

NLWJC- Kagan

Counsel - Box 003 - Folder 005

Timber: NFRC v. Glickman [4]

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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NUMBER OF PAGES: 22

DATE: November 29, 1995

FROM: Paula Clinedinst, Paralegal, 272-4698

MESSAGE: Attached are Scott Timber's and Proposed Interveno Vaagen Bros Lumber's Memos in Support of NFRC's Motion for Further Clarification or Enforcement of the Court's 10/17 Injunction, Vaagen Bros.' Request for Expedited Ruling, and a [Proposed] Order. Attached declarations are available upon request.

Effective Friday 12/1 at 6 PM, the General Litigation's new fax number will be 305-0429.

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Attorneys for Scott Timber Co.

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

10	NORTHWEST FOREST RESOURCE)	
11	COUNCIL, an Oregon)	
	corporation,)	
12)	
	Plaintiff,	)	No. 95-6244-HO (Lead)
13		)	No. 95-6267-HO (Consolidated)
	v.)	
14	DANIEL R. GLICKMAN, in his	)	SCOTT TIMBER CO.'S
15	capacity as Secretary of	)	MEMORANDUM IN SUPPORT OF
16	Agriculture, BRUCE BABBITT, in	)	NFRC'S MOTION FOR FURTHER
	his capacity as Secretary of	)	CLARIFICATION OR ENFORCEMENT
17	Interior,	)	OF THE COURT'S OCTOBER 17
		)	INJUNCTION
18	Defendants.)	

19 Plaintiff Scott Timber Co. joins in NFRC's Third Motion
 20 for Summary Judgment for Clarification that the timber sales
 21 enjoined or voluntarily withdrawn because of subsequent
 22 litigation are released under the terms of Pub. L. No. 104-19
 23 § 2001(k), 109 Stat. 194, 246 (1995). Scott Timber Co. was a
 24 successful high bidder at auctions for the First, Last, Nita,
 25 South Nita, Cowboy, and Boulder Krab Timber Sales. The Boulder
 26 Krab Sale, like the other sales, was not awarded because of

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1 litigation. However, the Forest Service in early November
 2 awarded the Boulder Krab Sale and Scott Timber Co. does not
 3 believe there is any distinction between the Boulder Krab Sale
 4 and the other sales that the Forest Service continues to
 5 withhold. Scott Timber Co. remains ready to accept award of all
 6 of these timber sales and wants the sales released so they can be
 7 completed by September 30, 1996 when the protections of the
 8 Rescissions Act expire. See Declaration of Allyn Ford attached
 9 to the Declaration of Scott W. Horngren.

10 Dated this 29th day of November, 1995.

11 HAGLUND & KIRTLEY

12
 13 By Scott W. Horngren
 14 Scott W. Horngren
 15 Attorneys for Plaintiff
 16 Scott Timber Co.
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing SCOTT
TIMBER CO.'S MEMORANDUM IN SUPPORT OF NFRC'S MOTION FOR FURTHER
CLARIFICATION OR ENFORCEMENT OF THE COURT'S OCTOBER 17 INJUNCTION
on the following parties:

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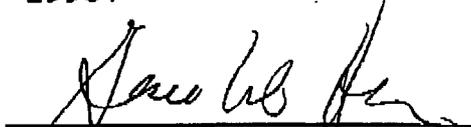
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Western Environmental Law Center
1216 Lincoln Street
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by serving a true and correct copy thereof to said parties by the
means indicated and on the date stated below.

DATED November 29th, 1995.



Scott W. Horngren
Counsel for Plaintiff
Scott Timber Co.

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6 Attorneys for Proposed Intervenor Vaagen Bros. Lumber, Inc.

7
 8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE DISTRICT OF OREGON

10	NORTHWEST FOREST RESOURCE)	
11	COUNCIL, an Oregon	)	No. 95-6244-HO (Lead)
	corporation,	)	No. 95-6267-HO (Consolidated)
12)	
	Plaintiff,	)	PROPOSED INTERVENOR VAAGEN
13		)	BROS. LUMBER, INC.'S
	v.	)	MEMORANDUM IN SUPPORT OF
14	DANIEL R. GLICKMAN, in his	)	NFRC'S MOTION FOR FURTHER
15	capacity as Secretary of	)	CLARIFICATION OR ENFORCEMENT
16	Agriculture, BRUCE BABBITT, in	)	OF THE COURT'S OCTOBER 17
	his capacity as Secretary of	)	INJUNCTION
17	Interior,)	
)	
	Defendants.)	

18 I. INTRODUCTION.

19 Proposed Intervenor-plaintiff, Vaagen Bros. Lumber,
 20 Inc. ("Vaagen") joins and supports plaintiff NFRC's Motion for
 21 Further Clarification or Enforcement of the Court's October 17
 22 Injunction and requests an expedited decision on the motion as it
 23 pertains to the Gatorson Timber Sale.

24 The government has failed to release the Gatorson
 25 Timber Sale ("Gatorson Sale") as required by the terms of the
 26 court's October 17 injunction and Section 2001(k) of Public Law

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1 No. 104-19, the Emergency Salvage Timber Sale Program. Vaagen,
2 to whom the Forest Service awarded a contract to harvest the
3 Gatorson Sale, seeks clarification that the requirements of
4 Section 2001(k)(1) to release the sales "notwithstanding any
5 other provision of law" means that the National Environmental
6 Policy Act is no longer applicable to the Gatorson Sale and that
7 further environmental analysis is not needed prior to
8 reinitiation of harvest on the sale.

9 While the defendants dispute that Section 2001(k)(1)
10 applies to eastside national forests, federal defendants
11 apparently concede that the Gatorson Sale must be released given
12 this Court's October 17 injunction and the Ninth Circuit denial
13 of an emergency stay pending appeal. See Defendants' Response to
14 NRFC's Two Motions Seeking Release of 11 Sales Subject to
15 Injunction or Other Court Orders (Fed. Defs. Mem.) at p. 12 and
16 16. Although the passage of time is of little consequence to the
17 attorneys, to Vaagen and its employees it may mean the difference
18 between survival and unemployment or mill closure. As explained
19 below, because of Vaagen's severe financial situation and the
20 impending winter weather, Vaagen respectfully requests that this
21 Court enter a written declaration regarding NRFC's motion
22 pertaining to the Gatorson Sale prior to the December 12 hearing
23 so that Vaagen can proceed with the sale as soon as possible.¹

24 _____
25 ¹ Vaagen has moved for an order releasing the Gatorson Sale
26 from the eastern district of Washington where the sale is
located, and asked the eastern district of Washington for an
expedited decision on its motion following a decision from this

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1 **II. A BRIEF HISTORY OF THE GATORSON SALE.**

2 The Forest Service awarded Vaagen the Gatorson Timber
3 Sale in March 1993. The Gatorson Sale is located in the Colville
4 National Forest in Washington. Access to the logs from the
5 Gatorson Sale is a critical factor that will determine whether
6 Vaagen's mills in Colville and Republic, Washington continue to
7 operate or are shutdown. See Declaration of Robert Heater
8 (Heater Dec.), Declaration of Duane Vaagen (Vaagen Dec.), and the
9 Declaration of Robert Beckley (Beckley Dec.). Vaagen Bros.' log
10 yard at the Republic mill is so depleted that Vaagen is only able
11 to deliver logs sufficient to run the Republic mill ten to twelve
12 days ahead. Vaagen Dec. at ¶ 2. The log yard at Colville faces
13 a similar shortage. Id. A year ago, the two mills employed 485
14 employees. Vaagen Dec. at ¶ 3. Currently, the two mills employ
15 310 employees. Id.

16 The Gatorson Sale was challenged by Mitchell Smith, an
17 outdoor enthusiast who recreates in the Colville National Forest
18 and owns a cabin near the sale area. Intervenor Oregon Natural
19 Resources Council's Opposition to NFRC'S Supplemental Memorandum
20 in Support of Its Third Motion for Summary Judgment and NFRC'S
21 Motion for Further Clarification (ONRC Opp.) at 12. Mr. Smith
22 alleged the Forest Service's offering of the Gatorson Sale failed
23 to comply with the National Environmental Policy Act (NEPA) and
24 _____
25 Court. Aside from Vaagen's request for an expedited decision,
26 the procedural approach is similar to that adopted by Judge Dwyer
in Seattle Audubon Society v. Thomas, 89-160-WD, attached to
NFRC's Notice of Filing dated November 6, 1995, CR 221.

1 the Washington State Wilderness Act (WSWA).² Smith filed suit
2 in the United States District Court for the Eastern District of
3 Washington. Smith v. United States Forest Service, Civ.
4 No. 93-0178-JLQ.

5 The district court initially entered a preliminary
6 injunction enjoining the sale. Ultimately, the district court
7 entered summary judgment for the Forest Service and Vaagen
8 rejecting both Smith's NEPA and WSWA claims. In its order, the
9 district court allowed harvest of three units "pending appeal."
10 These units were harvested by Vaagen pursuant to the timber sale
11 contract. Vaagen Dec. ¶ 7.

12 Upon reaching the merits, the Ninth Circuit Court of
13 Appeals upheld the district court's WSWA ruling, reversed the
14 district court's NEPA ruling, and remanded the case to the
15 district court. Ninth Circuit Mandate attached as Exhibit A.
16 The narrow holding of the Ninth Circuit was that the NEPA
17 documents prepared for the Gatorson Sale did not adequately
18 analyze the affect of the sale on a roadless area. Smith v.
19 United States Forest Service, 33 F.3d 1072, 1079 (9th Cir. 1994).
20 The appellate panel expressly declined to require preparation of
21 an environmental impact statement as sought by Smith. The court
22

23 ² Mr. Smith's NEPA claim dealt with the roadless character
24 of the Gatorson Sale area and did not challenge the conclusion of
25 the Forest Supervisor that the Gatorson Sale will have no
26 significant impact on soil quality, water quality, vegetation,
wildlife and fishery resources, recreational value, and scenic
quality. Smith v. United States Forest Service, 33 F.2d 1072,
1078 (9th Cir. 1994).

1 decided to "leave to the agency the decision of how best to
2 comply with NEPA and its implementing regulations." Id.

3 Upon issuance of the appellate court's mandate and
4 written opinion, the district court issued the following
5 judgment:

6 IT IS HEREBY ORDERED AND ADJUDGED THAT:

- 7 1. This Court's Judgment of December 13,
8 1993 is vacated.
- 9 2. Plaintiff is granted judgment, in part,
10 in accordance with the opinion of the
11 Ninth Circuit Court of Appeals,
12 published at 33 F.2d 1072 (9th Cir.
13 1994).
- 14 3. Plaintiff's remaining claims are
15 dismissed with prejudice.
- 16 4. This action is remanded to the
17 defendant, U.S. Forest Service for
18 proceedings in accordance with the
19 opinion of the Court of Appeals.

20 Judgment of March 30, 1995, attached as Exhibit 14 to ONRC Opp.

21 Neither the Ninth Circuit Mandate nor the district
22 court judgment is in the form of an injunction. Rather, the NEPA
23 issue was remanded to the agency for further proceedings. The
24 judgment did not require cancellation of the Gatorson Sale and
25 the Forest Service contends the contract is in effect. Vaagen
26 Dec. ¶ 8. However, the Forest Service has not yet prepared and
distributed for comment either a revised environmental assessment
or an environmental impact statement.

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: : :

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1 III. SECTION 2001(k) AND THIS COURT HAVE MANDATED THE IMMEDIATE
2 RELEASE OF THE GATORSON SALE FOR HARVEST.

3 The court's October 17, 1995 order requires Secretary
4 of Agriculture Glickman to release on or before October 25, 1995,
5 all timber sale contracts offered or awarded between October 1,
6 1990 and July 27, 1995, in any national forest in Oregon and
7 Washington, with the exception of sale units in which a
8 threatened or endangered bird species is known to be nesting.
9 Although no threatened or endangered bird species is nesting
10 within the Gatorson Sale, the Forest Service has not released the
11 Gatorson Sale. In its November 8, 1995 compliance report, the
12 Forest Service informs the court that the agency is "awaiting
13 determination of legal course of action under Smith v. USFS,
14 94-0178-JLQ." Federal defendants' November 8, 1995 Compliance
15 Report, Fourth Declaration of Jerry Hofer at p. 2, CR 230.

16 The defendant's position that further agency or court
17 action is needed before the Gatorson Timber Sale is released to
18 Vaagen demonstrates a fundamental misunderstanding about the
19 posture of the Smith litigation, the congressional intent
20 embodied in Section 2001(k), and this court's order of
21 October 17, 1995. The lone issue left unresolved by the Ninth
22 Circuit in Smith was NEPA compliance. After remand, the district
23 court dismissed all of plaintiff's claims and remanded the matter
24 on the NEPA claim to the Forest Service "for proceedings in
25 accordance with the opinion of the Court of Appeals." Exhibit 14
26 to ONRC Opp. Before the Forest Service completed any NEPA

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1 analysis, however, Congress enacted Pub. L. No. 104-19,
 2 Section 2001(k). Section 2001(k) directs the Forest Service to
 3 release the Gatorson Sale immediately notwithstanding this
 4 agency's compliance with NEPA.

5 A. Congress Expressly Directed the Forest Service to
 6 Release the Gatorson Sale Regardless of NEPA
 7 Compliance.

8 Section 2001(k) of Pub. L. No. 104-19, addressed the
 9 fate of timber sales like the Gatorson and directs the Forest
 10 Service "[n]otwithstanding any other provision of law . . . to
 11 award, release, and permit to be completed in fiscal years 1995
 12 and 1996 . . . all timber sale contracts offered or awarded
 13 before that date in any unit of the National Forest System . . .
 14 subject to section 318 of Public Law 101-121." Pub. L.
 15 No. 104-19, § 2001(k), 109 Stat. 194, 246 (1995). Congress
 16 specifically directed that sales are to be released without
 17 change to the originally advertised terms, volumes, and bid
 18 prices. Id. Section 2001(k) provides for one and only exception
 19 to this congressional mandate -- sale units where threatened or
 20 endangered bird species are "known to be nesting." Id.
 21 Subsections (2) and (3) requires the Forest Service to provide
 22 replacement volume in the event a sale unit contained a
 23 threatened or endangered bird species "known to be nesting."³

24 ³ Section 2001(k), reads in full as follows:
 25 (k) AWARD AND RELEASE OF PREVIOUSLY OFFERED AND
 UNAWARDED TIMBER SALE CONTRACTS. -

26 (1) AWARD AND RELEASE REQUIRED. - Notwithstanding any
 other provision of law, within 45 days after the date of the

1 The unambiguous congressional intent of Section 2001(k)
 2 was to temporarily suspend, through September 30, 1996, the
 3 underlying body of statutory law which typically govern the sale
 4 of federal timber and the administration of timber sales.
 5 Section 2001(k) acts to replace this body of statutory law with a
 6 new environmental standard--no sales units are to be released
 7 where a threatened or endangered bird species is known to be
 8 nesting. NEPA is among the body of statutory law amended by
 9 Section 2001(k).

10 1. Section 2001(k)'s "notwithstanding any other
 11 provisions of law" precludes further application
 12 of NEPA to the Gatorson Sale.

13 The plain language of Section 2001(k) is controlling on
 14 the application of NEPA to the Gatorson Sale. Section 2001(k)

15 enactment of this Act, the Secretary concerned shall act to
 16 award, release, and permit to be completed in fiscal years 1995
 17 and 1996, with no change in originally advertised terms, volumes,
 18 and bid prices, all timber sale contracts offered or awarded
 19 before the date in any unit of the National Forest System or
 20 district of the Bureau of Land Management subject to § 318 of
 21 Public Law 101-121 (103 Stat. 745). The return of the bid bond
 22 of the high bidder shall not alter the responsibility of the
 23 Secretary concerned to comply with this paragraph.

24 (2) THREATENED OR ENDANGERED BIRD SPECIES.--No sale
 25 unit shall be released or completed under this subsection if any
 26 threatened or endangered bird species is known to be nesting
 within the acreage that is the subject of the sale unit.

 (3) ALTERNATIVE OFFER IN CASE OF DELAY.--If for any
 reason a sale cannot be released and completed under the terms of
 this subsection within 45 days after the date of the enactment of
 this Act, the Secretary concerned shall provide the purchaser an
 equal volume of timber, of like kind and value, which shall be
 subject to the terms of the original contract and shall not count
 against current allowable sale quantities.

Pub. L. No. 104-19, § 2001(k), 109 Stat. 194, 246 (1995).

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1 directs the Forest Service to release certain timber sales within
2 45 days from the date of enactment "[n]otwithstanding any other
3 provision of law," unless a threatened or endangered bird species
4 is known to be nesting within a sale unit. Nothing in the
5 wording or structure of Section 2001(k) works to cast any
6 ambiguity on the literal meaning of the clause "notwithstanding
7 any other provision of law." As statutory law, NEPA is included
8 within the meaning of "[n]otwithstanding any other provision of
9 law." See In re Hokkaido Fisheries Co., Ltd., 506 F. Supp 631,
10 633-34 (D. Alaska 1981). Thus, if the Forest Service did not
11 comply with NEPA by 45 days after the date of enactment, NEPA no
12 longer applied to the Gatorson Sale.

13 2. The legislative history of Section 2001(k)
14 supports the literal meaning of "notwithstanding
15 any other provision of law".

16 The Conference Committee Report that accompanied
17 Section 2001(k)'s parent bill, H.R. 1158, states

18 [f]or sales in Section 318 areas, the bill
19 contains language which deems sufficient the
20 documentation on which the sales are based,
21 and significantly expedites legal actions and
22 virtually eliminates dilatory legal
23 challenges. Environmental documentation,
24 analysis, testimony, and studies concerning
25 each of these areas is exhaustive and the
26 sufficiency language is provided so that
sales can proceed.

H. Conf. Rep. No. 104-124, 104th Cong., 1st Sess. 136 (May 16,
1995), NFRC Exhibit 1 at p. 4. The legislative history supports
the argument that further environmental documentation and

1 analysis under the National Environmental Policy Act is not
2 necessary to proceed with the Gatorson Sale.

3 B. Because Section 2001(k) Creates A Clear and Unavoidable
4 Conflict With NEPA, NEPA Must Yield.

5 Section 2001(k) requires the release of qualifying
6 timber sales within 45 days of the date of enactment. This
7 mandatory, fixed timeline is precisely the type of statutory
8 provision which the Supreme Court holds creates a clear and
9 unavoidable statutory conflict that requires NEPA to yield.

10 In Flint Ridge Development Co. v. Scenic Rivers
11 Association of Oklahoma, 426 U.S. 776 (1976), the Supreme Court
12 concluded that Section 102 of NEPA recognizes that where a clear
13 and unavoidable conflict in statutory authority prevents NEPA
14 compliance, NEPA must yield. Id. at 788. The conflicting
15 statute in Flint Ridge Development required that private real
16 estate developers marketing unimproved subdivision tracts file
17 disclosure statements with the Department of Housing and Urban
18 Development (HUD) setting out information to protect prospective
19 purchasers. Under the Disclosure Act, complete and accurate
20 disclosure statements filed with the Secretary of HUD
21 automatically became effective on the 30th day if not already
22 approved by the Secretary. When HUD did not prepare an
23 environmental impact statement before Flint Ridge Development's
24 disclosure statement became final, an environmental group brought
25 suit alleging HUD's failure to prepare an EIS violated NEPA.

