
18 Foreign Service Association v. Garfinkel, 490 U.S. 153, 161-62
19 (1989) (per curiam); see cases cited supra at 18. Here, such a
20 reconciling interpretation is the most logical way to read
21 Section 2001(k) (1).

22 By its plain terms, Section 2001(k) (1) applies only to
23 timber sale contract offers and awards. Specifically, Section
24 2001(k) directs the Secretary concerned (of Agriculture for
25 Forest Service lands or of Interior for Bureau of Land Management
26 lands) "to award, release, and permit to be completed" previously
27 offered or awarded timber sale contracts. In other words,

1 Section 2001(k) directs the Forest Service and BLM to complete
2 the contract formulation and performance process, which would
3 need to be done if the sale had been cancelled.

4 Under black letter contract law, an "offer" entails the
5 willingness to enter into a contract. See Restatement of
6 Contracts (2d), § 24 (Offer defined) (offer "is the manifestation
7 of willingness to enter into a bargain, so made as to justify
8 another person in understanding that his assent to that bargain
9 is invited and will conclude it.") An offer is not present if
10 "the person to whom it is addressed knows or has reason to know
11 that the person making it does not intend to conclude a bargain
12 until he has made further manifestation of assent." Id. § 26
13 (Preliminary Negotiations).

14 No offer exists when the government has cancelled a timber
15 sale. Any previous offer then becomes a nullity, and if the
16 agency later wants to pursue that sale, it must start the
17 contract formation process over with a new advertisement. See
18 Croman Corporation v. United States, 31 Fed. Cl. 741 (1994). In
19 these circumstances, the government is unwilling to enter into a
20 bargain, and no one would be justified in assuming otherwise.
21 This is particularly the case where the agency has cancelled the
22 sale because of a court injunction or to avoid judicial review of
23 a meritorious claim. In this situation, any future plans to
24 proceed with the sale would be vastly different from those
25 derailed by the court action.

26 The absurdity of requiring such a cancelled sale to go
27 forward under Section 2001(k)(1) is illustrated by Boulder Krab.

1 In 1991, the Forest Service rejected all bids and agreed not to
2 proceed with the Boulder Krab sale on the Siskiyou National
3 Forest without making a new decision and holding a new auction.
4 After it made this decision, the area was designated a late
5 successional old-growth reserve and a key watershed under Option
6 9 off-limits to logging. As a result, the Forest Service
7 abandoned all plans to log this area. The Forest Service closed
8 and obliterated the road that would have led to the Boulder Krab
9 sale area, and it reconstructed the old hiking trail that would
10 been converted into the principal logging road for the Boulder
11 Krab sale. The Forest Service's actions unequivocally
12 demonstrate that it is not and for some time has not been willing
13 to offer the Boulder Krab timber sale.

14 Section 318 supports reading the term offered to continue to
15 apply to timber sales that have been withdrawn. For example, the
16 conference report to Section 318 made it absolutely clear that
17 "[s]ales offered under this section but not awarded and withdrawn
18 after October 1, 1990 under normal Forest Service or BLM
19 procedures may not be re-offered in subsequent fiscal years under
20 the terms of this section." H. Conf. Rep. No. 101-264, 101st
21 Cong., 1st Sess. 87 (1989). Accordingly, if the Forest Service
22 or BLM wanted to proceed with such a sale, it would have to begin
23 anew under applicable environmental laws, contracting procedures,
24 and administrative and judicial review provisions.

25 Significantly, Section 2001(k)(1) says nothing about
26 requiring timber sales to proceed in defiance of prior court
27 orders. In contrast, the logging rider's salvage and Option 9

1 provisions provide that particular timber sales may go forward
2 despite previous judicial orders. Section 2001(b)(1), (d).
3 Indeed, these provisions specifically clarify that the phrase
4 "notwithstanding any other provision of law" includes laws under
5 which judicial orders have been issued. Given the controversy
6 surrounding these aspects of the rider, see, e.g., 141 Cong. Rec.
7 H3233 (Mar. 15, 1995) (Rep. Miller); id. at H3235 (Rep. Skaggs),
8 it is inconceivable that Congress would so lightly trample on
9 prior court orders in Section 2001(k)(1) without making that
10 intent clear, as it did in other provisions of the rider.

11 Finally, the purposes given throughout the legislative
12 process for Section 2001(k)(1) simply do not fit the eleven sales
13 at issue. The logging rider's sponsors and the congressional
14 reports argued that Section 2001(k)(1) would reduce the
15 government's liability for contract cancellations by releasing a
16 category of timber sales that had been held up by consultations
17 with the Fish and Wildlife Service over the sales' effects on
18 threatened or endangered species and that the President's
19 Northwest Forest Plan assumed would be logged.⁷⁷ Of course, the
20 Section 318 sales that were cancelled many years ago could not
21 possibly expose the government to financial liability for
22 cancelling those contracts today. In addition, the eleven sales

24 Z/ H. Rep. No. 104-71, 104th Cong., 1st Sess. 22 (Mar. 8,
25 1995); S. Rep. No. 104-17, 104th Cong. 1st Sess. 123 (Mar. 24,
26 1995); H. Conf. Rep. No. 104-124, 104th Cong., 1st Sess. 137 (May
27 16, 1995); 141 Cong. Rec. at H3233 (Mar. 15, 1995) (Rep. Taylor);
id. at H5557-58 (May 24, 1995) (Rep. Taylor); 141 Cong. Rec. at
S4881 (Mar. 30, 1995) (Sen. Hatfield); id. at S4875 (Sen.
Gorton); id. at 4870, 4873 (Sen. Murray); id. at S10,464-65 (July
21, 1995) (Sen. Gorton).

1 at issue were not being held up due to consultations over
 2 threatened or endangered species. Moreover, the President's
 3 Northwest Forest Plan expressly did not assume that the enjoined
 4 Section 318 sales would be logged and made no such assumption
 5 about the Gatorson sale, which is outside the reach of the
 6 President's Plan.