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1 The Supreme Court held that Congress' unqualified
2 requirement that accurate and complete disclosure statements be
3 approved by HUD within 30 days of filing created a clear and
4 unavoidable conflict with NEPA that required NEPA to yield. NEPA
5 compliance, reasoned the Court, could not be achieved within the
6 30-day time limit. Any contrary reconciliation of the two
7 statutes wrote the Supreme Court, would grant the Secretary of
8 HUD a "power not conferred by statute" and "contravene the
9 purpose of the 30-day provision." Id. at 790-91.

10 The statutory duty that the Emergency Salvage Timber
11 Sale Program in Section 2001(k) imposes on the Secretary of
12 Agriculture--to release the Gatorson Sale within 45 days-- is the
13 same type of mandatory duty imposed on the Secretary of HUD by
14 the conflicting statutory provision construed in Flint Ridge
15 Development. As was true for the Secretary of HUD in Flint Ridge
16 Development, the Secretary of Agriculture must perform his
17 statutory duty (release of the Gatorson Sale) regardless of
18 whether he has complied with NEPA. The short time line to comply
19 with the statutory release duty makes NEPA compliance impossible
20 for all practical purposes. This was also the case in Westlands
21 Water Dist. v. Nat. Res. Def. Council, 43 F.3d 457, 460 (9th Cir.
22 1994). In Westlands, the court held that the Central Valley
23 Project Improvement Act which required the Secretary of Interior
24 to deliver a specified amount of water to wetlands in the Central
25 Valley "[u]pon enactment of this title" created an irreconcilable
26 conflict with NEPA. Given Section 2001(k)'s charge that the

1 Gatorson Sale be released within 45 days of enactment, NEPA must
2 yield to prevent what otherwise would be a clear and unavoidable
3 conflict. Westlands, 43 F.3d at 460 ("An irreconcilable conflict
4 is created if a statute mandates a fixed time period for
5 implementation and this time period is too short to allow the
6 agency to comply with NEPA").⁴

7 IV. CONCLUSION.

8 For the reasons stated above, Vaagen Bros.' request
9 this court declare the Section 2001(k) applies to the Gatorson
10 Timber Sale.

11 Dated this 20th day of November, 1995.

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13
14 By Scott W. Horngren
15 Attorneys for Proposed
16 Intervenor Vaagen Bros.
Lumber, Inc.

17
18 ⁴ ONRC's reliance on Alaska Wilderness Recreation & Tourism
19 Association v. Morrison, 67 F.3d 723 (9th Cir. 1995) is misplaced
20 because the statute at issue there did not contain the words
21 "notwithstanding any other provision of law." And, as
22 importantly, did not require that the Secretary take action
23 within a specific time period.
24
25
26

Vaagen

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEP 13 1994
MANDATE ISSUED

NO. 93-36187
CT/AG#: CV-93-00178-JLQ

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MITCHELL SMITH, an Individual
Plaintiff - Appellant

SEP 15 1994

J. P. LINDEN, CLERK DEPUTY

v.

U.S. FOREST SERVICE, an agency of the United States; VAAGEN
TIMBER PRODUCTS, a Washington corporation

Defendants - Appellees

APPEAL FROM the United States District Court for the
Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the
Record from the United States District Court for the Eastern
District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and
adjudged by this Court, that the judgment of the said District
Court in this cause be, and hereby is AFFIRMED in part, REVERSED
in part and REMANDED.

Filed and entered August 22, 1994

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
SEP 13 1994
by: *[Signature]*
Deputy Clerk

SEP 19 '94

NO. 93-36187

Ex. 1 to Proposed Int. Vaagens Memo.

22

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 3 Shay S. Scott, OSB 93421
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10 Attorneys for Proposed Intervenor Vaagen Bros. Lumber, Inc.

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 12 FOR THE DISTRICT OF OREGON

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14	COUNCIL, an Oregon)	No. 95-6244-HO (Lead)
15	corporation,)	No. 95-6267-HO (Consolidated)
16)	
17	Plaintiff,	)	PROPOSED INTERVENOR VAAGEN
18		)	BROS. LUMBER, INC.'S REQUEST
19	v.	)	FOR EXPEDITED RULING ON THE
20		)	GATORSON TIMBER SALE PORTION
21	DANIEL R. GLICKMAN, in his	)	OF NFRC'S MOTION TO CLARIFY
22	capacity as Secretary of	)	OR TO ENFORCE COURT'S
23	Agriculture, BRUCE BABBITT, in	)	OCTOBER 17 INJUNCTION
24	his capacity as Secretary of)	
25	Interior,)	
26)	
	Defendants.)	

27 Proposed intervenor Vaagen Bros. Lumber, Inc.

28 ("Vaagen") requests that this Court give expedited consideration
 29 to NFRC's Motion for Further Clarification or Enforcement of the
 30 Court's October 17 Injunction as it pertains to Vaagen's Gatorson
 31 Timber Sale ("Gatorson Sale"). The federal defendants apparently

32 : : :
 33 : : :

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1 concede that the Gatorson Sale must be released given this
 2 Court's October 17 injunction and the Ninth Circuit denial of an
 3 emergency stay pending appeal. See Defendants' Response to
 4 NFRC's Two Motions Seeking Release of 11 Sales Subject to
 5 Injunction or Other Court Orders (Fed. Defs. Mem.) at p. 12 and
 6 16.

7 While warm, wet, weather in the Pacific Northwest has
 8 kept heavy winter snows at bay, Vaagen must begin work on the
 9 Gatorson Sale to provide logs to its volume starved mills in
 10 Republic and Colville. Declaration of Duane Vaagen at ¶ 2.
 11 Because Vaagen is currently placed in a "special credits"
 12 category by First Interstate Bank, it is unable to obtain capital
 13 from the bank. Declaration of Robert Heater. The wood from the
 14 Gatorson Sale will be used to run the mills to generate
 15 sufficient cash to pay the employees and keep the company afloat.
 16 Some of the payroll checks to employees have been late. See IRS
 17 letter attached to the Heater Dec. The Declarations of Robert
 18 Heater and Robert Beckley explain the vital need to access the
 19 Gatorson Sale before winter snows make operations difficult.

20 Vaagen has filed a proposed order with this Court
 21 regarding its Gatorson Sale, which it intends to follow through

22 : : :

23 : : :

24 : : :

25 : : :

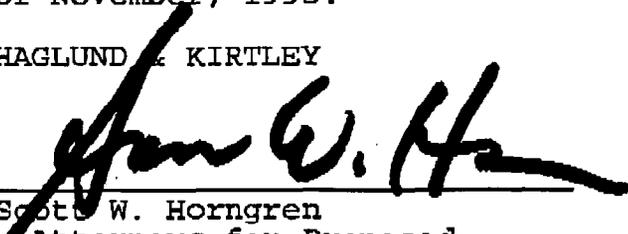
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1 on with the eastern district of Washington to obtain the final
2 release of the Gatorson Sale. Vaagen respectfully requests an
3 expedited ruling on NFRC's motion pertaining to the Gatorson
4 Sale.

5 Dated this 29th day of November, 1995.

6 HAGLUND & KIRTLEY

7
8 By 
9 Scott W. Horngren
10 Attorneys for Proposed
11 Intervenor Vaagen Bros.
12 Lumber, Inc.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE)
 COUNCIL, an Oregon)
 corporation,)

Plaintiff,)

v.)

DANIEL R. GLICKMAN, in his)
 capacity as Secretary of)
 Agriculture, BRUCE BABBITT, in)
 his capacity as Secretary of)
 Interior,)

Defendants.)

No. 95-6244-HO (Lead)
 No. 95-6267-HO (Consolidated)

[PROPOSED] ORDER

Vaagen Bros. Lumber, Inc. has joined in Northwest
 Forest Resource Council's (NFRC) motions seeking release of sales
 and for enforcement of this Court's October 17, 1995 order.
 Having reviewed the filings of the parties in this matter, the
 emergency nature of Section 2001(k), and the urgent need of
 Vaagen Bros. for a decision so that it can avoid closure of its

: : :
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 : : :

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1 sawmills, this Court hereby declares that defendant Glickman is
2 required to release and permit to be completed the Gatorson
3 Timber Sale.

4 DATED this ____ day of _____, 1995.

6
7 Honorable Michael G. Hogan
District Judge

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GENERAL LITIGATION SECTION
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NUMBER OF PAGES: 27

DATE: November 28, 1995

FROM: Paula Clinedinst, Paralegal, 272-4698

MESSAGE: Attached is NFRC's Reply Memo in Support of Third Motion for Summary Judgment and in Support of Motion for Further Clarification or Enforcement of the Court's 10/17 Injunction.

Effective Friday 12/1 at 6 PM, the General Litigation's new fax number will be 305-0429.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE)	Civil No. 95-6244-HO
COUNCIL, an Oregon corporation,	)	Lead Case
)	
Plaintiff,	)	Civil No. 95-6267-HO
	)	Consolidated Cases
vs.)	
)	
DAN GLICKMAN, in his capacity)	
as Secretary of Agriculture;)	
BRUCE HABBITT, in his capacity)	
as Secretary of the Interior,)	
)	
Defendants.)	

NPRC'S REPLY MEMORANDUM IN SUPPORT OF
THIRD MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF
MOTION FOR FURTHER CLARIFICATION
OR ENFORCEMENT OF THE COURT'S
OCTOBER 17 INJUNCTION

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INTRODUCTION

The defendants have narrowed the issues in dispute by conceding that seven timber sales they previously withdrew or suspended, but were never enjoined by a court, are subject to section 2001(k) and must be released. Defendants' Response to NFRC's Two Motions Seeking Release of 11 Sales Subject To Injunctions Or Other Court Orders at 3 ("As to the remaining seven sales . . . defendants are not aware of grounds for contesting their release.").

Defendants' concession has narrowed the remaining issues in this case to 15 sales containing 54 million board feet of timber in the following five categories:

1. Three sales¹ where the Forest Service has refused to award a sale because the agency erroneously believes the original high bidder is out of business. See Declaration of Les Bridges, ¶ 2 (filed herewith). This category contains 7.8 million board feet of sales.

2. One sale² where the Forest Service has refused to award a sale because the original high bidder is in fact out of business. This category includes .7 million board feet of timber.

¹ The sales are Eagle Ridge Houselog, Allen and Prong Salvage.

² The sale is the Horn Salvage sale.

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1 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR FURTHER CLARIFICATION OR ENFORCEMENT OF THE COURT'S OCTOBER 17 INJUNCTION

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1 3. Four sales³ where the Forest Service or BLM has refused
2 to award the sale because the original high bidder rejected the
3 contract at some time in the past. This category contains
4 somewhere over 7.6 million board feet of sales.

5 4. Three sales⁴ where the Forest Service has refused to
6 award a sale because the sale has been "re-marked" on the ground,
7 although the original high bidder still desires award of the sale
8 on its original terms. The volume in this category is 8.5
9 million board feet of sales.

10 5. Four sales⁵ that may or may not be enjoined in the
11 *Seattle Audubon Society v. Thomas* case in the Western District of
12 Washington. Judge Dwyer has stayed that case pending this
13 court's ruling on the applicability of section 2001 to these four
14 sales. The volume in this category is 29.6 million board feet.

15 The plain language of section 2001(k)(1) requires the award
16 and release of these sales:

17 a. Where the high bidder is not in fact out of business,
18 the sales should be awarded just like any other sales.

19 b. The "out of business" and "rejected" sales should be
20 awarded in the manner established in the Forest Service and BLM

21 _____
22 ³ The sales are the Hiack Thin and Holdaway 2 sales from the
23 Forest Service and the Olalla Wildcat and Twin Horse sales from
the BLM.

24 ⁴ The sales are the Stagecoach, Bald and Bugout Salvage
sales.

25 ⁵ The sales are the Cowboy, Nita, South Nita and Garden
26 sales.

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1 regulations which cover this very issue.

2 c. The re-marked sales should be awarded under the
3 statute; the fact that the Forest Service may need to visit the
4 site to mark trees does not create an implied exemption under
5 section 2001(k)(1) for those sales.

6 d. The statute also requires the award and release of the
7 four enjoined sales, although the court issuing the original
8 injunction will have to vacate the injunction before the sales
9 can actually be awarded and released. Section 2001(k)(1)
10 requires the award and release of sales "notwithstanding any
11 other provision of law," which makes the past legality or
12 illegality of a sale immaterial.

13 Defendants have recognized that section 2001(k)(1) requires
14 the award and release of previously-illegal sales. Defendants
15 have conceded their duty to release the Tip, Tiptop and Gaterson⁶
16 sales that courts had found illegal under the National Environ-
17 mental Policy Act ("NEPA"). They have already awarded and
18 released the Elk Fork and Boulder Krab sales they had withdrawn
19 in the face of claims of illegality under NEPA and the Wild and
20 Scenic Rivers Act.

21 Defendants have even conceded that sales prepared in
22 violation of section 318 must be awarded and released under
23 section 2001(k): defendants concede their duty to award and
24

25 ⁶ NFRS represents the purchasers of these sales. Fifth
26 Declaration of Robert E. Ragon, ¶ 2 (filed herewith).

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3 - NFRS'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR
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1 release the Last and First sales on the Umpqua National Forest
2 although they admit the two sales violated section 318 for the
3 same reason as their four companion sales that were enjoined by
4 Judge Dwyer, and the Forest Service withdrew these two sales in
5 1990 solely because it faced a certain injunction based on
6 section 318.

7 These concessions are fatal to defendants' position on the
8 four enjoined sales. For the same reasons section 2001(k)(1)
9 requires the award and release of the Tip, Tiptop and Gaterson
10 sales even though a court has determined they violate NEPA; for
11 the same reasons the statute requires award and release of the
12 Elk Fork and Boulder Krab sales even though the sales in fact
13 conflicted with NEPA or another previously-applicable environmen-
14 tal law; and for the same reasons the statute requires award and
15 release of the Last and First sales even though the sales
16 violated section 318 in exactly the same way as the four enjoined
17 sales, the statute also requires the award and release of the
18 four enjoined sales.

19 All 15⁷ of the timber sales still in dispute are subject to
20 award and release under section 2001(k)(1), as are the seven
21 sales which defendants have conceded to be subject to the
22 statute. The court should grant declaratory and injunctive
23

24 ⁷ NFRC does not seek the release of any sales except the 15
25 sales described in this memorandum, as well as the FY 1991-95
26 sales and the murrelet sales that are the subject of its other
two motions for summary judgment.

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4 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
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1 relief compelling the award and release of these sales; for
2 currently enjoined sales, the court should direct award and
3 release following the vacating of the injunction by the court
4 that originally issued the injunction.

5 **ARGUMENT**

6 **I. SECTION 2001(k) COMPELS THE AWARD AND RELEASE OF**
7 **THREE TIMBER SALES TO ROGGE WOOD PRODUCTS, INC.**
8 **SINCE THE COMPANY IS NOT OUT OF BUSINESS AND SEEKS**
9 **AWARD OF THE SALES.**

10 The defendants have refused to award three FY 1991-95 timber
11 sales to Rogge Wood Products, Inc. ("Rogge") of Wallowa, Oregon,
12 the high bidder on the sales, in the mistaken belief that Rogge
13 is out of business. See Eighth Declaration of Jerry L. Hofer at
14 6 (November 22, 1995) (attached to Federal Defendants' November
15 22, 1995 Compliance Report). Apart from whether the statute does
16 or does not permit the withholding of a sale where the high
17 bidder is in fact out of business, the Forest Service is simply
18 mistaken as to Rogge. Declaration of Les Bridges, ¶ 3 (filed
19 herewith). Rogge has informed the Forest Service that it is
20 capable of purchasing the three sales, and wants to be awarded
21 the three sales so it may "third-party" the sales to another
22 company, an established practice for Forest Service timber sales.
23 *Id.* Rogge's western Oregon affiliate entered into similar
24 transactions on four BLM sales that were subject to section
25 2001(k), and the BLM approved the transactions and awarded the
26 sales to the third-party transferee. *Id.* ¶ 5.

Since Rogge is willing and able to accept award of the three

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5 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
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1 sales, and since the defendants have admitted the three sales are
2 subject to section 2001(k)(1) under the court's October 17
3 injunction, there is no basis for the Forest Service to refuse to
4 award these three sales.

5 **II. SECTION 2001(k) COMPELS THE AWARD AND RELEASE OF**
6 **TIMBER SALES WHERE THE ORIGINAL HIGH BIDDER IS OUT**
7 **OF BUSINESS OR HAS REJECTED A SALE, OR WHERE THE**
8 **SALES HAVE BEEN RE-MARKED SUBSEQUENT TO OFFER.**

9 The defendants have refused to award one sale where the
10 original high bidder is in fact now out of business, four sales
11 where the original high bidder at some point rejected award of a
12 sale, and three sales which were "re-marked" on the ground after
13 the sale was originally offered. Defendants have never offered
14 any explanation for why they have refused to award these sales.
15 See Federal Defendants' Compliance Reports, October 25-November
16 22, 1995. They evidently believe section 2001(k)(1) implicitly
17 exempts these categories of sales from award and release.

18 There are no implied exemptions in section 2001(k)(1) for
19 any of these circumstances. The statute requires the defendants
20 to award and release all these sales, using the established
21 Forest Service and BLM procedures as required to achieve award.

22 **A. Section 2001(k)(1) does not contain implied exemptions for**
23 **sales where the high bidder is out of business or has**
24 **rejected a sale or where the sale was subsequently re-marked**
25 **on the ground.**

26 **1. "All" means "all."**

The statute requires the Secretaries to award and release
"all timber sale contracts offered or awarded before [July 27,
1995]" in the section 318 geographic area. "All" means "all."

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6 - NFRS'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
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1 The statute simply does not contain any exception for contracts
2 where the high bidder has gone out of business or has rejected a
3 sale, or where the sale has been re-marked on the ground.

4 The first rule of statutory interpretation is that a statute
5 is interpreted and applied according to its plain meaning.
6 *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*
7 467 U.S. 837, 843 (1984). There are few words in the English
8 language clearer than "all." Cf. *Commissioner v. Asphalt*
9 *Products Co., Inc.*, 482 U.S. 117, 120 (1987) ("any" means "any";
10 no implied exceptions exist); *Securities Industry Ass'n v.*
11 *Connolly*, 883 F.2d 1114, 1118 (1st Cir. 1989) ("any contract"
12 means "any contract"; no implied exceptions exist). The three
13 implied exemptions to "all timber sale contracts" in section
14 2001(k)(1) claimed by the defendants simply do not exist.

15 **2. The existence of the express (k)(2) exemption negates**
16 **the existence of implied exemptions in (k)(1).**

17 The express exemption in subsection (k)(2) for sale units
18 where a threatened or endangered bird species is "known to be
19 nesting" negates the existence of implied exemptions in (k)(1).
20 Under the doctrine of *expressio unius est exclusio alterius*,
21 "[t]he express enumeration [of an exception] indicates that other
22 exceptions should not be implied." *In Re Gerwer*, 898 F.2d 730,
23 732 (9th Cir. 1990); *U.S. v. Newman*, 982 F.2d 665, 673 (1st Cir.
24 1992) ("Under the principle of *expressio unius est exclusio*
25 *alterius*, the enumeration of specific exclusions from the
26 operation of a statute is an indication that the statute should

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7 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
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apply to all cases not specifically excluded"); *U.S. v. Rocha*, 916 F.2d 219, 243 (5th Cir. 1990) (same). There is no implied exemption for sales where the high bidder is out of business. where the high bidder previously rejected a sale, or where a sale has been "re-marked" on the ground.

3. *Forest Service and BLM procedures provide for award to the highest available bidder, at the high bid price, when a high bidder cannot or will not accept award of a sale.*

Both the Forest Service and the BLM have adopted procedures to handle the situation where a high bidder on a sale either cannot or will not accept the award of a sale. The Forest Service regulation provides that if the high bidder cannot accept award of a sale, "award at the highest bid price may be offered to the next highest qualified bidder or to the other qualified bidders in order of their bids until the award is accepted by one or refused by all of the qualified bidders." 36 C.F.R. § 223.102 (Exhibit A).