7 In sum, because Section 2001(k)(1) directs the Forest
 8 Service and the Bureau of Land Management to go forward with
 9 timber sale contracts offered long ago, it defines what must be
 10 done entirely by reference to past agency actions. Since the
 11 statute itself borrows from the past, it should be read to take
 12 the past as it, in fact, occurred. Accordingly, Section
 13 2001(k)(1) is inapplicable to timber sales that were enjoined or
 14 withdrawn in court proceedings prior to July 27, 1995.^{2'}

CONCLUSION

16 For the reasons set forth above, this Court should declare
 17 that Section 2001(k)(1) does not apply to timber sales that were
 18 enjoined or withdrawn in court proceedings prior to July 27,

19 ///
 20 ///
 21 ///
 22 ///
 23 ///

25 g/ The motion for preliminary injunction filed today in
 26 Pilchuck Audubon explains in greater detail that Section
 27 2001(k)(1) should be read not to apply to cancelled or withdrawn
 sales. If the two cases are not consolidated, amici will file
 those papers in this case to assist the Court.

1 1995, and the Court should clarify that its October 17, 1995 is
2 inapplicable to any such sales.

3 DATED this ____ day of November, 1995.

4 Respectfully submitted,

5 
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7 KRISTEN L. BOYLES (WSB #23806)
8 Sierra Club Legal Defense Fund
9 705 Second Ave., Suite 203
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16 Local Counsel for Plaintiffs
17 Amici/Defendants-Intervenors

18 506OPP.INJ

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CERTIFICATE OF SERVICE

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

On November 20, 1995, I served true copies of OPPOSITION TO NFRC'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS THIRD MOTION FOR SUMMARY JUDGMENT AND NFRC'S MOTION FOR FURTHER CLARIFICATION by overnight mail service to:

Mark C. Rutzick
Mark C. Rutzick Law Firm
500 Pioneer Tower
888 S.W. Fifth Ave.
Portland, OR 97204-2089

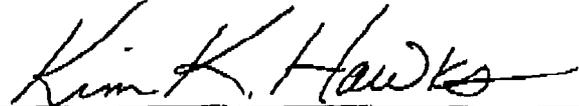
Jean E. Williams
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Wells D. Burgess
Michelle Gilbert
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Env't & Natural Resources Div.
General Litigation Section
Room 854
601 Pennsylvania Ave. NW
Washington, D.C. 20004

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

Executed on this 20th of November, 1995, at Seattle, Washington.



Kimberly Hawks

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) 272-6817, 6815, 5775
CONFIRMATION NUMBER (202) 272-8056

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
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	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman	514-0557
	Lois Schiffer	
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NUMBER OF PAGES: 25

DATE: November 24, 1995

FROM: Paula Clinedinst, Paralegal, (202) 272-4698

MESSAGE: NFRC v. Glickman, 95-6384

Attached are 1) Notice of Filing of BLM
Supplemental Compliance Report and 2) Federal
Defendants' 11/22/95 Compliance Report.

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 9 Telephone: (202) 272-8338

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

11	NORTHWEST FOREST RESOURCE COUNCIL,)	
12	Plaintiff,)	Civil No. 95-6244-HO
13	v.)	(lead)
14	)	Civil No. 95-6267-HO
	)	(consolidated case)
15	DAN GLICKMAN, in his capacity)	NOTICE OF FILING OF
16	as Secretary of Agriculture,)	BLM SUPPLEMENTAL
17	BRUCE BABBITT, in his capacity)	COMPLIANCE REPORT
18	as Secretary of the Interior,)	
	Defendants.)	

19 On November 15, 1995, pursuant to paragraph one of this
 20 Court's October 17, 1995 Order, and in accordance with
 21 representations made in the Declarations attached to Federal
 22 Defendants' November 1, 1995 Compliance Report, federal
 23 defendants informed this Court of additional Forest Service
 24 timber sale contracts that had been offered or awarded prior to
 25 fiscal year 1991. In that filing, federal defendants requested
 26 an additional two working days upon expiration of the government

1 furlough in which to supplement the BLM compliance report as to
2 pre-fiscal year 1991 timber sale contracts.

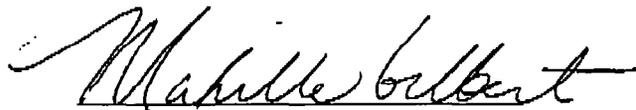
3 Accordingly, federal defendants hereby attach the Eighth
4 Declaration of William L. Bradley that provides supplemental
5 information as to timber sale contracts offered or awarded prior
6 to fiscal year 1991.

7 Dated this 22nd day of November 1995.

8 Respectfully submitted,

9 KRISTINE OLSON
10 United States Attorney

11 LOIS J. SCHIFFER
12 Assistant Attorney General

13 

14 MICHELLE L. GILBERT
15 EDWARD BOLING
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29 KAREN MOURITSEN
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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

EIGHTH 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). In my second declaration, I provided a list of fourteen Section 318 sales (sales originally offered during Fiscal Years 1989 and 1990 (between October 1, 1988 and September 30, 1990)) which were subject to the provisions of Section 2001(k) of the Act. In my third declaration I provided a list of 28 sales covered by Judge Hogan's September 13, 1995, order.

3. In my sixth declaration I supplemented previous declarations filed in this case identifying sales that had been offered or awarded prior to October 1, 1990, pursuant to section 318, but had not proceeded. In that declaration I identified four instances in which BLM offered timber for sale under section 318 but the sales never went forward, at the request of the purchasers. I stated that these sales have not been carried on BLM's records as section 318 sales and have not been considered to fall within the scope of section 2001(k)(1).

4. As stated in my previous declaration, these four sales are Olalla Wildcat, Twin Horse, Frosty Johnson, and Rocky Glade. The information regarding the existence of these sales was contained on spreadsheets maintained in the Oregon state office.

5. In my previous declaration I stated that a further review of sales offered or awarded before October 1, 1990 (other than originally offered 318 sales), to date did not show any additional sales offered or awarded before October 1, 1990, which had not proceeded. This conclusion was reached after a cursory review of existing records contained within our timber sale database which we refer to as the Timber Sale Information System (TSIS).

6. Subsequent to the filing of my sixth declaration, the BLM conducted a more exhaustive review of sales in TSIS. Data from previous fiscal years beginning with fiscal year 1984, is stored within the TSIS. Therefore, the BLM believes that a review of records within the system beginning with fiscal year 1984 constitutes a reasonable search.

7. This review revealed five additional sales which were offered prior to October 1, 1990, but had not proceeded according to the information recorded in TSIS. The five sales are Humpy Mountain, Maple Thinning Project, Bounds Creek, High Chaparral, and Hugo Quarry. The BLM does not consider these sales to fall within the scope of section 2001(k)(1).