The BLM Oregon state office Timber Sale Procedure Handbook similarly provides: "When the successful bidder fails to sign and return the contract, and any required bond and payments, the contract may be offered or awarded for the amount of the high bid to the highest of the bidders who is qualified, responsible, and willing to accept the contract" BLM Timber Sale Procedures Handbook 5450-1, ¶ VII (D) (Exhibit B).

Thus, both agencies have established procedures addressing the situation where a high bidder cannot or will not accept a

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8 - NFRS'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR FURTHER CLARIFICATION OR ENFORCEMENT OF THE COURT'S OCTOBER 17 INJUNCTION

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1 bid. There is no reason to believe Congress did not expect those
2 procedures to apply to section 2001(k) sales.

3 The purpose of section 2001(k) was not to confer a personal
4 privilege on an original high bidder of a sale; the purpose was
5 to get timber into the market promptly. Congressman Taylor, the
6 author of § 2001(k)(1), explained that it will "immediately
7 provid(e) substantial amounts of timber for mills hurt by Federal
8 supply reductions." 141 Cong. Rec. H3233 (daily ed. March 15,
9 1995) (Exhibit 5). The Senate sponsors intended section 2001(k)
10 "to provide some short-term relief to timber communities," 141
11 Cong. Rec. S10463 (daily ed. July 21, 1995) (remarks of Sen.
12 Gorton) and "to get wood to the mills of the Pacific Northwest in
13 the next 18 months." 141 Cong. Rec. S4882 (daily ed. March 30,
14 1995) (remarks of Senator Hatfield). There is absolutely no hint
15 that Congress intended a sale to be withheld under section
16 2001(k) simply because the passage of time has caused a particu-
17 lar high bidder to be unable or unwilling to accept the award of
18 a sale.⁹

19
20
21
22
23 * Amicus ONRC argues that the award of a sale is not
24 required unless the offering agency is "willing" to sell the
25 sale. The subjective desires of the offering agency are irrele-
26 vant under section 2001(k). Congress has directed the agencies
to award the sales under section 2001(k); that Congressional
direction makes the agencies "willing" under principles of
contract law.

Page

9 - NFR's REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR
FURTHER CLARIFICATION OR ENFORCEMENT OF THE COURT'S
OCTOBER 17 INJUNCTION

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NO1-9506\1R890875.1CN

III. SECTION 2001(k) COMPELS THE AWARD AND RELEASE OF
TIMBER SALES SUBJECT TO A PRE-EXISTING INJUNCTION.

A. There is no implied exemption in section 2001(k) for timber sales previously enjoined by a court.

There also is no implied exemption in section 2001(k) (1) for timber sales previously enjoined by a court.⁹ "All sales" means "all sales." Further, Congress made the prior legal status of sales irrelevant by unconditionally ordering their award and release "notwithstanding any other provision of law."

Defendants do not argue that the words of section 2001(k) (1) exempt the four enjoined sales. Rather, they argue that the four enjoined sales do not seem to fit the description of the goal of the statute offered in some of the legislative history. Defendants' Response to NFRF's Two Motions Seeking Release of 11 Sales (November 21, 1995) at 13-14.

Yet defendants themselves have conceded that Congress did intend to release sales that had been prepared in violation of a statute:

1. Defendants now concede their duty to release the Tip, Tiptop and Gaterson sales although each of these sales was found illegal under NEPA.

2. Defendants previously awarded and released the Elk Fork

⁹ It is not clear that there is any injunction outstanding against any of the four timber sales in the Western District of Washington. Judge Dwyer indicated in his stay order of November 3, 1995 that he would consider any party's motion relating to the four sales after this court rules. If this court determines that the statute applies to the four sales that may be enjoined, Judge Dwyer can determine if the sales are in fact enjoined.

Page

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NO1-9508\1RB90875.1CN

1 and Boulder Krab sales that were withdrawn in the face of claims
2 of illegality under NEPA and the Wild and Scenic Rivers Act.

3 3. Defendants now also concede their duty to award and
4 release the Last and First sales on the Umpqua National Forest
5 even though Judge Dwyer had already ruled that the process used
6 by the Umpqua National Forest to prepare these sales and the
7 Cowboy, Nita, South Nita and Garden sales violated section 318,
8 and had enjoined the Cowboy, Nita, South Nita and Garden sales
9 based on that violation. The Forest Service withdrew these two
10 sales in 1990 solely because they faced a certain injunction
11 based on that violation of section 318.

12 Defendants have pointed to nothing in the words of section
13 2001(k) (1) or the legislative history of the section that treats
14 the illegality of the Tip, Tiptop, Gatorson, Elk Fork, Boulder
15 Krab, Last and First timber sales differently than the illegality
16 of Cowboy, Nita, South Nita and Garden. There is no difference;
17 all the sales were offered prior to July 27, 1995, and all must
18 be awarded and released under section 2001(k) (1) "notwithstanding
19 any other provision of law."

20 Scott Timber Co. of Douglas County, Oregon is the high
21 bidder on all four of the enjoined sales. Scott Timber Co. is
22 ready, willing and able to purchase and log all of these sales,
23 and seeks prompt award of the sales so it can complete harvest of
24 the sales during the period of legal protection that ends
25 September 30, 1996. Declaration of Allyn Ford, ¶ ¶ 2-6 (filed
26 herewith).

Page

11 - NFRCS REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR
FURTHER CLARIFICATION OR ENFORCEMENT OF THE COURT'S
OCTOBER 17 INJUNCTION

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NO1-9506\1RB90875.1CN

1 B. Section 2001(k)(1) does not violate the separation of powers
2 doctrine.

3 1. Section 2001(k) changes the underlying law with respect
4 to these and other timber sales, and does not prescribe
5 a rule of decision.

6 Amicus Oregon Natural Resources Council argues that
7 § 2001(k) violates the separation of powers doctrine because, as
8 they read it, the statute requires a court to reopen a final
9 judgment. This argument has no merit.¹⁰

10 In challenging the constitutionality of § 2001(k) ONRC
11 presents the same separation of powers arguments that were
12 rejected by the Supreme Court regarding section 318. *Robertson*
13 *v. Seattle Audubon Society*, 503 U.S. 429, 430 (1992). For the
14 same reasons those arguments failed regarding section 318, they
15 lack merit here.

16 Like section 318, § 2001(k) provides a temporary legislative
17 resolution to a portion of the forestry controversy in the
18 Pacific Northwest. By requiring the immediate award and release
19 of certain timber sales notwithstanding any other provision of
20 law, § 2001(k) properly "compelled changes in law, not findings
21 or results under old law." *Robertson v. Seattle Audubon Society*,
22 503 U.S. at 430.

23 Congress did not direct a particular decision in a case,
24 while leaving the applicable substantive and remedial law in

25 ¹⁰ Although ONRC makes the argument as to the four enjoined
26 sales and the Last and First sales, there can be no separation of
powers argument as to Last and First since they were never
subject to a court order.

Page

12 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR
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OCTOBER 17 INJUNCTION

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NO1-9506\1RB90875.1CN

1 place. Cf. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.
 2 Ed. 519 (1871). As the Ninth Circuit has explained, Congress may
 3 not "direct[] certain findings in pending litigation, without
 4 changing any underlying law" *Gray v. First Winthrop*
 5 *Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993). Congress did not
 6 direct findings or adopt a rule of decision in § 2001(k).
 7 Instead, Congress changed the applicable substantive law by
 8 requiring release of these and other sales "notwithstanding any
 9 other provision of law." This is precisely what Congress is
 10 empowered by the Constitution to do.

11 The fact that the Western District of Washington litigation
 12 is concluded does not lessen Congress' authority to change the
 13 law and permit what formerly was prohibited. In *Pennsylvania v.*
 14 *The Wheeling and Belmont Bridge*, 59 U.S. (18 How.) 421, 15 L. Ed.
 15 435 (1855), the Supreme Court had originally declared that, based
 16 on certain acts of Congress, the Wheeling bridge was an obstruc-
 17 tion of navigation and had ordered it torn down. After a final
 18 judgment was entered and the case was ended, Congress passed a
 19 law declaring that the bridge was lawful. When the defendants
 20 then rebuilt the bridge, plaintiffs challenged the new law as
 21 unconstitutional because it had "the effect and operation to
 22 annul the judgment of the court already rendered." 15 L. Ed. at
 23 437.

24 The Court rejected this claim and held the law constitu-
 25 tional. The Court explained that because its earlier order had
 26 been based on one statute, there was no constitutional bar to

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13 - NPRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
 FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR
 FURTHER CLARIFICATION OR ENFORCEMENT OF THE COURT'S
 OCTOBER 17 INJUNCTION

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NOI-9506\1R890875, JCN

1 Congress changing the underlying substantive law and thereby
2 removing the basis for the Court's previous order, thus requiring
3 the dissolution of the injunction:

4 So far, therefore, as this bridge created an
5 obstruction to the free navigation of the
6 river, in view of the previous Acts of Con-
7 gress, they are to be regarded as modified in
8 this subsequent legislation; and although it
9 still may be an obstruction in fact, is not
10 so in the contemplation of law.

11 [T]hat part of the decree, directing the
12 abatement of the obstruction, is executory,
13 a continuing decree, which requires not only
14 the removal of the bridge, but enjoins the
15 defendants against any reconstructions or
16 continuance. . . . If, in the meantime,
17 since the decree, this right has been modi-
18 fied by the competent authority, so the
19 bridge is no longer an unlawful obstruction,
20 it is quite plain the decree of the court
21 cannot be enforced.

22 *Id.*

23 The Ninth Circuit has confirmed that Congress may change the
24 underlying substantive law, even making that change applicable to
25 a specific case. "[I]t is of no constitutional consequence that
26 [the statute] affects, or is even directed at, a specific
judicial ruling so long as that legislation modifies the law."
Gray v. First Winthrop Corp., 989 F.2d at 1569 (citing *Wheeling
and Belmont Bridge*). The Ninth Circuit in *Gray* stated that the
Supreme Court's decision in *Robertson* "indicates a high degree of
judicial tolerance for an act of Congress that is intended to
affect litigation so long as it changes the underlying substan-
tive law in any detectable way." *Id.* at 1569-70.

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Page

14 - NFRS'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR
FURTHER CLARIFICATION OR ENFORCEMENT OF THE COURT'S
OCTOBER 17 INJUNCTION

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1 Congress can constitutionally change the law and permit an
2 action previously ruled unlawful by a court in either a pending
3 case or a completed case. *Robertson* confirms Congress' power to
4 change the law in pending cases, and *Wheeling and Belmont Bridge*
5 confirms Congress' power to change the law to overturn an
6 injunction where a final judgment has already been entered.

7 The recent case of *Plaut v. Spendthrift Farm, Inc.*, 115 S.
8 Ct. 1447, 131 L. Ed. 2d 328 (1995), does not change this analy-
9 sis. There, the Court was faced with legislation that "pre-
10 scribes what the law was at an earlier time," and retroactively
11 required courts to reopen closed cases and apply the new law to
12 those old cases. 131 L. Ed. 2d at 346. The Court stated that
13 "apart from the statute we review today, we know of no instance
14 in which Congress has attempted to set aside the final judgment
15 of an Article III court by retroactive legislation." *Id.* at 349.

16 In enacting § 2001(k) Congress has not prescribed what the
17 law was prior to the statute's enactment, nor ordered a court to
18 set aside a final judgment. Instead, Congress has simply changed
19 the substantive law, just as it properly did with section 318 in
20 *Robertson*, and as it did in the *Wheeling and Belmont Bridge* case.

21 When Congress changes the underlying law to permit or
22 require what formerly was prohibited, courts have a duty to apply
23 and enforce the new law. "When a change in the law authorizes
24 what had previously been forbidden it is an abuse of discretion
25 for a court to refuse to modify an injunction founded on the
26 superseded law." *American Horse Protection Association v. Watt*,

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15 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
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OCTOBER 17 INJUNCTION

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NO1-9506\1R890875.1CM

1 694 F.2d 1310, 1316 (D.C. Cir. 1982). There is no separation of
2 power defect to section 2001(k).

3 **CONCLUSION**

4 The defendants are obligated to award and release all 15 of
5 the sales that remain contested, as well as the seven sales which
6 the defendants have conceded to be subject to award and release
7 under § 2001(k). The court should order the defendants to award
8 and release all of the sales that are not subject to formal court
9 injunctions within two working days, and should order the
10 defendants to award and release any currently enjoined sales
11 promptly after taking all necessary steps to vacate any existing
12 injunction issued by another court.

13 Dated this 28th day of November, 1995.

14 MARK C. RUTZICK LAW FIRM
15 A Professional Corporation

16 By: 
17 Mark C. Rutzick
18 Alison Kean Campbell
19 Attorneys for Plaintiff

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Page

16 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF THIRD MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR
FURTHER CLARIFICATION OR ENFORCEMENT OF THE COURT'S
OCTOBER 17 INJUNCTION

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Title 36—Parks, Forests, and Public Property

§ 223.102 Procedures when sale is not awarded to highest bidder.

If the highest bid is not accepted and the sale is still deemed desirable, all bids may be rejected and the timber readvertised; or, if the highest bidder cannot meet the requirements under which the timber was advertised or the withholding of award to him is based on one or more of paragraphs (c), (d), and (e) of § 223.100, award at the highest price bid may be offered to the next highest qualified bidder or to the other qualified bidders in order of their bids until the award is accepted by one or refused by all of the qualified bidders.

EXHIBIT A
PAGE 1 of 1

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

Attorneys for Plaintiff

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

10	NORTHWEST FOREST RESOURCE)	
	COUNCIL, an Oregon corporation,)	
11		)	Civil No. 95-6244-HO
	Plaintiff,	)	Lead Case
12)	
	vs.	)	Civil No. 95-6267-HO
13		)	Consolidated Cases
	DAN GLICKMAN, in his capacity)	
14	as Secretary of Agriculture;	)	FIFTH DECLARATION OF ROBERT
	BRUCE BABBITT, in his capacity	)	E. RAGON
15	as Secretary of the Interior,)	
)	
16	Defendants.)	

18 Robert E. Ragon, with full knowledge of the penalty of
19 perjury, declares as follows:

20 1. I currently serve as the chairman of the Northwest
21 Forest Resource Council ("NFRC"), plaintiff in this case. I have
22 filed four previous declarations in this case. I make this
23 declaration on personal knowledge, and if called to testify as a
24 witness herein would testify as set forth below.

25 2. NFRC represents Longview Fibre, purchasers of the
26 Tip timber sale, and St. Joe Lumber, purchasers of the Tiptop

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1 timber sale. NFRC would also represent Vaagen Brothers Lumber
2 Co. except that company has separately moved for intervention as
3 a plaintiff in this case.

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

6 Executed on November 22, 1995.

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8 
9 Robert E. Ragon

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1 Mark C. Rutzick, OSB # 84336
 2 Alison Kean Campbell, OSB #93011
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 5 500 Pioneer Tower
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 9
 10 Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE) COUNCIL, an Oregon corporation,)) Plaintiff,)) vs.)) DAN GLICKMAN, in his capacity) as Secretary of Agriculture;) BRUCE BABBITT, in his capacity) as Secretary of the Interior,)) Defendants.)	Civil No. 95-6244-HO Lead Case Civil No. 95-6267-HO Consolidated Cases DECLARATION OF MARK C. RUTZICK REGARDING THE DECLARATION OF LES BRIDGES
--	--

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

1. I am one of the attorneys for plaintiff Northwest Forest Resource Council in this action. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. Attached hereto is a true and correct copy of the Declaration of Les Bridges which we received by telefax from him this morning. An original will be filed with the court as soon

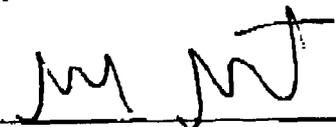
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as it is received.

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

Executed on November 27, 1995.



Mark C. Rutzick

Page

2 - DECLARATION OF MARK C. RUTZICK REGARDING THE DECLARATION OF LES BRIDGES

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5 Attorneys for Plaintiff

6
 7
 8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE DISTRICT OF OREGON

10	NORTHWEST FOREST RESOURCE)	
	COUNCIL, an Oregon corporation,)	
11		)	Civil No. 95-6244-HO
	Plaintiff,	)	Lead Case
12)	
	vs.	)	Civil No. 95-6267-HO
13		)	Consolidated Cases
	DAN GLICKMAN, in his capacity)	
14	as Secretary of Agriculture;	)	DECLARATION OF LES BRIDGES
	BRUCE BABBITT, in his capacity)	
15	as Secretary of the Interior,)	
)	
16	Defendants.)	

17
 18 Les Bridges, with full knowledge of the penalty of perjury,
 19 declares as follows:

20 1. I am the general manager of Rogge Wood Products, Inc.
 21 in Wallowa, Oregon. I make this declaration on personal knowl-
 22 edge, and if called to testify as a witness herein would testify
 23 as set forth below.

24 2. My company was the high bidder on the Allen, Prong
 25 Salvage and Eagle Ridge Houselog timber sales on the Wallowa-
 26 Whitman and Umatilla National Forests in eastern Oregon. I

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1 understand that the Forest Service has filed court documents
2 stating that they will not award these sales to my company
3 because they believe we are out of business and do not want the
4 sales.

5 3. When I learned that the Forest Service held this
6 belief, I wrote the two forest supervisors a letter informing
7 them that the Forest Service was mistaken about my company's
8 status, that my company is not out of business and that we would
9 like to receive the award of these sales to transfer them in a
10 third-party transaction to D.R. Lumber Co., which will operate
11 them to completion. A copy of my letter is attached to this
12 declaration.

13 4. I have not received any response from the Forest
14 Service to my letter, and none of the sales have been awarded to
15 my company.

16 5. The western Oregon affiliate of our company, Rogge
17 Forest Products, Inc., recently entered into a similar third-
18 party transaction with another company (Lone Rock Timber Co.)
19 transferring four BLM timber sales that were subject to the
20 emergency timber salvage law. The BLM approved the third-party
21 transfer of these sales and I understand these sales have all
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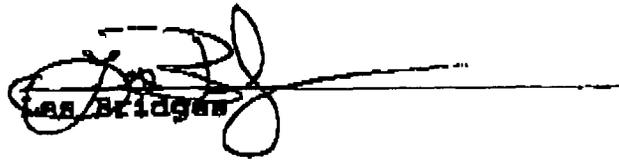
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been awarded to Lone Rock Timber Co.

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

Executed on November 27th, 1995.



Les Bridges

AROGGE

WOOD PRODUCTS, INC.
P.O. BOX 547
WALLOWA, OREGON 97885

(503) 888-2651
FAX: (503) 888-8185

October 31, 1995

Bob Richmond
Forest Supervisor
Wallowa-Whitman National Forest
PO Box 907
Baker City, OR 97814

Dear Bob Richmond and John Klines

I am writing to discuss the status of the Allen, Cantrel Spring, Prong Salvage and Eagle Ridge Houselog tieber sales. Our company was the high bidder at the auction of these sales.

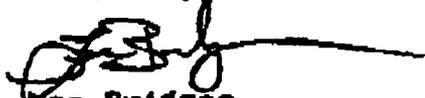
I understand that the Forest Service has a misunderstanding about our company's financial condition. I want to correct the record. Our company is financially responsible and able to bond and perform these sales. We intend to third-party these sales to O. R. Johnson Lumber Co., which will provide all necessary bonding to supplement our bonding capacity.