8. Humpy Mountain was originally offered by the Medford District on December 29, 1983. J W Taylor was the apparent high bidder. The original sale contained 5,167 MBF. This sale was

protested and appealed, thereby delaying the award. The Interior Board of Land Appeals set-aside and remanded the BLM's denial of the protest stating that "[a] decision to implement a timber sale proposal based on a finding of no significant impact may be remanded where the environmental assessment for the sale fails to adequately consider the site-specific impacts of the sale" The bid bond on this sale was returned to J W Taylor. Portions of this sale were subsequently offered for sale as the Humpy Mtn. timber sale on May 29, 1986. The sale was purchased by Boise Cascade and contained 3,784 MBF. The remaining portion of the original Humpy Mountain sale has never been reoffered.

9. The Maple Thinning Project was originally offered by the Salem District on September 18, 1986. The sale contained 100 MBF and Clark A. Stevenson was the apparent high bidder. According to TSIS, this sale was never awarded and it is not located in the fiscal year 1987 TSIS records. The Salem District was instructed to search for information regarding this sale. The Salem District determined that this sale had proceeded and that the contract had been completed. The contract was terminated on March 10, 1987. However, for unknown reasons, the award date and termination date had apparently not been entered in TSIS.

10. The Bounds Creek sale was originally offered by the Eugene District on March 31, 1988. The sale contained 6,635 MBF

and Murphy Timber Company was the apparent high bidder. The district was able to locate a letter from the district to Murphy Timber Company dated November 1, 1989, which returned the bid bond to the purchaser. The letter stated that "[b]ased on the "Settlement Agreement" reached between your company and the Bureau of Land Management dated September 22, 1989, the return of this bid bond is required under Paragraph No. 1." The district has been unable to locate a copy of the agreement referred to in the letter. The State Office was able to locate a letter dated June 30, 1989, from the State Director to the Murphy Company which stated that the BLM determined that the Murphy Company had violated the export substitution requirements under the terms of two contracts. The final paragraph of the letter states "[y]ou are hereby declared ineligible to receive future awards of Bureau of Land Management contracts for a period of one year from receipt of this notice. This action includes the Bounds Creek sale on the Eugene District for which you have been declared the high bidder, but has not been awarded." This sale has never been reoffered and is now located within a Late-Successional Reserve (LSR) under our current forest management plan.

11. The High Chaparral sale was originally offered by the Eugene District on February 25, 1988. The sale contained 3,771 MBF and Bohemia was the apparent high bidder. The district was able to locate a letter to Bohemia dated August 13, 1990, in which the bid bond was returned. The letter stated that award

was not made following the sale due to an injunction. The letter goes on to state that the injunction was lifted in September 1989. By that time the sale was in informal conferencing for the northern spotted owl, further delaying award. A decision was eventually made to not award the sale because it was located within a HCA-1 and policy in effect at the time, was to avoid placement of sales within those areas. This sale has never been reoffered and is currently located within a LSR.

12. The Hugo Quarry sale was originally offered by the Eugene District on May 25, 1989. The sale contained 6,096 MBF and Weyerhaeuser was the apparent high bidder. The district was able to locate a letter to Weyerhaeuser dated June 27, 1990, in which the bid bond was returned. The letter stated that award was not made due to the sale's "anticipated adverse impact on the Northern Spotted Owl." This sale has never been reoffered and is currently located within a LSR.

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

Executed at Portland, Oregon, on November 21, 1995.


William L. Bradley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 22, 1995, she caused one copy of the foregoing NOTICE OF FILING OF BLM SUPPLEMENTAL COMPLIANCE REPORT, to be served via facsimile and by first-class United States mail upon the counsel of record hereinafter named:

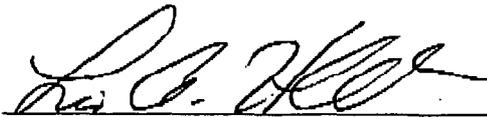
MARK RUTZICK
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and by first-class United States mail upon the counsel of record hereinafter named:

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

12	NORTHWEST FOREST RESOURCE COUNCIL,)	
13)
14	Plaintiff,)	Civil No. 95-6244-HO
15		) (lead case)
16	v.)	Civil No. 95-6267-HO
17		) (consolidated case)
18	GLICKMAN, in his capacity)	
19	as Secretary of Agriculture,)	FEDERAL DEFENDANTS'
20	BRUCE BABBITT, in his capacity)	NOVEMBER 22, 1995
21	as Secretary of Interior)	COMPLIANCE REPORT
22)
23	Defendants.)	
24)

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

Attached is the Ninth Declaration of William L. Bradley and
 the Eighth Declaration of Jerry Hofer updating the Court on the
 FEDERAL DEFENDANTS' NOVEMBER 22, 1995
 COMPLIANCE REPORT - 1

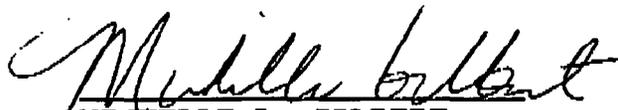
1 actions of the Bureau of Land Management and Forest Service as to
2 these timber sales.

3 Dated this 22nd day of November, 1995.

4 Respectfully submitted,

5 KRISTINE OLSON
6 United States Attorney

7 LOIS J. SCHIFFER
8 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

NINTH 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 seventh 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 declarations, I have attached Table 1 which shows the status of sales covered by Judge Hogan's October 17, 1995, order and Table 2 which shows the status of Section 318 sales which were subject to Section 2001(k) of Public Law No. 104-19.

5. In my previous declaration, Table 2 listed the status of the Bear Air sale as "awarded". Unit No. 1 of the Bear Air sale was awarded to Murphy Timber Co. on September 7, 1995. Unit No. 2 was not awarded because it was occupied by marbled murrelets. In a letter to the BLM dated September 12, 1995, Murphy Timber requested specific information regarding the substitute volume to be provided in lieu of the award of Unit No. 2. Murphy Timber also requested that the BLM provide this information within 30 days. If that was not possible, Murphy Timber requested a 30-day extension to consider whether or not to

accept the award. Under our regulations, purchasers of BLM sales are given 30 days to accept the award of a timber sale. They may be granted one 30-day extension. The BLM informed Murphy Timber that the information requested was not yet available. The BLM extended the deadline for Murphy Timber's acceptance of the Bear Air award to November 9, 1995.