Our western Oregon company similarly third-partied several BLM timber sales to another company, and those sales were awarded by the BLM under the emergency timber salvage law.

The letter I wrote Carla Tipton on October 11 does not apply to these four sales. I was told by the Forest Service that I would need to state in the letter that our company is financially insolvent in order for the Forest Service to approve our agreement to third-party the McKay tieber sale to another party. That is why I wrote that letter.

We want to be awarded these four sales as soon as possible. Please let us know when the award will occur.

Sincerely,



Les Bridges
General Manager

LBs:jb

Attachment A

AROGGE

WOOD PRODUCTS, INC.
P.O. BOX 647
WALLOWA, OREGON 97825

(503) 886-2851
FAX: (503) 886-8185

October 31, 1995

John P. Kline
Acting Forest Supervisor
Umatilla National Forest
2517 SW Halley Ave
Pendleton, OR 97801

Dear John Kline and Bob Richards:

I am writing to discuss the status of the Allen, Central Spring, Prong Salvage and Eagle Ridge Houslog timber sales. Our company was the high bidder at the auction of these sales.

I understand that the Forest Service has a misunderstanding about our company's financial condition. I want to correct the record. Our company is financially responsible and able to bond and perform these sales. We intend to third-party these sales to D. R. Johnson Lumber Co., which will provide all necessary bonding to supplement our bonding capacity.

Our western Oregon company similarly third-partied several BLM timber sales to another company, and those sales were awarded by the BLM under the emergency timber salvage law.

The letter I wrote Carla Tipton on October 11 does not apply to these four sales. I was told by the Forest Service that I would need to state in the letter that our company is financially insolvent in order for the Forest Service to approve our agreement to third-party the McKay timber sale to another party. That is why I wrote that letter.

We want to be awarded these four sales as soon as possible. Please let us know when the award will occur.

Sincerely,



Les Bridges
General Manager

LB:jwb

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 3 Portland, OR 97204-2024
 (503) 727-1008

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 5 Assistant Attorney General
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 6 JOHN WATTS
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 7 U.S. Department of Justice
 Environment and Natural Resources Division
 8 General Litigation Section
 P.O. Box 663
 9 Washington, D.C. 20044-0663
 Telephone: (202) 272-8338

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

13 NORTHWEST FOREST RESOURCE COUNCIL,)
)
 14 Plaintiff,)
)
 15 v.)
)
 16 DAN GLICKMAN, in his capacity)
 as Secretary of Agriculture,)
 17 BRUCE BABBITT, in his capacity)
 as Secretary of Interior)
 18)
 Defendants.)
 19)

Civil No. 95-6244-HO

NOTICE OF FILING
 RE SIXTH DECLARATION
 OF JERRY L. HOFER

20 Federal defendants hereby attach the Sixth Declaration of
 21 Jerry L. Hofer. This document is intended to correct and amend
 22 the Fifth Declaration of Jerry L. Hofer attached to federal
 23 defendants' Notice of Filing and Request for Additional Time to
 24 Supplement BLM Compliance Report in Light of Government Furlough.

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 28 NOTICE OF FILING RE: SIXTH
 DECLARATION OF JERRY L. HOFER - 1

1 Dated this 16th day of November, 1995.

2 Respectfully submitted,

3 KRISTINE OLSON
4 United States Attorney

5 LOIS J. SCHIFFER
6 Assistant Attorney General

7 

8 MICHELLE L. GILBERT
9 JOHN WATTS
10 EDWARD BOLING
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13 Resources Division
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Washington, D.C. 202-272-6217

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

v.

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

Defendants.

Civil No. 95-6244-HO

SIXTH DECLARATION OF
JERRY L. HOFER

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

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

2. On November 15, 1995, I executed the FIFTH DECLARATION OF
OF JERRY L. HOFER, to which was attached Exhibit 1, Timber Sales

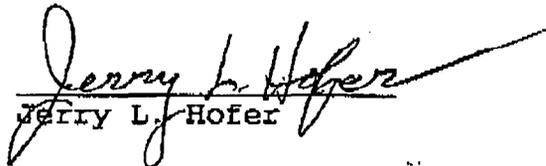
Offered or Awarded Prior to FY91. It has come to my attention that two entries in Exhibit 1 are in error. I make this sixth declaration to correct the errors and provide an Amended Exhibit 1.

3. The Amended Exhibit 1 corrects the errors as to Prong and Mr. Rogers Timber Sales on the Siuslaw (SIU) National Forest by changing their status from "Awarded; Contract Suspended, Marbled Murrelet" to "Not Awarded, Marbled Murrelet."

4. This amendment to Exhibit 1 now discloses that 54 timber sale contracts have been awarded prior to FY91, but suspended and that 42 timber sales have been offered, but not awarded, prior to FY91.

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

Executed at Portland, Oregon, on November 15, 1995.


Jerry L. Hofer

Amended Exhibit 1 to the Sixth Declaration of Jerry L. Hofer

Forest Service, Region 6

Timber Sales Offered or Awarded Prior to FY 91

Prepared pursuant to the Court's Order, October 17, 1995, NFRC v. Glickman, Civ. No. 95-6244HO

18-Nov-95 10:17 AM

Forest	Sale Name	Bld Date	Original Volume	High-Bidder	Previously Reported to The Court	Sale Status
FRE	AUGER	09/26/89	11500	Fremont Sawmill	Yes	Not Awarded, ONRC v. Grossarth, Civ. No. 89-6451
GIP	SILVER 7	02/24/89	6700	Pacific Lumber Sales Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	POLAR 2	03/20/89	9300	Stinson Lumber	No	Not Awarded, pursuant to Section 318 (f) (1)
MBS	SIBLEY	03/14/89	4950	Summit Timber	No	Not Awarded, pursuant to Section 318 (f) (1)
	FLASH GORDON	03/09/89	6450	Miller Shingle Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SKOOKUM DOE	09/11/85	16500	Marshall Logging, Inc.	No	Not Awarded, records indicate litigation
	DRY RANGER	08/21/85	23700	Auburn Timber	No	Not Awarded, records indicate litigation
	H. 410 SILV. #2 SSTS	10/19/83	330	Pat Johnson	No	Not Awarded
	FISH STORY	12/12/89	6700	LB&R Logging	Yes	Awarded: Contract Suspended, Marbled Murrelet
	OLD GRADE	08/14/80	9900	Summit Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	MEDIAN BUYBACK	09/27/90	7190	LB&R Logging	Yes	Awarded: Contract Suspended, Marbled Murrelet
	STALWART	09/16/90	2800	Miller Shingle	Yes	Awarded: Contract Suspended, Marbled Murrelet
	SCRAPS	09/27/90	7550	Miller Shingle	Yes	Awarded: Contract Suspended, Marbled Murrelet
	BOYD CREEK	09/25/90	3750	Horn Shingle	Yes	Awarded: Contract Suspended, Marbled Murrelet
	CLEAR CREEK	08/21/90	3435	Buse Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
MTH	PISTOL RESELL	02/28/89	9900	Vanport Mfg. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	JIGSAW	03/07/89	15100	Vanport Mfg. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	ROCK BUTTE RESELL	03/21/89	5450	Stevenson Co-Ply. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	BI	03/21/89	8200	Frees Lumber Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SI	03/21/89	5700	Frank Lbr. Co., Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
OLY	LONER ELK	01/29/89	3380	Last Camp Timber	No	Not Awarded, Spotted Owls
	CAMEL	01/04/90	6050	Mayr Brothers	Yes	Awarded: Contract Suspended, Marbled Murrelet
	NOT BAD	07/02/90	7290	Hoh River Lumber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	DEODAR	09/14/90	9900	Hoh River Lumber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	YOU WHO	09/14/90	12400	MCMC Resources	Yes	Awarded: Contract Suspended, Marbled Murrelet
	WEST BOUNDARY	08/20/90	4300	Mayr Brothers	Yes	Awarded: Contract Suspended, Marbled Murrelet
	WYNOCHEE RES.	09/24/90	16980	Mayr Brothers	Yes	Awarded: Contract Suspended, Marbled Murrelet
	STEVENS	09/06/90	5600	Mayr Brothers	Yes	Awarded: Contract Suspended, Marbled Murrelet
	SQUEEGEE	09/15/88	4800	Walle Star	Yes	Awarded: Suspended, Spotted Owls & Marbled Murrelet
ROR	ESMOND SALVAGE	05/30/84	500	JU Logging	No	Not Awarded
	SMALL TREE	09/28/83	1020	Jeffries Timber Corp.	No	Not Awarded
SIS	REDWOOD SPRINGS T	03/14/89	2720	CLR Timber Holdings, Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SUGAR CUBE	09/17/90	4830	CLR Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	WINRIVER	01/08/90	3140	CLR Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	SPUR TRIGGER	05/22/90	5420	CLR Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	LOBSTER	09/08/90	6560	CLR Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	FATHER OAK	03/28/90	5730	Scott Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	TAYLOR RANCH	12/27/89	5350	CLR Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	TOASTBERRY	06/08/90	4010	Scott Timber	Yes	Awarded: Contract Suspended, Marbled Murrelet
	GARDEN	09/12/90	4590	Medford Corporation	Yes	Not Awarded, SAS vs. Thomas 89-160WD
SIU	TENMILE 808	03/21/89	8637	Hampton Tree Farms	No	Not Awarded, pursuant to Section 318 (f) (1)
	MAYPOLE	03/01/84	5975	Davidson Industries	No	Not Awarded, Siuslaw Task Force vs. USFS, 83-1153MA
	PANTHER SALVAGE	03/29/84	2205	Ball Wood Products	No	Not Awarded, Siuslaw Task Force vs. USFS, 83-1153MA
	WASSER RANCH	09/21/82	9284	Bohemia, Inc.	No	Not Awarded, Siuslaw Task Force vs. USFS, 83-1153MA
	FOLAND RIDGE	09/25/90	4400	Hampton Tree Farms	Yes	Awarded: Contract Suspended, Marbled Murrelet
	GORDY BLUFF	05/29/90	7590	Hampton Tree Farms	Yes	Awarded: Contract Suspended, Marbled Murrelet

006/007

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Amended Exhibit 1 to the Sixth Declaration of Jerry L. Hofer

Forest Service, Region 6

Timber Sales Offered or Awarded Prior to FY 91

Prepared pursuant to the Court's Order, October 17, 1995, NFRC v. Glickman, Civ. No. 95-6244HO

18 Nov 93 9:57 AM

Forest	Sale Name	Bid Date	Original Volume	High Bidder	Previously Reported to The Court	Sale Status
SRU	NORTH BALL	04/11/89	6700	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SQUARE CLARE	05/29/90	10700	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BERRY BUSHEL	07/06/90	5500	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CONDON CARR.	09/11/90	6800	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FIVEMILE FLUME	09/27/90	7500	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FRANKLIN RDGE	09/11/90	5000	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	INDIAN HOOK	09/11/90	15200	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	LOWER BAILEY	09/27/90	3200	Lone Rock Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MARIA SKYLINE	09/20/90	12700	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SKYWALKER	09/04/90	7700	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SOUTH PAXTON	09/20/90	9200	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SUGAR MAPLE	03/08/90	6400	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SULPHUR	06/07/90	6400	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UNCLE CONDON	09/11/90	12800	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UPPER MCLEOD	09/11/90	5100	Seneca Sawmills	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BENNER BUNCH	12/19/89	10300	Bucaboo Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GRASS HULA	07/31/90	6700	Bucaboo Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GREEN APPLE	07/24/90	10100	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GREEN HORN	08/21/90	5800	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	RANDALL SALAD	09/28/90	6500	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	RYAN WAPITI	03/20/90	10700	Fries Lumber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BEAMER 712	06/26/90	8900	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CANAL 606	04/03/90	9400	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FORMADER 103	08/14/90	8300	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FORMADER 717	08/28/90	2400	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UPPERTEN 012	05/03/90	14485	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WAPITI 305	09/20/90	2300	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WHEELOCK 403	08/19/90	6013	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MR ROGERS	09/28/90	10000	Seneca Sawmills	Yes	Not Awarded, Marbled Murrelet
	PRONG	08/27/90	4800	Lone Rock Timber	Yes	Not Awarded, Marbled Murrelet
UMP	DONEGAN	03/15/89	14400	Boise Cascade Corp	No	Not Awarded, pursuant to Section 318 (b) (1)
	JUMP	03/15/89	3300	Deer Creek Timber, Inc.	No	Not Awarded, pursuant to Section 318 (b) (1)
	BVD	03/08/89	19980	Scott Timber Co.	No	Not Awarded, pursuant to Section 318 (b) (1)
	ROCK RIDGE	03/08/89	8700	Lone Rock Timber Co.	No	Not Awarded, pursuant to Section 318 (b) (1)
	IMALT	02/22/89	16400	Western Timber Co.	No	Not Awarded, pursuant to Section 318 (b) (1)
	WHISKEY THIN	07/11/84	370	Samuel Riddle	No	Not Awarded, no Cert of Competency at SBA
	ABES WREN	12/27/89	6580	D.R. Johnson Company	Yes	Awarded; Contract Suspended, Spotted Owls
	COWBOY	04/18/90	9400	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	NITA	08/29/90	9300	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	SOUTH NITA	08/28/90	6300	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	LAST	09/12/90	6700	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	FIRST	09/19/90	5100	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
WIL	DALY WEST	02/22/89	6000	Frank Lumber Co., Inc.	No	Not Awarded, pursuant to Section 318 (b) (1)
	BUNCHVIEW	02/28/89	16300	Penn Timber, Inc.	No	Not Awarded, pursuant to Section 318 (b) (1)
	METROETTE TBV	02/28/89	5800	Weyerhaeuser Co.	No	Not Awarded, pursuant to Section 318 (b) (1)
	COLD SALVAGE	03/01/89	250	John Ladd Logging	No	Not Awarded
	CUP SALVAGE	03/03/89	480	T. E. Richards	No	Not Awarded
	LATE	08/24/78	11600	TOMCO, Inc.	No	Not Awarded
	ANCHOVY	09/28/90	3400	Thomas Creek	Yes	Awarded; One Unit Suspended, Spotted Owls
COL	HELEN	09/13/83	11000	Boise Cascade Corp.	No	Not Awarded

007/007

11/17/95 13:33

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 6 Western Environmental Law Center
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 7 Eugene, OR 97401
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8 Local Counsel for Plaintiffs

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

11
 12 PILCHUCK AUDUBON SOCIETY, OREGON)
 NATURAL RESOURCES COUNCIL,)
 13 PORTLAND AUDUBON SOCIETY, BLACK)
 HILLS AUDUBON SOCIETY, WESTERN)
 14 ANCIENT FOREST CAMPAIGN,)
 HEADWATERS, COAST RANGE)
 15 ASSOCIATION, FRIENDS OF THE ELK)
 RIVER, LEAVENWORTH AUDUBON ADOPT-)
 16 A FOREST, NORTH CENTRAL WASHINGTON)
 AUDUBON SOCIETY, and KNUT and ANN)
 17 AAGAARD,)
 Plaintiffs,)
 18)
 v.)
 19)
 20 DAN GLICKMAN, Secretary of)
 Agriculture, BRUCE BABBITT,)
 Secretary of Interior, UNITED)
 21 STATES FOREST SERVICE, and BUREAU)
 OF LAND MANAGEMENT,)
 22)
 Defendants.)
 23

Civil No. 95-6384-TC

MOTION TO CONSOLIDATE
Expedited Consideration
Requested

24
 25 Plaintiffs Pilchuck Audubon Society et al. hereby ask the
 26 Court to consolidate this case with Northwest Forest Resource
 27

1 Council v. Glickman, No. 95-6244-HO. The issues presented in
2 this case are also being considered by this Court in NFRC v.
3 Glickman. Consolidating the two cases will enable the Court to
4 have all interested parties brief and argue the issues in one
5 proceeding. It would also ensure that no interested parties are
6 excluded from the proceedings that will determine their
7 interests.

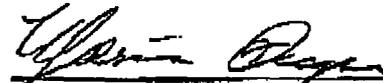
8 Plaintiffs request expedited resolution on this motion. The
9 proceedings in NFRC v. Glickman are moving quickly. Last week,
10 the plaintiff in NFRC v. Glickman asked this Court to decide on
11 an expeditious basis whether Section 2001(k) (1) requires the
12 immediate award and release of certain previously cancelled
13 timber sales. The plaintiffs in this case have a strong interest
14 in many such sales. In order to ensure that plaintiffs have an
15 opportunity to be heard before the fate of these sales is sealed,
16 this Court should act expeditiously to consolidate the two cases.

17 Respectfully submitted this 7th day of November, 1995.

18 

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Gilbert

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13 Local Counsel for Plaintiffs

14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE DISTRICT OF OREGON

16 PILCHUCK AUDUBON SOCIETY, OREGON)
17 NATURAL RESOURCES COUNCIL,)
18 PORTLAND AUDUBON SOCIETY, BLACK)
19 HILLS AUDUBON SOCIETY, WESTERN)
20 ANCIENT FOREST CAMPAIGN,)
21 HEADWATERS, COAST RANGE)
22 ASSOCIATION, FRIENDS OF THE ELK)
23 RIVER, LEAVENWORTH AUDUBON ADOPT-)
24 A-FOREST, NORTH CENTRAL WASHINGTON)
25 AUDUBON SOCIETY, and KNUT and ANN)
26 AAGAARD,)
27 Plaintiffs,)

Civil No. 95-06384-TC

NOTICE OF NON-OPPOSITION
TO PLAINTIFFS' MOTION TO
CONSOLIDATE

v.

DAN GLICKMAN, Secretary of
Agriculture, BRUCE BABBITT,
Secretary of Interior, UNITED
STATES FOREST SERVICE, and BUREAU
OF LAND MANAGEMENT,

Defendants.

90-1-4-4665

Counsel for plaintiffs Pilchuck Audubon Society et al.

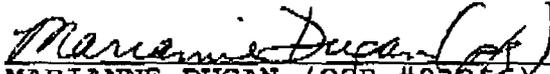
("Pilchuck") has conferred with counsel for defendants and

1 counsel for potential defendant-intervenors regarding plaintiffs'
 2 Motion to Consolidate, and is authorized to represent that there
 3 is no opposition to plaintiffs' motion to consolidate this case
 4 with Northwest Forest Resource Council v. Glickman, No. 95-6244-
 5 HO (D.Or.).

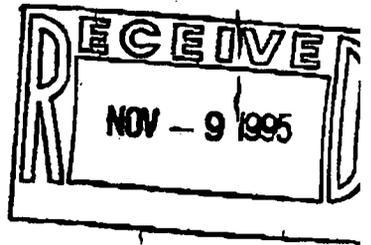
6 Respectfully submitted this 8th day of November, 1995.

7
 8 
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12 Attorneys for Plaintiffs

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 14 MARIANNE DUGAN (OSB #93256)
 15 Western Environmental Law Center
 1216 Lincoln Street
 16 Eugene, OR 97401
 (503) 485-2471

17 Local Counsel for Plaintiffs



Congress of the United States
Washington, DC 20515

November 6, 1995

25 NOV 8 - ALL : 12

President William J. Clinton
The White House
Washington, D.C.

Dear President Clinton:

We read your statement of Saturday, October 28, concerning the implementation of Section 2001 of the FY 1995 funding rescission bill (PL 104-19) with a mixture of bewilderment and surprise. Section 2001 is the section of the bill that deals with forest health activities and directs the Secretaries of Interior and Agriculture to expedite some timber sales, as well as release others that have already been sold, and for which the government has outstanding contract liability.

Your Saturday statement bewilders us for at least four reasons. First, you assert that the release of these sales does not comport with the agreement that the Administration and Congress laboriously negotiated concerning the implementation of this measure. Certainly, the direction in Section 2001 (k) to release these sales "notwithstanding any other provision of law" is not difficult to translate into executive action. Moreover, during negotiations your negotiators asked for, and were given, a list of the kinds of sales that we intended to be covered. It is rather late after (1) concluding negotiations, (2) signing the bill, (3) developing your own interpretation of the statutory language, and (4) having it rejected by two courts to say you misunderstood what we and your negotiators agreed to.

Second, your predictions of dire environmental and economic consequences from the release of these sales do not square with the facts. These sales involve less than 10,000 acres out of the 30 million acres (fewer than 1 in every 3,000 acres) of federal forest land in Oregon and Washington. They come at a time when, thanks to the zeal of extreme preservationists who want to take us back to pre-settlement conditions, Pacific Northwest timber harvesting is at an all-time low. The statute and existing law provide you the flexibility to set-aside additional acreage to protect species in places where the government has not already incurred financial liability associated with cancelling already-sold timber sales. Perhaps your advisors have not shared the availability of this flexibility with you.

*Don't release
? 2 Option
9h??*

*OMB
48616*

11/15/95 WED 12:17 FAX

003

NOU-08 95 13:19 FROM:

2024566221

TO: 53888

PAGE: 02

The President
November 6, 1995
Page Two

Third, and in a related vein, is the apparent lack of concern for the government's financial liability. Since these sales have already been sold they are no longer the government's possession strictly speaking. Cancelling them will involve the assumption of liability for damages claims from the purchasers. Current estimates suggest liabilities in excess of \$150 million. Together with foregone timber sale receipts, the Treasury would lose in excess of \$400 million. That loss would have to be reflected in agency budget cuts in FY 1997 or in out years.

Finally, we are bewildered because until October 28, Administration representatives and witnesses at congressional hearings were urging us to forebear from any changes to Section 2001 of PL 104-19. As you may know, we are not pleased with the slow rate of progress your Administration has made in implementing the provision. Nevertheless, we were inclined to agree that — as one Administration witness entreated — "it is a bit premature" to consider changes. Perhaps broader legislative changes should now be considered.

In addition to bewildering us, your intention to introduce legislation in this area leaves us surprised. So far, the only piece of legislation in the natural resources and environmental area that your Administration has introduced was the Superfund proposal brought forward in the 103rd Congress. Even that measure was not reintroduced in this Congress. Thus, your forthcoming forestry proposal will be only the second environmental initiative advanced under your leadership. Given the pressing problems in other areas of environmental concern (eg, the Endangered Species Act, Clean Water Act, the Farm bill) we are surprised at the selection of this issue as a top priority, but we nevertheless agree that a legislative proposal may be superior to the Administration's current approach which violates the law. We believe that the courts that have reviewed the Administration's performance to date would concur.

Therefore, we stand ready to entertain your legislative proposal and are willing to discuss an early hearing date in the relevant Committee or Committees of jurisdiction. We do request, however, that your proposal be accompanied by an accurate estimate of financial damages to the government associated with cancelling any contracts. Your proposal should also include provisions for determining which agency budgets should be reduced to offset the damage claims. We would also appreciate your thoughts on whether the federal government has any obligations to the affected counties to make up for lost revenues to schools.

The President
November 6, 1995
Page Three

At the end of the day, we will likely not agree on the outcome of this dispute. But even as an initial matter, we would not recommend contract cancellations and federal revenue losses as a viable proposal.

Sincerely,

Wes Cooley

Kelin Chenoweth

Wally Harger

Frank Riggs

Jeff Randall

John King

Mark Torker

Charles B. Taylor

Walter B. Jones, Jr.

Jack Metcalf

Richard Pombo

Jim Longley

David B...

Frank W. Smith

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

FAX NUMBER (202) 514-4240

DATE: November 14, 1995
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 RE: NFRC v. Glickman and Babbitt
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 NUMBER OF PAGES: Message and 16 Pages
 PLEASE DELIVER TO:

TO: Don Barry 208-4684
 Bob Baum 208-3877
 Dianh Bear 456-0753
 Michelle Gilbert,
 Ellen Athas 272-6817
 Mike Gippert, 690-2730
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 Tom Tuchmann (503) 326-6254
 Sue Zike (503) 326-7742
 Jean Williams,
 Ellen Kohler 724-6941
 Terry Garcia 482-4893
 Elena Kasam 456-1647

MESSAGE:

Attached is a copy of a proposed amicus brief filed on behalf of Senator Leahy and Representatives Bonior, Furse McDermott, Miller, Skaggs, Studds, Vento and Yates.

Al Ferlo
 Attorney, Appellate Section

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 95-36038 & 95-36042
Consolidated

NORTHWEST FOREST RESOURCE COUNCIL,
Plaintiff-Appellee,

v.

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

Defendants-Appellants,

and

OREGON NATURAL RESOURCES COUNCIL, et al.,

Intervenors.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON
Civil No. 95-6244-MRH

AMICUS BRIEF OF
UNITED STATES SENATOR PATRICK J. LEAHY
AND REPRESENTATIVES

DAVID E. BONIOR, ELIZABETH FURSE, JIM McDERMOTT, GEORGE MILLER,
DAVID E. SKAGGS, GERRY E. STUDDS, BRUCE VENTO AND SIDNEY R. YATES

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INTRODUCTION

Amici United States Senator Patrick J. Leahy, and Representatives David E. Bonior, Elizabeth Furse, Jim McDermott, George Miller, David E. Skaggs, Gerry E. Studds, Bruce Vento, and Sidney R. Yates seek to assist the Court in understanding the legislative intent concerning section 2001(k) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19. E.g. Order at 8-10 (Sept. 13, 1995). Out-of-context and obscure statements relied on by the district court do not reflect the stated pre-passage intent of the sponsors of section 2001(k), nor do they represent Congress' intent as a whole. Amici urge this Court to overturn the district court's flawed interpretation of section 2001(k) and to restore the narrow purpose of this section intended by Congress.

BACKGROUND

Section 2001(k) came into being as part of the so-called "salvage logging amendment" to the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act ("Rescissions Act"), Pub. L. 104-19. The salvage logging amendment has three parts, two of which are not related to "salvage" logging. The first of the amendment's three parts, which establishes limited environmental standards and judicial review for salvage timber sales, received the lion's share of congressional attention and debate. The second part expedites non-salvage timber sales under the President's Northwest Forest Plan, known as "Option 9." The third part -- codified as section

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2001(k) -- calls for the release of a category of timber sales within 45 days of enactment. Section 2001(k) identifies these sales by an express reference to a 1990 statute.

That statute, section 318, or the "Northwest Timber Compromise," was enacted as part of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act, Pub. L. 101-121. It mandated a minimum level of timber sales from Forest Service and Bureau of Land Management (BLM) lands in Washington and Oregon, which would be subject to minimal environmental standards and judicial review. While § 318 established targets for all of Washington and Oregon, the bulk of its provisions applied only to forests and BLM districts "known to contain northern spotted owls." *Id.* at section 318(i). Section 318 expired at the end of fiscal year 1990, although it continues to govern contracts offered under its provisions. *Id.* at section 318(k).

During House and Senate debate over the salvage logging amendment, the provision ultimately codified at § 2001(k) was consistently described in narrow terms as applying only to the specific sales sold under § 318 of the FY 1990 Interior and Related Agencies Appropriations bill that were subsequently held up for additional environmental review. Members of Congress were not told during those debates that the provision could be applied to all sales ever offered but not logged on federal forests in Washington and Oregon.

Nonetheless, on October 17, 1995, the district court for the district of Oregon ordered Secretaries Glickman and Babbitt to release under § 2001(k)(1) every timber sale offered since § 318

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expired, but prior to enactment of the Rescissions Act, in any national forest in Washington or Oregon, as well as any BLM district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting.

In addition, the Forest Service and BLM were ordered to develop and submit to the court a list of all sales offered but not ultimately logged prior to the enactment of § 318, back to 1891 if necessary and even if those sales are in areas now off limits to logging, such as in Congressionally-designated Wilderness Areas.

The court thus extended § 2001(k)'s geographic reach well beyond national forests and BLM districts harboring spotted owls. It also vastly expanded § 2001(k)'s temporal reach from sales offered in fiscal years 1990 to all sales before or since that time. Many of these sales had been canceled for environmental reasons. These sales are now being released in their originally advertised terms, volumes, and bid prices, and without compliance with our environmental laws. The government has submitted declarations showing that logging these sales will irreparably harm the forests and adversely affect the ability of threatened and endangered species to survive. Declaration of Jacqueline V. Wyland (Oct. 13, 1995); Declaration of Thomas J. Dwyer (Oct. 13, 1995).

Contrary to the district court's orders, Congress meant for § 2001(k)(1) to release only timber sales previously offered or sold under section 318 of Pub. L. 101-121. The expansive interpretation adopted by the district court in no way reflects

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what Congress as a whole understood § 2001(k) to do.

ANALYSIS

I. REFERENCES DURING HOUSE DEBATE TO THE LANGUAGE CODIFIED AT SECTION 2001(K) REPEATEDLY DESCRIBED SALES OFFERED OR SOLD PURSUANT TO SECTION 318, NOT TO SALES OFFERED OR SOLD BEFORE AND AFTER THAT TIME

Every legislator to speak on the House floor about section 307(i) of H.R. 1159, 104th Cong., 1st Sess. (1995), the provision that was ultimately codified as § 2001(k) of Pub. L. 104-19, including sponsors of the salvage logging amendment, asserted their understanding that the provision would release only timber sales that had been offered or awarded under § 318. Similarly, the House Report expressly describes only such sales. Any contrary statements during House debate are ambiguous or were clearly contradicted by the sponsors' direct statements on the floor.

A. The House Report Accompanying The Salvage Logging Amendment Refers Only To Sales Sold Under Section 318.

Section 2001(k) was initially proposed as section 307(i) of H.R. 1159, the House version of the 1995 Rescissions Act. The report of the Appropriations Committee accompanying H.R. 1159, which was the only written description of the proposal in front of House members during floor consideration, explained that:

The section also includes subsection (i), a provision to release a group of sales that have already been sold under the provisions of Section 318.

H.R. Rep. No. 71, 104th Cong., 1st Sess., at 22 (March 8, 1995) (emphasis added). The report contained no direct or indirect reference to any sales offered or sold before or after § 318. This unambiguous interpretation of § 2001(k) contradicts the

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broad interpretation adopted by the district court.

- B. Members Of Congress Who Spoke About The Logging Amendment On The House Floor Consistently Described The Same Narrow Interpretation Of Section 307(i) That Was Included In The House Report.

The logging amendment was sponsored in the House by Representative Charles Taylor. There was no spoken reference to § 307(i) when it first came before the House on March 15, 1995. Thus members who voted on a motion to strike section 307 from H.R. 1159, as well as to approve the overall bill, had no reason to believe that § 307(i) had any meaning other than the one provided in the Committee Report.

The district court, however, apparently gave considerable weight to a lengthy written statement inserted in the Congressional Record by Representative Taylor after debate on the logging amendment had concluded. In the statement, Representative Taylor said:

Subsection 307(i)...applies to all national forests and BLM districts that were subject to section 318....it directs the award of all unawarded sales as originally advertised...and it directs the release of these sales and all other awarded sales in the affected area so that all the sales can be operated to completion, on their original terms, in fiscal years 1995 and 1996.

141 Cong. Rec. at H3233 (March 15, 1995).

There are several important reasons why the court should not have relied on this statement to expand broadly the geographic and temporal scope of § 2001(k) far beyond what Congress intended.

First, those words were never spoken on the House floor. Members of Congress who were present on the House floor,

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participated in the debate, and voted on the legislation never heard any such expansive description of the provision.

Second, Representative Taylor's written description is flatly contradicted by the explanation of the provision contained in the official House Appropriations Committee report accompanying H.R. 1159.

Third, Representative Taylor's written description is contradicted by other statements in his same insert. In particular, Representative Taylor noted that section 307(i) was needed to insulate the government from "liability for failure to perform a contract." Id. This statement is consistent with the Committee Report's description of sales that had "already been sold under the provisions of Section 318." It is not consistent with an interpretation that makes § 307(i) applicable to hundreds or thousands of unawarded timber sales dating back as much as 100 years.

Fourth, Representative Taylor's written statement is contradicted by his own subsequent spoken statements on the House floor. After the House of Representatives approved the House-Senate Conference Report accompanying H.R. 1158^{1/}, Representative Taylor and other members took time on the House floor to speak about President Clinton's promise to veto the Rescissions package. Representative Taylor told his colleagues that:

[T]he timber salvage amendment includes three phases....It

^{1/} After H.R. 1159 was reported from the Appropriations Committee, it was combined with H.R. 1158. The logging amendment was included as section 2001 of that bill during consideration by the Conference Committee.

includes the timber salvage portion, it includes the section 318 timber that has been approved and been waiting five years now, past all regulations, been waiting five years to be put on the market, and the option 9 that the President himself recommended.

141 Cong Rec. at H5559 (May 24, 1995) (emphasis added).

Representative Taylor further explained that:

the section 318 timber ... has already met all the environmental requirements. This is green timber but it has not yet been released. It has been waiting since 1990, over 5 years. ...[I]t has already been approved to move, but it has been held up for over five years....

Id. at H5558.

Representative Taylor's spoken explanation of the scope of section 2001(k) affirmatively excludes all timber sales except those that have "already been approved" but have "been held up for over five years." Id. In other words, § 2001(k) releases § 318 sales and only § 318 sales; nothing more and nothing less. The fact that numerous sales have been released by the Forest Service and BLM pursuant to the district court's October 17 injunction that do not meet "all the environmental requirements" clearly shows that the court's interpretation goes far beyond what Congress contemplated and intended.

Finally, Representative Taylor's written statement inserted into the March 15, 1995 Congressional Record is contradicted by subsequent legislative history of this provision in the Senate.

II. REFERENCES DURING SENATE DEBATE TO THE LANGUAGE CODIFIED AT SECTION 2001(k) REPEATEDLY DESCRIBED SALES OFFERED OR SOLD PURSUANT TO SECTION 318, NOT TO SALES OFFERED OR SOLD BEFORE AND AFTER THAT TIME

As in the House, members of the Senate were repeatedly told that § 2001(k) released timber sales previously offered or sold

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under § 318, and nothing more.

A. Senators On The Appropriations Subcommittee On Interior And Related Agencies Were Provided With A Narrow Interpretation Of Section 2001(k).

Senator Slade Gorton was the primary sponsor of the salvage logging amendment in the Senate and is Chairman of the Appropriations Subcommittee on Interior and Related Agencies. Prior to offering the logging amendment to the S. 617, 104th Cong., 1st Sess. (1995), the Senate version of the Rescissions bill, Chairman Gorton wrote a letter to the Senators on his Subcommittee explaining his proposal:

[i]ncluded in the Chairman's mark will be the following three amendments: emergency salvage timber sales, "318 sales", and sufficiency language for "Option 9." I will briefly outline the purpose of ... each amendment in this letter.

...
318 Sales amendment: I have ... included [this] language to release a group of timber sales that have already been sold under the provisions of Section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act.

Letter from Slade Gorton (March 20, 1995) (emphasis added).

Nowhere in this letter to the members of the Subcommittee that first considered and approved the logging amendment was there any direct or indirect reference by Senator Gorton to any timber sales other than those that were sold pursuant to § 318.

B. During Floor Debate On The Logging Amendment, Senator Gorton Clearly Limited The Scope Of Section 2001(k) To Sales Sold Pursuant To Section 318.

Senator Gorton repeated his unambiguous interpretation that § 2001(k) applied only to timber sales sold pursuant to § 318 throughout floor debates on the salvage logging amendment. When

S. 617 was brought to the Senate floor in March, Senator Gorton explained that:

[t]he second and third elements in both amendments have to do with option 9 and with so-called section 318 sales. Section 318 was a part of the Appropriations Act in 1990 designed to provide some interim help for the forest in the two Northwest states. But many of the sales directed by this Congress pursuant to that law have been held up by subsequent environmental actions. The proposal that the committee has made simply says that those sales would go ahead unless they involved places in which endangered species were actually found.

141 Cong. Rec. at S4875 (March 30, 1995) (emphasis added).

In July, after President Clinton vetoed the first version of the 1995 rescissions bill, the Senate debated a slightly modified version of the salvage logging amendment attached to a new rescissions bill. During debate, Senator Gorton once again reiterated his interpretation of the limited scope of § 2001(k):

Subsection (k) releases sales that were authorized under section 318 of the FY 1990 Interior Appropriations bill.

141 Cong. Rec. at S10464 (July 21, 1995).

The Senator went on to explain that:

Roughly 300 million board feet of timber sales have been held up due to agency gridlock over the marbled murrelet.

Id. The 300 million board foot figure corresponds to the Administration's consistent estimates of the amount of timber awaiting release under § 318. See Forest Service document "Timber Sales Amendments to FY 1995 Rescission, Effect of House Action" (April 26, 1995); see also Memorandum from James R. Lyons and Mike Dombeck to Jack Ward Thomas (Aug. 22, 1995). Under the expansive interpretation of section 2001(k) adopted by the court, hundreds of millions of board feet of post-Section 318 timber

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sales already have been released, and the list of pre-Section 318 timber sales is likely to be substantially larger.

In case it wasn't clear enough, Senator Gorton confirmed the narrow scope of § 2001(k) on July 21 when he again told Senators that:

[l]anguage has ... been included to release a group of sales that have already been sold under the provisions of section 318.

141 Cong. Rec. at S10464 (July 21, 1995) Id.

Over and over again, Senator Gorton expressed his view that § 2001(k) required the release only of § 318 sales and not of any sales offered prior to or after § 318.

C. The Other Senators Who Mentioned Section 2001(k) During Senate Debates Also Described Only In Terms Of Timber Sold Pursuant To Section 318.

Every other member of Congress that discussed § 2001(k) prior to passage of the Rescissions Act expressed a similar understanding of the provision's terms.

For example, Senator Patty Murray explained that:

[Senator Gorton's] timber salvage authorizing language is designed to accomplish three things: respond to a timber salvage problem...; speed the rate of timber sales under the President's forest plan...; and release a few timber sales remaining from legislation passed by Congress four years ago.

141 Cong. Rec. at S10422 (July 20, 1995) (emphasis added); see also 141 Cong. Rec. at S4870 (March 30, 1995).

Similarly, Senator Mark Hatfield, Chairman of the Senate Appropriations Committee, described the sales covered under § 2001(k) as sales "originally authorized by the Northwest timber

compromise amendment of 1989." Id. at S4881 (March 30, 1995).

D. The Senate Report Accompanying The Rescissions Bill Does Not Support An Expansive Interpretation Of Section 2001(k).

Senator Hatfield authored the Senate Appropriation Committee report on the Rescissions Act. The Senate Report contains language virtually identical to that in the House Report:

The Committee also includes language to release 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. ... The harvest of these sales was assumed under the President's Pacific Northwest Forest Plan, but their release has been held up due to extended subsequent review by the U.S. Fish and Wildlife Service.

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

The only potentially significant difference between the senate and House report language is the substitution of the words "in the region affected by" for the words "under the provisions of" § 318. The district court found

a congressional intent for the phrase "subject to section 318" to define the geographic reach of the law, by referring to sales "in the region affected by section 318."

Order at 9 (Sept. 13, 1995).

However, like the obscure phrase inserted by Representative Taylor, this language in the Senate Report loses the meaning attributed to it when read in context.

First, the court's reading is contradicted by Senator Hatfield's subsequent statements on the floor.