6. After preliminary discussions between BLM and Murphy Timber Co. representatives, on October 31, 1995, the BLM sent a letter to the Murphy Timber Co. which stated that the award of Unit No.1 of the Bear Air sale was withdrawn. The letter went on to state that "[a]s soon as the BLM can prepare substitute volume, we will award the Bear Air contract containing Unit No. 1, and substitute volume for Unit No. 2, in accordance with Section 2001(k) of Public Law 104-19, unless there is a final ruling in pending litigation that the marbled murrelett [sic] occupancy found in Unit 2 would not require substitution." The letter further stated that if Murphy Timber was "in agreement with BLM's award withdrawal and our assertion that this withdrawal does not constitute a violation of Public Law 104-14 [sic], and that this withdrawal does not deprive Murphy Timber Company of any of the rights and benefits thereof, please have an officer authorized to sign BLM timber sale contracts sign this letter in the space provided below and return one copy of this letter to this office by November 9, 1995." Kevin Murphy signed for Murphy Timber Company on November 3, 1995, and returned the

letter to BLM. Therefore, by mutual agreement, the award of Unit No. 1 was withdrawn. In this declaration the status of the Bear Air sale has been changed to "unawarded".

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

Executed at Portland, Oregon, on November 21, 1995.



William L. Bradley

NOVEMBER 21, 1995

ANDESOLINE REPORT 1.MB

TABLE 1

THIRD BI-WEEKLY 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
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	Awarded October 26, 1995
CHERRY TREE PLUM	HULL-OAKES	1038	10			1038	Executed
CORNER SOCK	LONE ROCK	1721	52			1721	Executed
CRAZY 8'S	CLR	3957	140			3957	Executed
DAFFI DORA	SCOTT	4654	87			4654	Executed
DEAD MIDDLEMAN	DR JOHNSON	7154	197			7154	Executed
DEEP CREEK	CLR	3120	130	MM OCC. -#1,2	3120	0	Sale will not be awarded
GOLDEN SUCKER	ROUGH & READY	4367	160			4367	Executed
JEFFERS REVENGE	LONE ROCK	3914	74			3914	Executed
LICK #	WESTERN TIMBER	811	218			811	Executed
LOBSTER HILL	SCOTT	8471	211			8471	Executed
LOST SOCK	LONE ROCK	3596	47	MM OCC. -#4	1060	2536	Executed
MARTEN POWER	ROSBORO	9668	127			9668	Executed
NORTH FORK CHETCO	CLR	7372	267	MM OCC. -#1	1070	6302	Awarded October 26, 1995
PARK RIDGE BASIN	HULL-OAKES	2710	34			2710	Executed
POND VIEW	DR JOHNSON	4777	84			4777	Executed
PP&J	BOISE CASCADE	6387	269			6387	Executed
ROCKY ROAD	THOMAS CREEK	1574	23			1574	Executed
SHADY	TIMBER PRODUCTS	7635	588			7635	Executed
TOBE WEST	HULL-OAKES	4807	78			4807	Executed
UGLY ECKLEY	LONE ROCK	5815	217			5815	Executed
WREN 'N DOUBT	SCOTT	8803	163	MM OCC. -#2,3,5,7	4937	3866	Executed
TOTALS		125823	4661		10187	115636	

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

NOVEMBER 21, 1995

ACCOMPLISHMENT REPORTING

TABLE 2

THIRD BI-WEEKLY PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	STATUS	
88 BLACK JACK	WEYCO	6863	96				6863	EXECUTED
90 PITCHER PERFECT THINNING	SWANCO	2438	180				2438	EXECUTED
90 ROMAN DUNN	HULL-OAKES	10646	142	MM OCC. - #12	5264		5382	EXECUTED
BEAR AIR	MURPHY TIMBER	11564	201	MM OCC. - #2	4617		6947	UNAWARDED
BIG WINDS	SPALDING	6864	236				6864	EXECUTED
CANTON CREEK II	DOUGLAS CO. FP	3440	47				3440	EXECUTED
CHANEY ROAD	LONE ROCK	3800	75				3800	EXECUTED
HOXIE GRIFFIN	CROMAN	2809	255				2809	EXECUTED
SUMMIT CREEK	SCOTT	7910	126				7910	EXECUTED
SWINGLOG THINNING	SWANCO	1542	95				1542	EXECUTED
TEXAS GULCH	DR JOHNSON	6212	119				6212	EXECUTED
UPPER RENHAVEN	BOHEMIA	1796	45				1796	EXECUTED
WHITT'S END	SENECA	1097	36				1097	EXECUTED
YELLOW CR. MTN	SCOTT	7080	141				7080	EXECUTED
TOTALS		74061	1796		9861		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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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

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

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

2. On November 8, 1995, my Fourth Declaration included a report describing the status of 33 timber sales in five separate categories which are subject to the Court's Order of October 17, 1995.

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

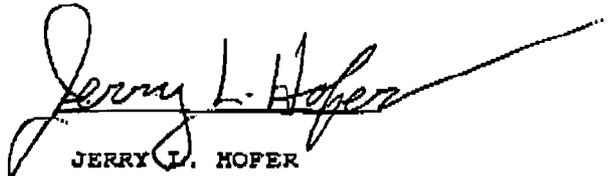
have updated the November 8, 1995, status report. It is attached herewith as Exhibit 1.

4. The changes in status are the award of the following timber sales:

<u>Sale</u>	<u>High Bidder</u>	<u>Forest</u>	<u>Date Awarded</u>
John	Huffman/Wright	Winema	11/14/95
Yoss	Boise Cascade	Winema	11/14/95
Willy	Boise Cascade	Winema	11/14/95
Bill	Huffman/Wright	Winema	11/14/95
Cinder	Scott Timber	Winema	11/14/95
Park HFR	Boise Cascade	Wallowa-Whitman	11/13/95
RD Salvage	Dodge Logging	Wallowa-Whitman	11/14/95
Hilton	Malheur Lumber	Wallowa-Whitman	11/14/95
Locust	Smerski Logging	Malheur	11/22/95

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

Executed at Portland, Oregon, on November 22, 1995.


JERRY L. HOFER

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

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

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

<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
1. JOHN	WIN	1,800 MBF	HUFFMAN/WRIGHT	AWARDED 11/14/95
2. JOHN LODGEPOLE	WIN	2,200 MBF	DAW	NOTICE TO PARTIES IN <u>ONRC v. LOWE, 92-1121AS, DISTRICT OF OR. 10/19/95</u> OF INTENT TO AWARD ON OR AFTER OCTOBER 30, 1995 LETTER SENT TO HIGH BIDDER 10/30/95.
3. YOSS	WIN	7,100 MBF	BOISE CASCADE	AWARDED 11/14/95
4. WILLY	WIN	4,400 MBF	BOISE CASCADE	AWARDED 11/14/95
5. NELSON	WIN	7,400 MBF	DAW	NOTICE TO PARTIES IN <u>ONRC v. LOWE, 92-1121AS, DISTRICT OF OR. 10/19/95</u> OF INTENT TO AWARD ON OR AFTER OCTOBER 30, 1995; REGIONAL FORESTER DISMISSED ADMINISTRATIVE APPEALS 10/25/95. LETTER SENT TO HIGH BIDDER 10/30/95.
6. BILL	WIN	5,800 MBF	HUFFMAN/WRIGHT	AWARDED 11/14/95
7. CINDER	WIN	5,300	SCOTT	AWARDED 11/14/95

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

<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
8. GATORSON	COL	11,860 MBF	VAAGEN BRO	SALE AWARDED 5/6/93; SALE SUSPENDED 5/20/93; USFS AWAITING DETERMINATION OF

LEGAL COURSE OF ACTION
 UNDER SMITH v. USFS,
 93-0178-JLQ (E.D.Wa),
 REPORTED IN 33 F3D 1072
 (9TH CIR. 1994).
 PURCHASER HAS SUBMITTED AN
 OPERATING SCHEDULE,
 REQUESTED RELEASE OF 3
 PAYMENT UNITS, AND
 ALLOCATED PAYMENT BOND TO
 THIS SALE.

- 9. TIP WEN 751 MBF LONGVIEW FIBER SALE AWARDED 9/9/94;
 ENJOINED 3/3/95. USFS
 AWAITING DETERMINATION OF
 LEGAL COURSE OF ACTION
 UNDER LEAF et al v.
FERRARO. 94-1025 (W.D. WA)

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

III. SALE NO LONGER EXISTS AS OFFERED

<u>SALE</u>	<u>NE</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
11. STAGE-COACH	UMA	200 MBF	BOISE CASCADE	BIDS REJECTED 12/11/91; NO INTENT TO AWARD AS OFFERED. SALE AREA REDESIGNED INTO FY96 TIMBER SALE
12. BALD	UMA	2,900 MBF	BOISE CASCADE	BIDS REJECTED 12/11/91; NO INTENT TO AWARD AS OFFERED. SALE AREA REDESIGNED INTO FY96 TIMBER SALE
13. BUGOUT SLV WAW		5,400 MBF	DODGE LOGGING	BIDS REJECTED 2/23/95; NO INTENT TO AWARD AS OFFERED. SALE AREA REDESIGNED INTO FY95 TIMBER SALE
14. TOWER SLV WAW		1,010 MBF	BOISE CASCADE	BIDS REJECTED 2/23/95; NO INTENT TO AWARD AS OFFERED. PORTION OF SALE AREA BURNED IN FY 94 AND PLANNED AS FY96 TIMBER

SALE

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

<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
15. BLUE FORD FRE		6,500 MBF	BOISE-CASCADE	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
16. BANTY SLV WAW		610 MBF	ELLINGSON LUM.	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
17. JOHNSON SLV	WAW	3,600 MBF	ROSBORO LUMBER	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
18. PARK HFR WAW		700 MBF	BOISE CASCADE	AWARDED 11/13/95
19. RD SLV WAW		3,300 MBF	DODGE LOGGING	AWARDED 11/14/95
20. HILTON WAW		5,300 MBF	MALHEUR LUMBER	AWARDED 11/14/95
21. SWEET PEA WAW		1,280 MBF	ELLINGSON LUM	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
22. TANHORSE WAW		1,340 MBF	BOISE CASCADE	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
23. TANYA WAW		585 MBF	BOISE CASCADE	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
24. LOCUST MAL		1,000 MBF	SMERSKI LOG.	AWARDED 11/22/95
25. NICHOLSON SLVG I	OKA	890 MBF	VAAGAN BRO.	SALE AWARDED 11/03/95

V. SALES CANNOT BE AWARDED TO HIGH BIDDER

<u>SALE</u>	<u>NE</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
26. FORKS	MAL	5,000 MBF	SNOW MTN. PINE	SNOW MTN PINE NO LONGER IN BUSINESS AS OF 12/13/94 AND CANNOT MEET THE ORIGINAL TERMS, CONDITIONS, AND REQUIREMENTS OF A RESPONSIBLE BIDDER. 36 CFR 223.101
27. OFF BROADWAY	OCH	12,300 MBF	KINZUA CORP.	KINZUA CORP NO LONGER IN BUSINESS AS OF 8/5/94 AND CANNOT MEET THE ORIGINAL TERMS, CONDITIONS, AND REQUIREMENTS OF A RESPONSIBLE BIDDER. 36 CFR 223.101.
28. HIACK THIN	SIU	1,600 MBF	HAMPTON	HAMPTON NOTIFIED USFS ON 10/28/94 OF UNWILLINGNESS TO ACCEPT AWARD
29. EAGLE RIDGE HOUSELOG	UMA	170 MBF	ROGGE WOOD	ROGGE WOOD NOTICE TO USFS ON 10/11/95 OF FINANCIAL INSOLVENCY AND CANNOT MEET THE ORIGINAL TERMS, CONDITIONS, AND REQUIREMENTS OF A RESPONSIBLE BIDDER. 36 CFR 223.101.
30. ALLEN	WAW	3,800 MBF	ROGGE WOOD	ROGGE WOOD NOTICE TO USFS ON 10/11/95 OF FINANCIAL INSOLVENCY AND CANNOT MEET THE ORIGINAL TERMS, CONDITIONS, AND REQUIREMENTS OF A RESPONSIBLE BIDDER. 36 CFR 223.101.
31. CANTREL SPRG	WAW	610 MBF	ROGGE WOOD	ROGGE WOOD NOTICE TO USFS ON 10/11/95 OF FINANCIAL INSOLVENCY AND CANNOT MEET THE ORIGINAL TERMS, CONDITIONS, AND REQUIREMENTS OF A

RESPONSIBLE BIDDER. 36 CFR 223.101.