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Second, the Senate Report indicates that the Senate was referring to "a group of sales that had already been sold," the harvest of which was "assumed under the President's Pacific Northwest forest plan" and would "remove tens of millions of dollars of liability from the Government for contract cancellation." S. Rep. No. 17 at 123.

These descriptions can only be read to apply to the subset of outstanding § 318 sales, not to an open-ended set of timber sales offered but not logged as long as a century ago within a cryptically defined geographic region.

III. THE OVERWHELMING WEIGHT OF LEGISLATIVE HISTORY ACCOMPANYING THE LOGGING AMENDMENT DEMONSTRATES THAT MEMBERS OF CONGRESS UNDERSTOOD SECTION 2001(k) TO APPLY ONLY TO A SET OF DISCRETE, IDENTIFIABLE TIMBER SALES SOLD PURSUANT TO SECTION 318

The district court's reading of the Senate Report, Representative Taylor's statement, and the Conference Report on the Rescissions Act (which also referred to sales "in the geographic area encompassed by Section 318", H. Rep. No. 124, 104th Cong., 1st Sess., (May 16, 1995)), runs directly contrary to every statement made on the floor concerning § 2001(k) and to the whole tenor of the debate over the provision. Indeed, no legislator ever expressed on the floor that § 2001(k) might be read to resurrect timber sales that had been offered at some time other than FY 1990, but then canceled because they would violate environmental laws.

It was not until July 27, 1995 -- the day that President Clinton signed the Rescissions Act into law -- that six members openly declared that § 2001(k) requires the release of all

previously offered and awarded timber sales within the geographic region encompassed by § 318, whether or not the sales themselves were subject to § 318. See Letter from Senator Murkowski to Secretary Glickman and Secretary Babbitt (July 27, 1995).

As the district court correctly recognized, this post-passage letter is "not legislative history and should not be considered evidence of congressional intent." Order at 10 (Sept. 13, 1995). Moreover, it directly contradicts the pre-enactment statements of several of the signatories, namely Senator Gorton and Representative Taylor. Their personal views cannot be attributed to Congress as a whole.

CONCLUSION

The Court should overturn the district court and restore the narrow purpose of section 2001(k) that Congress intended.

Respectfully Submitted,


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NUMBER OF PAGES: 11

DATE: November 16, 1995

FROM: Lisa Holden, (202) 272-8063

MESSAGE: NFRC v. Glickman. Attached is our supplemental compliance report to the court re: timber sale contracts offered or awarded prior to fiscal year 1991. The document is entitled Notice of Filing and Request for Additional Time to Supplement BLM Compliance Report in Light of Government Furlough.

1 timber sale contracts offered or awarded prior to Fiscal Year
2 1991 (October 1, 1990).

3 As to supplemental information relating to Bureau of Land
4 Management timber sale contracts offered or awarded prior to
5 Fiscal Year 1991, federal defendants respectfully request
6 additional time in light of the government furlough. As the
7 Court is aware, on November 14, 1995, the Office of Management
8 and Budget directed Executive Agencies to modify their operations
9 in response to a lapse of appropriations as of midnight on
10 November 13. The responsible personnel and officials from the
11 BLM Oregon State Office have been affected by this action.

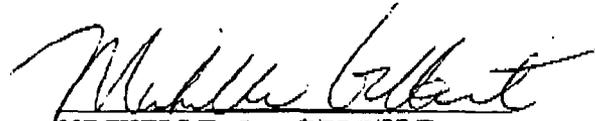
12 We are committed to meeting all applicable court deadlines.
13 However, in light of the budget situation, we respectfully
14 request the Court to grant additional time. Thus, federal
15 defendants request an additional two working days upon expiration
16 of the government furlough in which to supplement the BLM
17 compliance report as to these sales.

18 Dated this 15th day of November 1995.

19 Respectfully submitted,

20 KRISTINE OLSON
21 United States Attorney

22 LOIS J. SCHIFFER
23 Assistant Attorney General

24 
25 MICHELLE L. GILBERT
26 JOHN WATTS
27 EDWARD BOLING
28 United States Department of Justice

28 NOTICE OF FILING AND REQUEST
FOR ADDITIONAL TIME - 2

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

v.

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

Defendants.

Civil No. 95-6244-HO

FIFTH DECLARATION OF
JERRY L. HOFER

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

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

2. As declared to in the THIRD DECLARATION OF JAY MCWHIRTER,

November 1, 1995, filed in this case, the Forest Service, at my direction, has reviewed its records for information regarding timber sales offered or awarded before FY91.

3. Exhibit 1 identifies 56 timber sale contracts awarded prior to FY 91 but suspended, including the Squeegee Timber Sale on the Olympic National Forest, previously declared to in the THIRD DECLARATION OF JAY MCWHIRTER. These contracts were suspended due to the listing of the marbled murrelet or nesting by northern spotted owls.

4. As to timber sales offered prior to FY91 and not awarded, the Forest Service has no specific policy for maintaining records on timber sales offered, but unawarded. Typically, if an offered sale is not awarded for any purpose, the bids are rejected and the "timber sale" ceases to be an entity. This does not mean that the planning and resource analysis completed to the time of bid rejection is never used again. The named timber sale may be reoffered as is, reconfigured, or abandoned. The records search, therefore, for offered, but unawarded timber sales prior to FY91, cannot be directed to any particular record, file or report.

5. I directed the review of the Forest Service Regional Office files of the Forest Service Form 2400-17, entitled "REPORT OF TIMBER SALES, CONVERTIBLE AND NONCONVERTIBLE PRODUCTS", to determine if the form would reveal the contract status of timber sales offered before FY91. Form 2400-17 is used by the Forest

FIFTH DECLARATION OF JERRY L. HOFER

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Service to report each timber sale offered. Required information on this form includes sale name, state, National Forest, Ranger District, legal description, bid date, termination date, tree species, volume, bid rate and bidders, including the identified high bidder, and sale status. This required information is used by the Forest Service as the source of information for other data bases and reports including: timber sale accomplishments reports, bid rates to enter into timber sale contract, and cut and sold volume reports. However, Form 2400-17 has not been used to keep track of offered, but unawarded timber sales.

6. Each of the National Forests in Oregon and Washington reviewed the compiled list of sales from the Form 2400-17 review to confirm the existence, status and condition of the listed sales, as well as to report any additional timber sale offered but unawarded prior to FY91 that staff members could personally recall.

7. The results of the Form 2400-17 search and the National Forests' review are displayed in Exhibit 1. Exhibit 1 identifies 40 timber sales offered, but unawarded prior to FY91, including the Auger Timber Sale on the Fremont National Forest, previously declared to in the THIRD DECLARATION OF JAY MCWHIRTER.

8. Most of the timber sales not previously reported to the Court fail to meet the Forest Service Timber Sale Contract, Division B/BT, Standard Provisions included in each of the offered

timber sale contracts. This failure is due, in large part, to deterioration of painted tree markings and sale boundary posters. Some sales were reconfigured, sold and harvested as reconfigured sales, or the timber has deteriorated beyond the point of being merchantable.

9. As to the search for archived records, referred to in the THIRD DECLARATION OF JAY MCWHIRTER, records are typically referred to as "archived" when they are transmitted to the Federal Record Center in Seattle, Washington and no longer in the custody of the Forest Service. Before making a retrieval request to the Federal Record Center, I reviewed the Records Management Handbook for the Forest Service to determine if archived records would still be in existence for timber sale contracts offered or awarded prior to FY91.

10. The Forest Service Records Management Handbook (FSH 6209.11) establishes a 5 year retention period for records documenting the preparation, advertisement and award of timber sales. Whether retained by the individual National Forest office or archived with the Federal Record Center, records dated prior to October 1, 1990 for the preparation, advertisement and award of timber sales, are beyond the retention period. Thus, I did not request a retrieval of records from the Federal Records Center for records prior to October 1, 1990. Instead, as declared above, I directed the review of the Regional Office files of Form 2400-17. It is only because of the practical business nature of timber sale

FIFTH DECLARATION OF JERRY L. HOFER

PAGE 4

accounting procedures, program analysis, and contract payment rate redetermination that Forms 2400-17 have been retained by the Regional Office.

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

Executed at Portland, Oregon, on November 15, 1995.

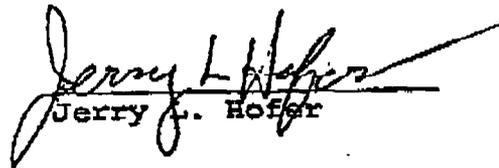

Jerry L. Hoyer

Exhibit 1 to the Fifth Declaration of Jerry L. Hofer

Forest Service, Region 6

Timber Sales Offered or Awarded Prior to FY 91

Prepared pursuant to the Court's Order, October 17, 1995, NFRC v. Glickman, Civ. No. 85-6244HO

10-Nov-95 09:28PM

Forest	Sale Name	Bid Date	Original Volume	High-Bidder	Previously Reported to The Court	Sale Status
FRE	AUGER	09/26/89	11500	Fremont Sawmill	Yes	Not Awarded, ONRC v. Grossarth, Civ. No. 89-6451
GIP	SILVER 7	02/24/89	6700	Pacific Lumber Sales Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	POLAR 2	03/20/89	9300	Stimson Lumber	No	Not Awarded, pursuant to Section 318 (f) (1)
MBS	SIBLEY	02/14/89	4950	Summit Timber	No	Not Awarded, pursuant to Section 318 (f) (1)
	FLASH GORDON	03/09/89	6450	Miller Shingle Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SKOOKUM DOE	09/11/85	15500	Marshal Logging, Inc.	No	Not Awarded, records indicate litigation
	DRY RANGER	08/21/85	23700	Auburn Timber	No	Not Awarded, records indicate litigation
	H. 410 SILV. #2 SSTS	10/19/83	330	Pat Johnson	No	Not Awarded
	FISH STORY	12/12/89	6700	LB&R Logging	Yes	Awarded; Contract Suspended, Marbled Murrelet
	OLD GRADE	08/14/90	9900	Summit Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MED AN BUYBACK	09/27/90	7180	LB&R Logging	Yes	Awarded; Contract Suspended, Marbled Murrelet
	STALWART	09/18/90	2600	Miller Shingle	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SCRAPS	09/27/90	7550	Miller Shingle	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BOYD CREEK	09/25/90	3750	Hum Shingle	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CLEAR CREEK	08/21/90	3435	Base Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
MTN	PISTOL RESELL	02/28/89	9900	Vanport Mfg. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	JIGSAW	03/07/89	15100	Vanport Mfg. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	ROCK BUTTE RESELL	03/21/89	5450	Stevenson Co-Pr. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	BI	03/21/89	6200	Freres Lumber Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SI	03/21/89	5700	Frank Lbr. Co., Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
OLY	LONER ELK	01/29/89	3350	Last Camp Timber	No	Not Awarded, Spotted Owls
	CAMEL	01/04/90	6050	Maw Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	NOT BAD	07/02/90	7290	Hoh River Lumber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	DEODAR	09/14/90	8900	Hoh River Lumber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	YOU WHO	09/14/90	12400	MCMC Resources	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WEST BOUNDARY	09/20/90	4300	Maw Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WYNOCHEE RES.	09/24/90	16900	Maw Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	STEVENS	09/06/90	5600	Maw Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SCREEGEE	09/15/88	4800	White Star	Yes	Awarded; Suspended, Spotted Owls & Marbled Murrelet
ROR	ESMOND SALVAGE	05/30/84	500	JU Logging	No	Not Awarded
	SMALL TREE	09/28/83	1020	Jeffins Timber Corp.	No	Not Awarded
SIS	REDWOOD SPRINGST	03/14/89	2720	CLR Timber Holdings, Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SUGAR CUBE	09/17/90	4830	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WINRIVER	01/06/90	3140	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SPUR TRIGGER	05/22/90	5420	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	LOBSTER	09/08/90	6550	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FATHER OAK	03/26/90	5730	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	TAYLOR RANCH	12/27/89	5350	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	TOASTBERRY	08/06/90	4010	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GARDEN	08/12/90	4590	Medford Corporation	Yes	Not Awarded, SAS vs. Thomas 89-180WD
SIU	TENMILE 800	03/21/89	6637	Hampton Tree Farms	No	Not Awarded, pursuant to Section 318 (f) (1)
	MYPOLE	03/08/84	6575	Davidson Industries	No	Not Awarded, SiuLay Task Force vs. USFS, 83-1153MA
	PANTHER SALVAGE	01/22/84	2205	Ball Wood Products	No	Not Awarded, SiuLay Task Force vs. USFS, 83-1153MA
	WASSEN RANCH	08/21/82	8284	Bohemia, Inc.	No	Not Awarded, SiuLay Task Force vs. USFS, 83-1153MA
	FOLAND RIDGE	09/25/90	4000	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WASSEN RANCH	05/20/90	7500	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet

Exhibit 1 to the Fifth Declaration of Jerry L. Hofer

Forest Service, Region 6

Timber Sales Offered or Awarded Prior to FY 91

Prepared pursuant to the Court's Order, October 17, 1995, NFRC v. Glickman, Civ. No. 85-6244HO

18-Nov-95 09:28 AM

Forest	Sale Name	Bid Date	Original Volume	Hgt-Bidder	Previously Reported to The Court	Sale Status
SIU	NORTH BALL	04/11/89	6700	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SQUARE CLARE	05/29/90	10700	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BERRY BUSH	07/06/90	5500	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CONCERN CARR	09/11/90	6800	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FIVENILE FLURE	09/27/90	7500	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FRANKLIN RIDGE	09/11/90	9000	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	INDIAN HOOK	09/11/90	15200	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	LOWER BAILEY	09/27/90	3200	Lone Rock Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MARIA SKYLINE	09/20/90	12700	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SKYWALKER	09/04/90	7700	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SOUTH PAKTON	09/20/90	9200	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SUGAR MAPLE	03/08/90	6400	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SULPHUR	05/07/90	6400	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UNCLE CONDON	09/11/90	12600	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UPPER MCLEOD	09/11/90	5100	Seneca Sawmills	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BENNER BLINCH	12/19/89	10300	Bugaboo Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GRASS HULA	07/31/90	8700	Bugaboo Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GREEN APPLE	07/24/90	10100	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GREEN HORN	08/21/90	5800	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	RANDALL SALADO	09/28/90	6500	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	RYAN WAPITI	03/20/90	10700	Fresno Lumber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BEAMER 712	06/26/90	8900	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CANAL 606	04/03/90	9400	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FORMADER 103	08/14/90	8300	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FORMADER 717	06/28/90	2400	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UPPERTEN 002	05/03/90	14485	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WAPITI 305	08/20/90	2300	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WHEELLOCK 403	08/19/90	6013	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MR ROGERS	09/28/90	10000	Seneca Sawmills	Yes	Awarded; Contract Suspended, Marbled Murrelet
	PRONG	08/27/90	4800	Lone Rock Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
UMP	DONEGAN	03/15/89	14400	Boise Cascade Corp	No	Not Awarded, pursuant to Section 318 (b)(1)
	JUMP	03/15/89	3300	Deer Creek Timber, Inc.	No	Not Awarded, pursuant to Section 318 (b)(1)
	BVD	03/08/89	19980	Scott Timber Co.	No	Not Awarded, pursuant to Section 318 (b)(1)
	ROCK RIDGE	03/08/89	8700	Lone Rock Timber Co.	No	Not Awarded, pursuant to Section 318 (b)(1)
	MALT	02/22/89	15400	Westman Timber Co.	No	Not Awarded, pursuant to Section 318 (b)(1)
	WHISKEY THN	07/11/89	370	Samuel Riddle	No	Not Awarded, no Cert of Competency at SEA
	ABES WREN	12/27/89	6580	D.R. Johnson Company	Yes	Awarded; Contract Suspended, Spoiled Owls
	COVBOY	04/18/90	9400	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	NITA	08/29/90	9300	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	SOUTH NITA	08/28/90	6300	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	LAST	09/12/90	6700	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	FIRST	09/19/90	5100	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
WIL	DALY WEST	02/22/89	6000	Frank Lumber Co., Inc.	No	Not Awarded, pursuant to Section 318 (b)(1)
	BUNCHVIEW	02/28/89	16300	Penn Timber, Inc.	No	Not Awarded, pursuant to Section 318 (b)(1)
	METROFETTE BV	02/28/89	5600	Weyerhaeuser Co.	No	Not Awarded, pursuant to Section 318 (b)(1)
	COLD SALVAGE	03/01/89	250	John Ladd Logging	No	Not Awarded
	CUP SALVAGE	03/03/89	450	T. E. Richards	No	Not Awarded
	LATE	08/24/78	11600	TOMCO, Inc.	No	Not Awarded
	ANCHOVY	09/28/90	3400	Thomas Creek	Yes	Awarded; One Unit Suspended, Spoiled Owls
CCL	HELEN	04/11/89	11000	Boise Cascade Corp	No	Not Awarded

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

FAX NUMBER (202) 514-4240

DATE: November 8, 1995
FROM: Albert M. Ferlo, Jr.
RE: NERC v. Glickman and Babbitt
OFFICE PHONE: (202) 514-2757
NUMBER OF PAGES: Message and Pages
PLEASE DELIVER TO:

TO: Bob Baum,
Dave Gayer 208-3877
Dianh Bear 456-0753
Mike Gippert, 690-2730
Tim Obst,
Jay McWhirter
Karen Mouritsen 219-1792
Terry Garcia 482-4893
-Elena Kagan 456-1674/647
Chris Nolan 395-4941
Roger Nesbit (503) 231-2166

MESSAGE:

Attached is a draft brief on the (k)(1) issue. The brief must be filed with the 9th Cir. on November 13, 1995. I would like to have any comments by 3:00 pm Friday, November 10, 1995.

9th Circuit rules limit the brief to 35 pages. As you can see, the draft is at 34 pages. I will be inserting a summary of argument by the end of today, so you should consider the draft to be 35 pages. With that in mind, it will be difficult to make any substantial additions without cutting some other part of the brief.

To provide you with the maximum time available to review the brief, I am sending this to you prior to proofreading. You may ignore the obvious typos.

Call or fax any comments or questions to me.

Al Ferlo
Attorney, Appellate Section

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95- 36042

NORTHWEST FOREST RESOURCE COUNCIL,
Plaintiff-Appellee

v.

DAN GLICKMAN and BRUCE BABBITT,
Defendants-Appellants

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

BRIEF OF APPELLANTS, DAN GLICKMAN AND BRUCE BABBITT

OPINION BELOW

The district court's (Honorable Michael Hogan) opinion and order, dated September 13, 1995, is unpublished and is reproduced at page ** of Appellants' Excerpt of Record (E.R.).

STATEMENT OF JURISDICTION

A. District court jurisdiction. -- Jurisdiction of the district court is based on 28 U.S.C. 1331 and 2201.

B. Jurisdiction of the Court of Appeals and Finality of Judgment. -- The district court entered a permanent injunction on October 17, 1995. (E.R.). This Court's jurisdiction is based on 28 U.S.C. 1292(a).

C. Timeliness of Appeal. -- The Federal defendants filed a notice of appeal on October 18, 1995, within sixty days of entry

of the injunction. Thus, this appeal is timely under 28 U.S.C. 2107(b).

STATEMENT OF ISSUES

1. Did the district court err in interpreting the phrase "subject to section 318," as used by Congress in Section 2001(k)(1) of Public Law 104-19 (the 1995 Rescissions Act), to require the Secretaries of Agriculture and Interior to release and allow to be completed, on their original terms and conditions, all timber sales offered or awarded at any time prior to July 27, 1995, in all units of the National Forest System in Washington and Oregon and all districts of the Bureau of Land Management in western Oregon.