32. HORN SLV WAW 1,340 MBF

KINZUA CORP

KINZUA CORP NO LONGER IN BUSINESS AS OF 8/5/94 AND CANNOT MEET THE ORIGINAL TERMS, CONDITIONS, AND REQUIREMENTS OF A RESPONSIBLE BIDDER. 36 CFR 223.101.

23. PRONG SLV WAW 3,800 MBF

ROGGE WOOD

ROGGE WOOD NOTICE TO USFS ON 10/11/95 OF FINANCIAL INSOLVENCY AND CANNOT MEET THE ORIGINAL TERMS, CONDITIONS, AND REQUIREMENTS OF A RESPONSIBLE BIDDER. 36 CFR 223.101.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 22, 1995, she caused one copy of the foregoing FEDERAL DEFENDANTS' NOVEMBER 22, 1995 COMPLIANCE REPORT, to be served via facsimile and by first-class United States mail upon the counsel of record hereinafter named:

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Lisa A. Holden

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 CONFIRMATION NUMBER (202) 272-8056

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NUMBER OF PAGES: 9

DATE: November 27, 1995

FROM: Lisa Holden, (202) 272-8063

MESSAGE: NERC v. Glickman. Attached is a Notice of Filing informing the court of filings made in Smith v. U.S. Forest Service, C93-178 (E.D. Wash.) relating to the GATORSON Sale and Leavenworth Audubon v. Ferraro, C94-1025 (W.D. Wash) relating to the TIP and TIPTOP sales.

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

NOTICE OF FILING

18 Defendants.)
 19)

20 Pursuant to representations made in the course of this
 21 litigation, federal defendants hereby provide notice of the
 22 following filings: (1) Notice of Proceedings Relating to the
 23 Gatorson Timber Sale filed in the action of Smith v. U.S. Forest
 24 Service, C93-178-JLQ (E.D. Wash); and (2) Notice of Proceedings
 25 Relating to the Tip and Tiptop Timber Sales filed in the action
 26

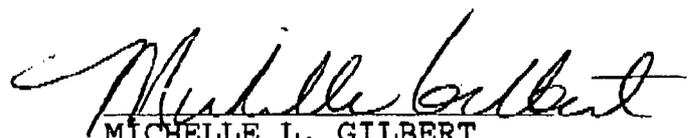
1 of Leavenworth Audubon v. Ferraro, C94-1025C (W.D. Wash.).
2 (attached hereto as Exhibits A and B).

3 Dated this 22nd day of November, 1995.

4 Respectfully submitted,

5 KRISTINE OLSON
6 United States Attorney

7 LOIS J. SCHIFFER
8 Assistant Attorney General



9
10 MICHELLE L. GILBERT
11 EDWARD A. BOLING
12 United States Department of Justice
13 Environment and Natural
14 Resources Division
15 General Litigation Section
16 P.O. Box 663
17 Washington, DC 20044-0663
18 (202) 272-8338

19 Attorneys for Defendants

20 Of Counsel:

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23 United States Department of Agriculture
24 Washington, DC

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

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 8 (202) 272-8338

9 Attorneys for Federal Defendant

10 IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF WASHINGTON

11	MITCHELL SMITH, an individual)	
12)	
13	Plaintiff,	)	No. CS-93-178-JLQ
14	v.)	
15	U.S. FOREST SERVICE, an agency	)	FEDERAL DEFENDANT'S
16	of the United States; and VAAGEN	)	NOTICE OF PROCEEDINGS
17	TIMBER PRODUCTS, a Washington	)	RELATING TO THE
18	corporation,	)	GATORSON TIMBER SALE
19)	
20	Defendants.)	

21 The United States Forest Service, through and by its
 22 counsel, hereby provides notice of proceedings in connection with
 23 the Gatorson timber sale located on the Colville National Forest
 24 in Washington State. This sale was previously the subject of
 25 litigation in the above-captioned action. The Gatorson timber
 26 sale had been awarded to defendant Vaagen Timber Products on May
 27 6, 1993. The sale was subsequently subject to a series of orders
 28 effectively prohibiting the sale from proceeding due to

DEFENDANTS' NOTICE OF PROCEEDINGS
 RELATING TO THE GATORSON
 TIMBER SALE -1-

Ex A, 1

1 violations of the National Environmental Policy Act. See
2 generally Smith v. United States Forest Service, 33 F.3d 1072
3 (9th Cir. 1994).

4 On July 27, 1995, Section 2001 of the Rescissions Act of
5 1995, Pub. L. 104-19, was signed into law. Litigation over
6 various provisions of Section 2001 of the Rescissions Act is
7 currently ongoing in the United States District Court for the
8 District of Oregon. Northwest Forest Resource Council v.
9 Glickman, 95-6244-HO (D. Oregon) (Complaint filed August 9,
10 1995). On September 13, 1995, the District Court of Oregon
11 declared that subsection 2001(k)(1) of the 1995 Rescissions Act
12 applied to sales offered or awarded in all national forests in
13 Washington and Oregon before the date of enactment, in which no
14 endangered bird species is known to be nesting. By order dated
15 October 17, 1995, the court issued an injunction directing the
16 agencies to release Fiscal Year 1991 - 1995 sales covered by
17 subsection 2001(k)(1), subject to the court's September 13 order.
18 The defendant agencies in that case, the Forest Service and the
19 Bureau of Land Management, have appealed that order to the Ninth
20 Circuit.

21 As part of that litigation, certain parties have sought the
22 release of the Gatorson sale, as falling within the court's
23 October 17 injunction. That issue has been scheduled for
24 argument on December 12, 1995 before Judge Hogan of the United
25 States District Court for the District of Oregon. In connection
26 with that proceeding, the Forest Service has represented that

27 DEFENDANTS' NOTICE OF PROCEEDINGS
28 RELATING TO THE GATORSON
TIMBER SALE -2-

Ex A, 2

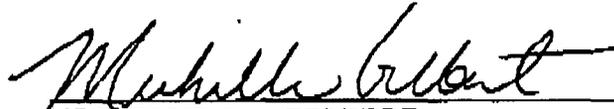
1 relevant courts and parties would be notified of the proceedings
 2 in NFRC v. Glickman. Accordingly, defendant agency hereby
 3 provides notice that, upon issuance of a ruling by the NFRC v.
 4 Glickman court relating to the Gatorson sale, the defendant
 5 agency will notify this Court of the ruling.