STATEMENT OF THE CASE

A. Nature of the case. -- This appeal involves a simple issue of statutory construction of a single provision in the 1995 Rescissions Act. At issue is the fate of thousands of acres of old growth forests throughout Oregon and Washington. The district court, in a vastly expansive and liberal interpretation of the statute, has ordered that the statute requires the Secretaries of Interior and Agriculture (the Secretaries) to release and allow to be harvested over sixty timber sales. Many of these sales had been previously withdrawn from public offering because of severe environmental impacts which would result from harvesting the sales as originally proposed. The sales, with a few exceptions not relevant to this appeal, have now been released. The district court has denied a stay of its order

requiring the release of the sales, and a motions panel of this Court denied the government's request for an emergency stay pending appeal. Trees which have been in existence for several hundred years are now being cut. However, should the government succeed on the merits of this appeal, this Court can stop further damage to these ancient forests. These forests provide vital and irreplaceable habitat to wildlife, including threatened and endangered species of birds and fish -- habitat which is vital for the continued existence of these species.

B. Statutory framework. -- On July 27, 1995, the President signed into law the 1995 Rescissions Act, Pub. L. 104-19. Section 2001 of that Act sets out an emergency salvage timber program which directs the Secretaries to expedite the award of timber harvesting contracts on Federal lands throughout the United States. The Act attempts to increase the flow of available timber for harvesting in three ways. First, in Section 2001(b) of the Act, Congress established expedited procedures for the release of salvage timber sales on a nationwide basis. Second, in Section 2001(d) Congress directed the Secretaries to award timber sales on an accelerated basis on Federal lands described in the April, 1994 "Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl." (The Northwest Forest Plan).

This litigation is centered on the third method created by Congress. In Section 2001(k) of the Act, Congress attempted to

require the release and harvesting of certain timber sales which Congress had previously authorized in 1989 in Section 318 of Public Law No. 101-121, also known as the Northwest Timber Compromise of 1989. See Robertson v. Seattle Audubon society, 503 U.S. 429 (1992). Section 2001(k)(1), provides:

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.

The forty-five day period for the "release" of the section 318 timber sales expired on September 10, 1995.¹

Subsequent to the enactment of Section 2001, both the Forest Service and the Bureau of Land Management worked diligently to release the sales previously offered under section 318. The Forest Service, in the summer of 1995, released 59 million board

¹ Section 2001(k)(2) of the Act exempts from release any sale "if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale * * *." The Departments of Agriculture and the Interior (the Agencies) interpret the phrase "known to be nesting" in accordance with a scientific protocol previously developed by a team of agency experts. NFRS also disagrees with the Secretaries interpretation of this subsection. The issue is currently pending before the district court on cross-motions for summary judgment. Finally, Section 2001(k)(3) requires the Secretaries to provide replacement timber, "if for any reason a sale cannot be released and completed under the terms of this subsection within 45 days after the date of the enactment of this Act."

feet of timber under that had been offered under the Section 318 program. During the month of September, the Forest Service continued taking steps to release additional sales. Another 8 MMBF was released in early September. In addition, the Forest Service subsequently issued letters notifying the affected purchasers that suspensions were lifted to release approximately 24 million board feet of additional timber. (E.R.). The Forest Service also sent letters notifying high bidders of its intent to award another 18 MMBF of timber upon confirmation of interest by the bidders in proceeding with the sale and satisfaction of typical contract requirements. Id. The BLM has acted to award approximately 64 MMBF of section 318 timber. (E.R.). See Declaration of William L. Bradley dated September 7, 1995 at ¶ 3. To date, a total of *** million board feet from *** previously withdrawn section 318 sales has been released under the provisions of Section 2001(k)(1).²

3. History of sales under Section 318. -- Section 318 of the Department of the Interior and Related Agencies appropriations Act, Fiscal year 1990, Pub. L. 101-121 (Section 318), also referred to as the Hatfield/Adams Amendment, was signed into law on October 23, 1989. See 135 Cong. Rec. S 8762,

² An additional **** board feet of timber has been withheld from release under Section 2001(k)(2), based on the Secretaries' determination that a threatened or endangered bird species is "known to be nesting" within the sale unit. The district court is scheduled to rule on these withheld sales on November ***, 1995.

8795-8797 (July 26, 1989) (relevant portions attached hereto as Addendum A). The intent of section 318 was:

to balance the goal of ensuring a predictable flow of public timber for fiscal years 1989 and 1990 with the goal of preserving significant old growth forest stands as the habitat of the northern spotted owl.

Gifford Pinchot Alliance v. Butruille, 742 F.Supp. 1077, 1079 (D.Or. 1990). To achieve these goals, subsection 318(a) set an overall target level of timber harvesting from national forests and BLM lands in Oregon and Washington for fiscal years 1989 and 1990. The substance of the statute was set out in subsections 318(b) - (k), which set forth procedures for expedited review, prohibitions on injunctions and restraining orders³ and numerous environmental safeguards.⁴ These procedures applied exclusively to "all timber sales from the thirteen national forests in Oregon and Washington and [BLM] Management districts in western Oregon known to contain northern spotted owls [NSOs]." See Subsection 318(i).⁵

³ See Section 318 (d), (f) (1), (g).

⁴ For example, subsection 318(b) directed the Forest Service to sell ecologically significant old growth within the 13 forests known to contain spotted owl only as necessary and in a manner designed to minimize the effects of fragmentation within each sale. Section 318(b) (1), (2). Section 318(e) provided that nothing was to affect interagency cooperation under the ESA and its regulations.

⁵ Section 318(i) reconfirms that:

Except for provisions of subsection (a) (1) of this section, the provisions of this section apply solely to the thirteen national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain
(continued...)

Some section 318 sales were delayed or suspended for a number of reasons. Section 318 was the subject of extensive litigation, with the Supreme Court ultimately affirming the constitutionality of the law in Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992). A number of section 318 sales were enjoined while this issue was being litigated. See generally Portland Audubon Society v. Lujan, 795 F.Supp. 1489, 1496 (D.Or. 1992). Other sales were affected by litigation over compliance with various terms of section 318, such as the requirement to minimize fragmentation of ecologically-significant old growth. See Seattle Audubon Society v. Robertson, Civ. No. 89-160 (W.D.Wash.).

Many section 318 sales did not go forward as a result of concerns about significant impacts to species listed under the Endangered Species Act (ESA). In June 1990, after enactment of section 318, the United States Fish and Wildlife Service (FWS) listed the northern spotted owl as a threatened species under the ESA. See 55 Fed. Reg. 26189 (June 26, 1990). Because of the listing of the NSO as threatened species, a number of Forest Service section 318 sales were "modified, eliminated or held in abeyance." See Gifford Pinchot, 742 F.Supp. at 1080. ✓

On September 28, 1992, the FWS listed the marbled murrelet as a threatened species. 57 Fed. Reg. 45328 (Oct. 1, 1992). As a result of the listing, the Forest Service reinitiated

⁵(...continued)
northern spotted owls.

consultation with the FWS under Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1536(a)(2), regarding the effects on murrelets of continuing to harvest section 318 sales that had already been awarded. In June 1995, the FWS subsequently concluded that further logging of a number of the Forest Service section 318 sales would likely jeopardize the continued existence of the marbled murrelet. As a result, these section 318 sales were suspended pending further survey work.

The BLM experienced similar delays in completing the contracting process for its section 318 sales. The successive listing of proposed spotted owl critical habitat and the listing of the marbled murrelet delayed finalization of several sales. See Lone Rock Timber Co. v. United States Dept. of Interior, 842 F. Supp. 433 (D. Or. 1994).

4. Challenge under Section 2001(k)(1) - "subject to Section 318". -- On August 8, 1995, just twelve days after enactment of Section 2001(k)(1), NFRC filed a complaint seeking mandamus and a permanent injunction compelling the Secretaries to award and release by September 10, 1995, "all timber sales offered prior to the date of enactment [of the Act] in all national forests in Oregon and Washington and Bureau of Land Management ("BLM") districts in western Oregon." (E.R.). The complaint further alleges that the Secretaries "are not complying and do not intend to comply with this law except for some timber sale contracts that were offered in fiscal year 1990 under Section 318 * * *." (E.R.).

At the core of NFRC's complaint is an interpretation of the phrase "subject to section 318." Under NFRC's interpretation, the phrase is a simple geographic description of all national forests in Washington and Oregon and BLM districts in western Oregon. (E.R.). NFRC's interpretation of the phrase eliminates any need for analysis of sections 318, and requires release of over sixty timber sales never subject to the terms of section 318 at any time.

In an order dated September 13, 1995 (E.R.), the district court totally adopted NFRC's interpretation, and held that Section 2001(k)(1) applies to timber sales previously offered or awarded in all national forests in Washington and Oregon and BLM districts in western Oregon up to July 27, 1995. (E.R.). The court rejected the Secretaries' arguments that the scope of 2001(k)(1) was limited to only those sales previously offered during 1989 and 1990 under the provisions of section 318. The district court found (E.R.) that the language of the statute was plain, and that the legislative history "strongly favors plaintiff's interpretation." (E.R.). Although the district court then "allowed" NFRC's "motion for summary judgment as to its first and second claims for relief" (E.R.), it did not enter an injunction or final declaratory judgment on either claim.

5. Post opinion proceedings. -- On September 21, 1995, only six working days after the district court issued its opinion, the plaintiff filed a motion for contempt, seeking imprisonment of two government officials, neither of whom were

named as defendants in the complaint, as well as monetary sanctions against the United States. (E.R.). NFRC claimed that the failure to release immediately sales "in all national forests in Oregon and Washington and all Bureau of Land Management (BLM) districts in Western Oregon" amounted to contempt of the district court's September 13 summary judgment order. (E.R.). NFRC, however, never submitted a list of the specific sales it believed were subject to release under the district court's September 13, 1995 opinion. In the alternative, NFRC requested that court amend its order by specifically granting a "permanent injunction compelling Secretary Glickman and Secretary Babbitt "to immediately award, release, and permit to be completed in fiscal years 1995 and 1996, * * * all timber sale contracts offered or awarded prior to July 27, 1995 in any national forest in Oregon and Washington or BLM district in western Oregon * * *." (Id. at 11).

The government filed its response on October 6, 1995. In addition to a defense on the merits of the contempt motion, the response indicated to the court that the government, because of its desire to obtain an appealable order, would not object to the entry of an injunction, on the assumption that a stay pending appeal would be entered. In a filing on October 13, 1995, the government further suggested to the district court that it could provide for immediate appeal on the issue before timber is actually cut (and while the other issues remain to be determined in the district court) by certifying the question of the scope of

Section 2001(k) (1) for interlocutory appeal pursuant to 28 U.S. 1292(b) or by issuing a declaratory judgment on the claim under Fed. R. Civ. P. 54(b).

At a hearing held on October 17, 1995, the district court denied the motion for contempt, and entered an order granting a permanent injunction. The injunction "compelled and directed" the Secretaries, "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 between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or BLM district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting." (E.R.). The court then denied from the bench the Secretaries' oral request for a stay pending appeal.

This appeal followed.⁶

SUMMARY OF ARGUMENT

[summary of argument to be added]

⁶ By order dated October 26, 1995, a motions panel of this Court denied the government's request for a stay pending appeal. Since that time over *** acres of the **** total acres covered by the court's October 17 injunction have been harvested or are in the process of being harvested.

ARGUMENT

THE AGENCIES CORRECTLY INTERPRETED SECTION 2001(k)(1) TO APPLY TO REMAINING SECTION 318 SALES, NOT TO ALL SALES PREVIOUSLY OFFERED IN THE STATES OF WASHINGTON AND OREGON

A. Standard of Review. -- This court reviews a district court's interpretation of a statute de novo. Spain v. Aetna Life Ins. Co., 11 F.3d 131 (9th Cir. 1993).

B. Introduction. -- The district court's October 17, 1995 order required the release of over 60 separate timber sales containing nearly 230 million board feet of timber. Many of these sales were previously withdrawn from public offering based on the likely environmental harm to many forest resources, including threatened and endangered species such as the northern spotted owl, the marbled murrelet, the Snake River chinook salmon, and the shortnose sucker. Harvesting of some sales will also have an impact on other forest species which, while not formally listed under the Endangered Species Act, require special consideration under the statutes and regulations governing timber harvesting by the Forest Service and the BLM. The district court's order, by interpreting Section 2001(k)(1) to require the release of these sales, has greatly expanded the scope of the Section to the detriment of the environment. As demonstrated below, the district court erred in giving such an expansive interpretation to what, in the final analysis, is a limited attempt by Congress to force the release of timber sales which it thought it had authorized nearly five years ago.

C. The Plain Language Of The Act Is Consistent With The Agencies' Interpretation That Subsection 2001(k) Applies To The Release Of Remaining Section 318 Sales. -- Subsection 2001(k) (1) requires the Secretaries of Agriculture and the Interior, within 45 days of enactment, to act to award, release and permit to be completed:

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 * * * .

Pub. L. 104-19, § 2001(k) (1) (1995) (emphasis added). Contrary to NFRC's theory, and the district court's interpretation (Op. at 7-8), Congress did not use the phrase "subject to section 318" as a short-hand geographic descriptor of the States of Washington and Oregon.' If Congress had meant that, it could simply have said so. Instead, Congress made a deliberate choice to refer to section 318. The issue, then, is what Congress meant in using the phrase "subject to section 318." Application of well-established rules of statutory construction to the Act's plain language reveals that Congress intended to require the implementing agencies to address the continuing delay in the completion of remaining section 318 timber sales, either through award under their original terms, as contemplated by section

⑦ In other sections of 2001, Congress made it clear when it meant "as described in" by simply saying so. See e.g. subsection 2001(b) (authorizing salvage sales from Federal lands "described in" subsection (a) (4), and subsection 2001(d) (directing expeditious implementation of sale contracts on Federal lands "described in" the ROD).

GOOD
 GOD -
 we can't
 say this -
 This is
 exceeding
 Putrich's
 argument.



2001(k)(1), or through the provision of alternative timber under the terms of section 2001(k)(3).

The operative portions of section 318 applied exclusively to sales offered in fiscal years 1989 and 1990 in the thirteen national forests in Oregon and Washington and BLM districts in western Oregon known to contain northern spotted owls. See Subsection 318(i); Robertson, 503 U.S. at 433. Subsection 318(k) provided that timber sales offered to meet the target requirements of subsection (a) would continue "to be subject to the terms and conditions of" section 318 for the duration of the contracts. "All other provisions of this section shall remain in effect until September 30, 1990." Subsection 318(k). Accordingly, Section 318 expired at the end of fiscal year 1990. See Robertson, 503 U.S. at 433.

Rules of statutory construction require words to be accorded their common meaning and proscribe interpretations that produce absurd or illogical results. 2A Sutherland Statutory Construction, § 47.28, 47.30 (5th ed. 1992). Because Section 318 expired almost five years ago, only sales offered prior to the statute's expiration remain "subject to section 318," according to the common meaning of the phrase "subject to." "Subject" is defined as "likely to be conditioned, affected, or modified in some indicated way: having a contingent relation to something and usu[ally] dependent on such relation for final form, validity, or significance * * * ." Webster's Third New International

Dictionary, 2275.⁸ The fiscal year 1989 and 1990 sales depend on section 318 in the most basic sense to define their very form and validity. On the other hand, the national forest and BLM lands in Washington and Oregon are not dependent on section 318 for their definition. The national forests and BLM districts exist outside the framework of section 318. The phrase "subject to section 318" as interpreted by the court adds nothing to the meaning of the statute. Indeed, by including forests that were never subject to the provisions of section 318, the district court has effectively repealed the phrase from the statute. Further evidence of the sweeping scope of the court's interpretation is found in the district court's order requiring the Secretaries to search for sales which occurred prior to the enactment of section 318. (E.R.). The inclusion of sales which were offered before section 318 was enacted renders the phrase "subject to section 318" totally meaningless.

1. Application of the rule of construction that a phrase modifies only the immediate antecedent leads to absurd results in this case. -- The court attempted to justify its broad interpretation of "subject to" to mean "Washington and Oregon" by relying on the rule of statutory construction that generally requires that a qualifying phrase modifies only the phrase which immediately precedes it. (Order at 5-6). However, that interpretative rule "is not inflexible or uniformly binding." 2A

⁸ Black's defines "subject to" as "liable, subordinate, subservient, inferior, obedient to; governed or affected by; . . ." Black's Law Dictionary, 1594 (4th ed. 1966).

Sutherland Statutory Construction, § 47.33 ("Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent"). This is especially true of statutes which are not "assiduously compiled." See Tippins, Inc. v. USX Corp., 37 F.3d 87, 93 (3d Cir. 1994). Here, the fact that this substantive provision, affecting vast areas of natural resources in the Pacific Northwest was developed in a few short months in an appropriations measure.

Under the district court's interpretation, limiting the phrase "subject to section 318" to the immediate antecedent phrase "any unit of the National Forest System or district of the Bureau of Land Management" has lead to an absurd result. The court's interpretation has required the release of timber sales, located throughout Washington and Oregon, which were offered just prior to the enactment date of Section 2001(k)(1) (get name of sale and cite) as well as prior to the enactment of Section 318 itself ((get name of sale and cite). The absurd result of requiring the release of sales which have never had the remotest relation to Section 318 cannot be supported by the rule of statutory construction upon which the district court so heavily relies. See Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1311 (9th Cir. 1992); Pacificorp v. Bonneville Power Administration, 856 F.2d 94, 97 (9th Cir. 1988).

The absurdity of the court's interpretation is also demonstrated by its apparent acceptance of an assumption that

Congress prefers to rely on oblique references to expired statutory programs to define the area covered by a new statute, when the area so defined is simply the states of Oregon and Washington. The court, however, offers no explanation as to why, if Congress had intended to use the phrase "subject to section 318" to actually mean Washington and Oregon, it did not simply say so. Indeed, the problems inherent in converting "subject to section 318" into a geographic descriptor are underscored by the court's contrary finding that "there is no 'description' of lands set forth in section 318." (E.R.). The court's inability even to correctly identify the area in which section 318 sales had been located undercuts its interpretation that the term "subject to section 318" simply describes "one set of National Forest Units and another set of BLM districts * * * ." Ibid.

2. The Secretaries' interpretation is the only one that gives meaning to all the words in Section 2001(k)(1). -- The court also erroneously relied on the rule of statutory construction that any interpretation must "give significance to all of * * * [the statute's] parts." (E.R.). The court states the "'phrase offered or awarded before that date' only makes sense if the statute has ongoing application to sales after fiscal year 1990, because the phrase serves to exclude sales offered after July 27, 1995." The court however ignores the fact, uncontested by NFRS, that many section 318 sales were actually awarded after the expiration of section 318 itself. (E.R.). Clearly, Congress wanted to ensure that all sales

either offered but not awarded in the two year window created by Section 318, and any 318 sale actually awarded after the expiration of Section 318, fell within the scope of section 2001(k)(1). The district court's interpretation fails to take into account the use of the words "or awarded" in the phrase "offered or awarded." By focussing only on the "offer" of sales under section 318, the court has unduly expanded the scope of Section 2001(k)(1).