6 Dated: November 22, 1995

7 Respectfully submitted,

8 JAMES P. CONNELLY
 9 United States Attorney

10 LOIS J. SCHIFFER
 11 Assistant Attorney General

12 

13 MICHELLE L. GILBERT
 14 STEPHEN G. BARTELL
 15 U.S. Department of Justice
 16 Environment and Natural Resources
 17 Division
 18 General Litigation Section
 19 P.O. Box 663
 20 Washington, D.C. 20044-0663
 21 (202) 272-8338

22 Attorneys for Federal Defendants

EX A, 3

THE HONORABLE JOHN C. COUGHENOUR

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

LEAVENWORTH AUDUBON ADOPT-A-
FOREST ALPINE LAKES PROTECTION
SOCIETY, et al.,

Plaintiffs,

v.

RICHARD A. FERRARO, et al.,

Defendants.

Civ. No. C94-1025C

NOTICE OF PROCEEDINGS
RELATING TO THE TIP
AND TIPTOP TIMBER SALES

The United States Forest Service, through and by its counsel, hereby provides notice of proceedings in connection with the Tip and Tiptop timber sales located on the Wenatchee National Forest in Washington State. These sales were previously the subject of litigation in the above-captioned action. The Tip timber sale had been awarded to defendant Longview Fibre Co. on September 9, 1994; the Tiptop timber sale had been awarded to defendant St. Joe Lumber Co. on February 2, 1994. The sales were subsequently enjoined by this Court on or about March 3, 1995 for NEPA violations. See Leavenworth Audubon v. Ferraro, 881 F.Supp. 1482 (W.D. Wash. 1995).

On July 27, 1995, Section 2001 of the Rescissions Act of 1995, Pub. L. 104-19, was signed into law. Litigation over

NOTICE OF PROCEEDINGS RELATING TO THE
TIP AND TIPTOP TIMBER SALES - 1

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
P.O. BOX 663
WASHINGTON, DC 20044-0663
TELEPHONE: (202) 272-8056

1 various provisions of Section 2001 of the Rescissions Act is
2 currently ongoing in the United States District Court for the
3 District of Oregon. Northwest Forest Resource Council v.
4 Glickman, 95-6244-HO (D. Oregon) (Complaint filed August 9,
5 1995). On September 13, 1995, the District Court of Oregon
6 declared that subsection 2001(k)(1) of the 1995 Rescissions Act
7 applied to sales offered or awarded in all national forests in
8 Washington and Oregon before the date of enactment, in which no
9 endangered bird species is known to be nesting. By order dated
10 October 17, 1995, the court issued an injunction directing the
11 agencies to release Fiscal Year 1991 - 1995 sales covered by
12 subsection 2001(k)(1), subject to the court's September 13 order.
13 The defendant agencies, the Forest Service and the Bureau of Land
14 Management, have appealed that order to the Ninth Circuit.

15 As part of that litigation, certain parties have sought the
16 release of the Tip and Tiptop sales, as falling within the NFRC
17 v. Glickman court's October 17 injunction. That issue has been
18 scheduled for argument on December 12, 1995 before Judge Hogan of
19 the United States District Court for the District of Oregon. In
20 connection with that proceeding, the Forest Service has
21 represented that relevant courts and parties would be notified of
22 the proceedings in NFRC v. Glickman. Accordingly, defendant
23 agency hereby provides notice that, upon issuance of a ruling by
24 the NFRC v. Glickman court relating to the Tip and Tiptop sales,
25 the defendant agency will notify this Court of the ruling.

26
27
28 NOTICE OF PROCEEDINGS RELATING TO THE
TIP AND TIPTOP TIMBER SALES - 2

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
P.O. BOX 663
WASHINGTON, DC 20044-0663
TELEPHONE: (202) 272-8056

1 Dated: November 22, 1995

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Respectfully submitted,

KATRINA C. PFLAUMER
United States Attorney

LOIS J. SCHIFFER
Assistant Attorney General



MICHELLE L. GILBERT
U.S. Department of Justice
Environment and Natural Resources
Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
(202) 272-8338

Attorneys for Federal Defendants

NOTICE OF PROCEEDINGS RELATING TO THE
TIP AND TIPTOP TIMBER SALES - 3

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
P.O. BOX 663
WASHINGTON, DC 20044-0663
TELEPHONE: (202) 272-8056

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) 272-6817, 6815, 5775
 CONFIRMATION NUMBER (202) 272-8056

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 Nolin	395-4941
	Dave Shilton	514-4240
	Al Ferlo	
	Anne Almy	
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 8

DATE: November 27, 1995

FROM: Paula Clinedinst, Paralegal, (202) 272-4698

MESSAGE: NFRC v. Glickman, CV-95-6244

Attached is Intervenor-Applicant Western
 Timber Co.'s Request for Expedited Hearing on
 Motion or Decision on Motion to Intervene.

Milbert

1 Patricia M. Dost, OSB #90253
Kirk Johansen, OSB #74159
2 SCHWABE, WILLIAMSON & WYATT
Suites 1600-1800, Pacwest Center
3 1211 S.W. Fifth Avenue
Portland, Oregon 97204-3795
4 Telephone: (503) 222-9981

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,)
12 Plaintiff,)
13 and)
14 WESTERN TIMBER CO.,)
an Oregon corporation,)
15 Plaintiff-)
16 Intervenor,)
17 v.)
18 DAN GLICKMAN, in his capacity)
as Secretary of Agriculture;)
19 BRUCE BABBITT, in his)
capacity as Secretary of the)
20 Interior,)
21 Defendant.)

Civil No. No. 95-6244-HO
Lead Case

Civil No. 95-6267-HO
Consolidated Cases

REQUEST FOR EXPEDITED
HEARING ON MOTION
OR DECISION ON
MOTION TO INTERVENE

#11
90-1-1-2928
LORDS

22 Pursuant to Local Rule 220-6, Intervenor-Applicant

23 Western Timber Co. respectfully requests that the Court expedite
24 hearing or decision on Western Timber's Motion to Intervene in
25
26

Page 1 - REQUEST FOR EXPEDITED HEARING ON MOTION
OR DECISION ON MOTION TO INTERVENE

(SW1/93556/102666/PMD/629057-1)
SCHWABE, WILLIAMSON & WYATT
Attorneys at Law
Suites 1600-1800, Pacwest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204-3795
Telephone (503) 222-9981

STRICTLY CONFIDENTIAL
NOV 29 11:10:32

1 this action.¹ Defendants have objected to the scheduled
2 December 12, 1995 hearing date on Western Timber's Motion to
3 Clarify the Court's September 13, 1995 Order and subsequent
4 Orders on the ground that Western Timber is not yet a party to
5 this action. Western Timber requests an expedited decision on
6 the Motion to Intervene in order to preserve the December 12,
7 1995 date for oral argument on the Motion to Clarify.²

8 Defendants have advised the Court that they will
9 neither support nor oppose Western Timber's Motion to Intervene.
10 Defendants' Opposition to Motion to Clarify, page 2.
11 Plaintiff's counsel has indicated to Western Timber that
12 plaintiff will not oppose Western Timber's intervention in this
13 action. Dost Affidavit, paragraph 2. Therefore, no further
14 briefing on the Motion to Intervene is necessary, and the Court
15 may render its decision on an expedited basis.

16 An early hearing date on the Motion to Clarify is
17 crucial to the right Western Timber seeks to intervene to
18 protect. Defendants were statutorily obligated to release the
19 Malt Timber Sale to Western Timber by September 10, 1995.
20 Western Timber is concerned that, in the future, parties opposed

21
22 ¹In the alternative, Western Timber respectfully requests
23 that the Court deny defendants' implied motion to hold Western
24 Timbers' Motion to Clarify in abeyance. See, Defendants'
25 Opposition to Motion to Clarify, p. 2.

26 ²Defendants state that they are prepared to respond to the
merits of the Motion to Clarify in an expedited manner.
Defendants' Opposition to Motion to Clarify, page 2. Therefore,
Defendants are in no way prejudiced by retention of the
December 12, 1995 hearing date.

Page 2 - REQUEST FOR EXPEDITED HEARING ON MOTION
OR DECISION ON MOTION TO INTERVENE

(SW1/93556/102666/PMD/629057-1)
SCHWABE, WILLIAMSON & WYATT
Attorneys at Law
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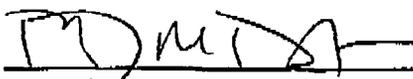
1 to the timber harvest may argue that operation of sales released
 2 under § 2001(k) must be completed by the end of fiscal year
 3 1996. Operation of the Malt Timber Sale will require difficult
 4 and extensive road building. Nicholls Affidavit, ¶ 2. The
 5 longer release of the sale is delayed, the more difficulty
 6 Western Timber will have completing operation of the sale by
 7 September 30, 1996. Id. As winter draws closer, weather
 8 conditions favorable for operating the Malt Sale will become
 9 more scarce, exacerbating the problem. Id., ¶ 3. If Western
 10 Timber loses the December 12, 1995 hearing date, the Court's
 11 calendar may not accommodate another date that would allow
 12 Western Timber to operate the Malt Sale immediately should the
 13 Court order its release.

14 Western Timber requests that the Court grant its
 15 Motion to Intervene and retain the December 12, 1995 date now
 16 set for oral argument on its Motion to Clarify.

17 DATED this 22 day of November, 1995.

18 Respectfully submitted,

19 SCHWABE, WILLIAMSON & WYATT

20
 21 BY: 
 22 Patricia M. Dost OSB #90253
 23 Kirk Johansen, OSB #74159
 24 Of Attorneys for
 25 Plaintiff-Intervenor
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE
COUNCIL, an Oregon
corporation,

Plaintiff,

and

WESTERN TIMBER CO.,
an Oregon corporation,

Plaintiff-
Intervenor

v.

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

Defendant.

STATE OF OREGON)

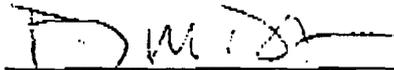
County of Multnomah)

) ss.

I, PATRICIA M. DOST, being first duly sworn depose and
say as follows:

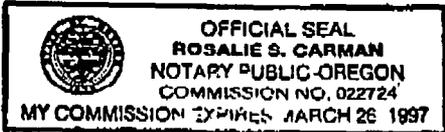
1 1. I am the attorney representing Intervenor-
2 Applicant Western Timber Co. in this matter. I make this
3 affidavit in support of Western Timber's Request for Expedited
4 Hearing on Decision.

5 2. Plaintiff's counsel, Mark C. Rutzick, has
6 indicated to me that Plaintiff will not oppose Western Timber's
7 intervention in this action.

8 
9 PATRICIA M. DOST

10
11 STATE OF OREGON)
12 County of Multnomah) ss.

13 This instrument was acknowledged before me this 22nd
14 day of November, 1995, by PATRICIA M. DOST.



15 
16 ROSALIE S. CARMAN
17 NOTARY PUBLIC FOR OREGON
18 My Commission Expires: 3/26/97

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE
COUNCIL, an Oregon
corporation,

Plaintiff,

and

WESTERN TIMBER CO.,
an Oregon corporation,

Plaintiff-
Intervenor

v.

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

Defendant.

STATE OF OREGON)
) ss.
County of Washington)

Civil No. No. 95-624-HO
Lead Case

Civil No. 95-6267-HO
Consolidated Cases

AFFIDAVIT OF
PAULA NICHOLLS

I, PAULA NICHOLLS, being first duly sworn depose and
say as follows:

1 1. I am a timber analyst for Intervenor-Applicant
2 Western Timber Co.

3 2. Operation of the Malt Timber Sale will require
4 difficult and extensive road building. Already, it will be
5 difficult to complete operation of the sale by September 30,
6 1996. The longer release of the sale is delayed, the more
7 difficult it will be to complete operation of the sale by that
8 date.

9 3. Operations could be done throughout the winter as
10 weather permits. Any further delay could cause Western Timber
11 to miss periods of favorable operating conditions, increasing
12 Western Timber's difficulty in completing operation of the sale
13 by September 30, 1996.

14 *Paula Nicholls*
15 PAULA NICHOLLS

16
17 STATE OF OREGON)
18 County of Washington) ss.

19 This instrument was acknowledged before me this _____ day
20 of November, 1995, by PAULA NICHOLLS.

21 _____
22 NOTARY PUBLIC FOR OREGON
23 My Commission Expires: _____
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