Nor is the court correct in finding (E.R.) that the Secretaries' interpretation of "subject to section 318" renders the phrase "in any unit of the National Forest System or district of the Bureau of Land Management meaningless." The Secretaries' interpretation recognizes that this phrase clarifies that subsection 2001(k)(1) applies to both Forest Service and BLM lands.⁹ Absent recognition of this clarification, the court's interpretation could be accused of violating the same rule. If the court is correct in finding that the phrase "subject to section 318" is a simple geographic description, then, because section 318 describes its geographic scope to cover explicitly both BLM and national forest lands, Congress simply could have

⁹ Section 318 defined this area in terms of geography, time and substantive provisions that "apply solely to the thirteen national forests in Oregon and Washington and Bureau of Land Management districts in western Oregon known to contain northern spotted owls," (318(1)), "until September 30, 1990," except that all of the remaining section 318 sales continue "subject to the terms and conditions of this section for the duration of those sale contracts." 318(k). Reference to section 318 clearly was intended to limit subsection 2001(k)(1)'s release provision to the area and timeframe within which these national forest and BLM lands were "subject to section 318."

stated "Federal lands subject to section 318" in defining the scope of subsection 2001(k)(1).¹⁰ Under the court's interpretation, there would have been no need to specify national forest and BLM lands. It is the Secretaries' construction then, that gives meaning to every word of section 2001(k)(1), and does not attempt to turn the phrase "subject to" or any other phrase into something it is not and cannot be.

3. The district court's interpretation fails to give any meaning to the phrase "subject to section 318". -- Also, even if the district court is correct in finding that "subject to section 318" is a simple geographic description, the court's interpretation erroneously includes all national forests in Washington and Oregon. The court falls into this error through its complete failure to analyze the language of section 318 itself. While subsection 318(a) generally described target volumes for sales from "net merchantable timber from the national forests of Oregon and Washington * * * ", all remaining operative provisions, which provide the real substance of the statute, expressly apply only to those thirteen national forests and BLM lands known to contain spotted owl, located in the western portion of the two states. See Section 318(i).

Thus, even assuming that, as the court found, "subject to section 318" was intended to be a geographic descriptor, the

¹⁰ Indeed, that is how BLM lands and national forests lands were referred to in subsection 2001(d), describing the scope of that subsection as applying to "Federal lands described in [the ROD]."

language certainly does not support the expansive geographic area encompassed by the court's order. Indeed, if the phrase were deemed to be a geographic descriptor, it would more logically be read to mean those limited areas of national forest and BLM lands actually encompassed by section 318 sales, as those are the only possible areas that remain "subject to" section 318. The court erred in requiring the Forest Service to release timber sales in the forests and portions of forests which are indisputably outside the range of the Northern Spotted Owl.¹¹

4. The Secretaries' interpretation is not an attempt to "silently adopt a position previously rejected by congress. -- Finally, the court also erred in relying on the rejection of an amendment proposed by Senator Murray, to support its conclusion that Congress intended to include all sales throughout Washington and Oregon in the scope of Section 2001(k)(1). The court found that the agencies' interpretation violates the statutory construction rule that "Congress is not deemed to have silently adopted a position it previously rejected." (E.R.). The court's conclusion is erroneous because the Murray language was fundamentally different from the agencies' interpretation of the current law. First, Senator Murray's amendment would have only released "each timber sale awarded pursuant to section 318," not unawarded sales. 141 Cong. Rec. S 4870 (daily ed. March 30, 1995) (emphasis added). It is this difference, the release of

¹¹ These forests include all of the Wallowa-Whitman National Forest, the Colville National Forest (obtain definitive list of non-owl forests)

offered or awarded sales, that distinguishes the Murray amendment from section 2001(k). See 141 Cong. Rec. H 5050. Indeed, a significant volume of timer is included in unawarded section 318 sales. (E.R.). The district court simply chose to ignore this important distinction.

Second, Senator Murray's section 318 release language was, like section 2001, part of a larger timber salvage amendment that presented more significant differences than simply the provisions of Section 2001(k)(1). Indeed, Senator Gorton, in his comparison of the two approaches, described the Section 318 release provisions in both the Murray amendment and the legislation eventually enacted, as applying to only the remaining section 318 timber sales:

The second and third elements in both amendments have to do with option 9 and with so-called section 318 sales. Section 318 was a part of the Appropriations Act in 1990, designed to provide some interim help for the forest in the two Northwest States. But many of the sales directed by this Congress pursuant to that law have been held up by subsequent environmental actions. The proposal that the committee has made simply says that those sales would go ahead unless they involved places in which endangered species are actually found, in which case, substitute lands will take their place.

141 Cong. Rec. S 4875 (March 30, 1995) (emphasis added). Thus, the Senate's rejection of the Murray amendment can have no significance for this case.

D. The Agencies' Interpretation Is Supported By The Legislative History. -- The district court also erred in finding that the legislative history of Section 2001(k)(1) supports its

interpretation of the scope of that section. A fair reading of the legislative history as a whole demonstrates that the only sure and certain intent of the entire Congress was to require the Forest Service and BLM to address the continuing delay in the completion of section 318 timber sales, either through award or through provision of replacement timber. Reliance on legislative history for establishing Congressional intent beyond that undisputed fact constitutes error.

Section 2001 of Public Law 104-19 was originally introduced as Section 307 of H.R. 1159, a bipartisan effort known as the Taylor-Dicks Amendment. What eventually became subsection 2001(k) originally contained only the language of paragraph 2001(k)(1), with 30 days provided for compliance. H.R. 1159, § 307(i). The description of subsection 307(1) in the Report of the House Appropriations Committee makes clear that subsection 307(i) was intended "to release a group of sales that have been already sold under the provisions of section 318. * * * The harvest of these sales was assumed under the President's Pacific Northwest Forest Plan * * * ." 104 H. Rept. 71. The provision's cosponsor, Representative Taylor, described the potential contract liability that this provision was designed to address, and that he believed the sales were previously approved for harvest.¹²

¹² Representative Taylor stated:

Many of these sales were awarded to purchasers
years ago; the government will have to pay tens of
(continued...)

In the Senate, the language of section 2001 was modified to provide the current provisions for protection of nesting birds and to require alternative timber volume where timber contracts could not be released. While debating an alternative amendment sponsored by Senator Murray, Senator Gorton, the author of section 2001, described subsection 2001(k) only as applying to section 318 sales.¹³ Senator Hatfield, the Chairman of the

¹²(...continued)

millions of dollars in contract buyouts if these sales were cancelled. Other sales were auctioned years ago but never awarded; in some cases the agencies rejected bids well after the auction due to administrative reviews and delays and changing standards. This is the case even though the preponderance of these sales were approved for harvest in the Record of Decision accompanying the President's Pacific Northwest Forest Plan, as not jeopardizing the continued existence of any of the numerous species of wildlife considered by that plan."

141 Cong. Rec. H 3233.

Representative Taylor also made clear that the authors of section 307 worked with the Forest Service in drafting this section "to assure that these requirements are technically correct, and evaluating the Forest Service's technical and operational capability to meet the requirements of section 307," 141 Cong. Rec. H3232, and "to make sure that the amendment is drafted in a technically and legally sound fashion." 141 Cong. Rec. H 3233.

¹³ Senator Gorton stated:

The second and third elements in both amendments have to do with option 9 and with so-called section 318 sales. Section 318 was a part of the Appropriations Act of 1990, designed to provide some interim help for the forest in two Northwest States. But many of the sales directed by this Congress pursuant to that law have been held up by subsequent environmental actions. The proposal that the committee has made simply says that those
(continued...)

Senate Appropriations Committee and the floor manager of the bill, also described Senator Gorton's amendment only in terms of applying to section 318 sales:

The Gorton amendment releases 375 million board feet of timber sales in western Oregon that were previously sold to timber purchasers. Most of these sales, originally authorized by the Northwest timber compromise amendment of 1989, were determined in the record of decision for President Clinton's option 9 plan not to jeopardize the existence of any species. To ensure further protections, the Gorton amendment includes provisions prohibiting activities in timber sale units which contain any nesting threatened or endangered species.¹⁴

141 Cong. Rec. S 4881. While the legislative history of the 375 million board feet figure is unclear, the remaining references by Senator Hatfield confirm that he was referring to section 318 sales.¹⁵ The "Northwest timber compromise amendment of 1989" pursuant to which the sales were originally authorized, was Section 318, sponsored by Senator Hatfield. (E.R.); see also 141 Cong. Rec. S 4881 (referring to 1989 compromise sponsored by Senators Hatfield and Adams).

¹³(...continued)

sales would go ahead unless they involved places in which endangered species are actually found, in which case, substitute lands will take their place.

141 Cong. Rec. S 4875.

¹⁴ In fact Senator Hatfield was apparently operating under a misunderstanding of the assumptions made in the ROD. The ROD did not conclude that the section 318 sales then in consultation on marbled murrelet would not jeopardize its continued existence.

¹⁵ By some accounts, there were at the time Senator Hatfield made his remarks, approximately 400 million board feet of timber in western Oregon previously offered but not awarded under section 318. (E.R.).

Prior to conference between the House and Senate, the Forest Service provided Congress with an assessment of the effects of both the House and Senate versions. (E.R.). In it, the Forest Service interpreted paragraph (1) of the House and Senate predecessors to 2001(k) only as "requiring the award and release of all timber sale contracts subject to Section 318." Id. The Forest Service estimated that the provision would release approximately 270 to 300 million board feet that was proposed for cancellation or suspension. Id. at 5.

The court, however, ignores this one consistent line of congressional intent, and has chosen to rely heavily on the Conference Report's description of 2001(k) (1) to support its interpretation that the statute releases all timber sales offered prior to the date of enactment within the area that allegedly had been encompassed by Section 318. Under the circumstances present here, the conference report description is not dispositive. As an initial matter, "[t]here are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 114 S. Ct. 655, 662 (1994); Estate of McAlpine v. Commissioner, 968 F.2d 459 (5th Cir. 1992) ("it is, after all, a statute that we are interpreting, not a conference report.") quoting Prussner v. U.S., 896 F.2d 218, 228 (7th Cir. 1990).¹⁶

¹⁶ Moreover, aspects of this conference report are inconsistent with the language of the statute. Compare, also.
(continued...)

The conference report referred to the "geographic area encompassed by section 318" - - at best this is ambiguous, and under plaintiff's interpretation, conflicts with the plain language of the statute. Moreover, the language inserted into the Conference Report is at odds with numerous statements by legislators debating the bill. As Justice Scalia has observed, "[a]s anyone familiar with modern-day drafting of congressional committee reports is well aware, their references * * * were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant * * * but rather to influence judicial construction * * * ." Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (concurring opinion).

This warning should be heeded here, especially given that after the conference report was issued, the sponsor of the legislation, Senator Gorton, reconfirmed that subsection 2001(k) applied to section 318 sales. The Conference Committee reported section 2001 as part of H.R. 1158, which was vetoed by the President. After extensive negotiations and changes to other aspects of the rescissions bill, section 2001 was incorporated into H.R. 1944 with one change to subsection (k) -- extending the

¹⁶ (...continued)
141 Cong. Rec. 5050 ("The only limitation on release of these sales is in the case of any threatened or endangered bird species with a known nesting site in a sale unit") with 2001(k)(3) ("If for any reason a sale cannot be released or completed . . .").

Secretaries' time for compliance from 30 to 45 days. Prior to the Senate vote on H.R. 1944, Senator Gorton described subsection 2001(k) using the Forest Service's estimate in its effects statement that the provision would release 300 million board feet of timber. 141 Cong. Rec. S 10464. Again, Senator Gorton described this provision only as intended to "release a group of timber sales that have already been sold under the provisions of Section 318 of the fiscal year 1990 Interior and Related Agencies Appropriations Act." Id.

The court's extensive reliance (E.R.) on statements made by Representative Taylor is misplaced. Taylor's statement that section 307(i) would release section 318 timber sales and "others * * * offered in fiscal year 1991 and some more recently," 141 Cong. Rec. H 3233, is not dispositive. First, given that some section 318 sales were awarded in fiscal year 1991 and later, because they were delayed by litigation and administrative action, Representative Taylor's statement may have intended to simply encompass later-awarded section 318 timber sales. (E.R.). Second, later statements by Representative Taylor, after the President announced that he would veto the rescissions bill, speak only in terms of the remaining section 318 timber sales:

For instance, the section 318 timber, it is in Washington and Oregon, this area has already met all the environmental requirements. This is green timber but it has not yet been released. It has been waiting since 1990, over 5 years. And this meets all the environmental requirements, and it meets, it has already been approved to move, but it has been held up for over 5 years while people in Washington and Oregon are without jobs.

141 Cong. Rec. H 5558. See also 141 Cong. Rec. H 5559 (reiterating his reference to "section 318 timber that has been approved.") Thus, even if the statement relied on by court is regarded as indicating a class of timber sales broader than the remaining section 318 sales, the court's reliance on those remarks are misplaced. The "remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history," Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980), especially where, as here, the single legislator has issued conflicting remarks.

The court also erred in giving any weight to a letter written to the Secretaries, by several members of Congress on the day the legislation was enacted, as evidence that Congress intended subsection 2001(k) to apply to all of Washington and Oregon. A post-enactment letter, signed by six legislators, is entitled to little, if any weight. Post-hoc legislative history generally is entitled to little weight, particularly where it represents the views of only one or a few legislators. See Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980); Montana Wilderness Ass'n v. U.S. Forest Service, 655 F.2d 951, 956 & n.8 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982). Moreover, off-the-record correspondence is not to be attributed to Congress as a whole. Montana Wilderness Ass'n at 956 n.10. Also, the fact that Senator Hatfield, the chairman of the Senate Appropriations Committee - the committee from which the legislation arose - did not sign the letter is significant.

Indeed, as demonstrated above, Senator Hatfield's interpretation of the scope of Section 2001(k) (1) is at odds with the interpretation set out in the post-enactment letter. The failure of the authors of the letter to have their explicit interpretation included in any of the legislative committee reports on the legislation cannot be cured by the publication of a post-enactment letter.

Finally, nowhere in the legislative history is there any explicit reference that section 318 was intended to mean the actual States of Washington and Oregon. In fact nowhere does the legislative history explain just what was the geographic scope of the area originally covered by section 318. The absence of any references to the States of Washington and Oregon in connection with the release of sales under section 2001(k) strongly undercuts plaintiff's proffered interpretation.

E. To the Extent that The Language Of The Act Is Deemed Ambiguous, The District Court Erred in Failing To Defer to the Agencies' Interpretation of the Statute. -- The error of the court's interpretation of the statute is further highlighted by the Agencies' contemporaneous interpretation of the meaning of "subject to Section 318." "Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law." National Railroad Passenger Corporation v. Boston & Maine Corp., 503 U.S. 407, 417 (1992), citing K Mart Corp. V. Cartier, Inc., 486 U.S. 281, 292-293 (1988); Pauley v. BethEnergy Mines, Inc., 501 U.S.

680, 696-697 (1991); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 822 (1984). The agency's interpretation need not be the only possible interpretation in order to warrant deference. In Good Samaritan Hospital v. Shalala, 113 S.Ct. 2151, 2156 (1993), the court stated:

In the circumstances of this case, where the agency's interpretation of a statute is at least as plausible as competing ones, there is little if any reason not to defer to its construction. We should be especially reluctant to reject the agency's current view which, as we see it, so closely fits 'the design of the statute as a whole and * * * its object and policy * * *.'

citing Crandon v. United States, 494 U.S. 152, 158 (1990); See also, Mt. Diablo Hospital v. Shalala, 3 F.3d 1226 (9th Cir. 1993). The district court's rejection of the Secretaries' interpretation violates these well-established, and long-held judicial precepts. The court erred in refusing to grant any deference to the agencies' interpretation of the scope of Section 2001(k)(1).

In the Agencies' Interpretation, the agencies in charge of implementing Section 2001(k) detail the rationale supporting their interpretation that the statute applies solely to section 318 sales. (E.R.). As the agencies explain, section 318 sales have been the subject of extensive and fierce debate in Congress and the Courts. Such sales are well-known and constitute a discrete set of sales known to have been developed based on specific ecological criteria and subject to expedited judicial review procedures developed by Congress. Id. In fact, Congress used section 318 as a model in drafting much of section 2001.

Compare (subsections 2001(f)(1)-(7) with (subsections 318(g)(1)-(3)). Congress had specific knowledge of the extent and circumstances causing the delays in completing section 318 sales through the quarterly reports from the agencies prepared pursuant to subsection 318(h). It was the agencies' understanding that, consistent with the overall framework of the statute, subsection 2001(k) addressed resolution of this discrete set of remaining 318 sales. This understanding is unambiguously reflected in the Forest Service's effects statement on the proposed legislation that was transmitted to Congress and then used by members of Congress in their floor statements and debates. (E.R.) (interpreting paragraph 1 of the House and Senate predecessors to 2001(k) as "requiring the award and release of all timber sale contracts subject to Section 318").

The agencies' interpretation is consistent with, and gives meaning to, the overall purpose of the statute. An analysis of section 2001 as a whole reveals that Congress intended to reach an accommodation between expediting the release of timber while acknowledging the overall forest planning strategies that have taken years to develop and put into place.¹⁷ Subsection 2001(d) expressly directs expedited implementation of the Pacific

¹⁷ For example, in connection with salvage sales, while the Act provides an expedited procedure for proceeding with such sales, at the same time, the Act expressly authorizes the Secretary to consider the environmental effects of any salvage timber sale, the effects on threatened or endangered species, and consistency with any management plans standards and guidelines, including those set forth in the Forest Plan. See Subsection 2001(c); see also 141 Cong. Rec. S 4881.

Northwest Forest Plan. See Subsection 2001(d). The Forest Plan consists of extensive standards and guidelines and land allocations that comprise a comprehensive ecosystem management strategy, designed to accommodate the need for sustained yield of timber and protection of forest resources.¹⁸ Section 318 sales were considered in development of the Forest Plan.¹⁹ Applying subsection 2001(k) to release section 318 sales as contemplated by the Forest Plan allows the expedited release of millions of board feet of timber²⁰ without undermining forest planning strategies.

Under the court's expansive interpretation, the Secretaries have now been required to release of all previously offered sales from the states of Washington and Oregon without conformance with any environmental laws or forest planning documents. This wholesale release of sales, if not reversed by this Court, could potentially require replanning of the Forest Plan which

¹⁸ ROD at 3-4 (Ex. B). The two primary categories of land allocations in the Forest Plan include (1) "Reserve Areas" within which possible timber sales and related ground-disturbing activities are severely limited or prohibited and (2) remaining unreserved areas designated as Matrix, in which programmed timber harvest may go forward subject to restrictions intended to preserve conservation objectives. ROD at 6-11.

¹⁹ The legislative history confirms that Congress understood that sales to be released under subsection 2001(k) had already undergone environmental review and would that their release would be consistent with the Forest Plan. See 141 Cong. Rec. H 3233 (statement by cosponsor Representative Taylor explaining his understanding that the preponderance of the sales had been approved for harvest in the ROD for the Forest Plan); see also 104 H.Rept. 71 (harvest of sales was assumed under Forest Plan); 141 Cong. Rec. S 4881.

²⁰ See e.g., Zielinski Dec., Ex. D.

contemplated that such sales would conform to the planning documents as amended by the April 24, 1994 ROD. Such a result runs contrary to Congress's clearly expressed intent in section 2001(d) that the Forest Plan be expeditiously implemented and must be rejected.

Given the strong rationale enunciated by the agencies in support of their interpretation of subsection 2001(k) to apply to remaining section 318 sales, the agencies' interpretation is entitled to deference and should not be rejected in favor of plaintiff's self-serving and potentially destructive construction. See Udall v. Tallman, 380 U.S. 1, 16 (1965); Alvarez v. Block, 746 F.2d 593, 606 (9th Cir. 1984) ("[d]eference requires affirmance of any interpretation within the range of reasonable meanings the words permit, comporting with the statute's clear purpose").

CONCLUSION

For the foregoing reasons, the district court's permanent injunction and grant of decalartory relief should be reversed.

Respectfully,

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NOVEMBER 1995
90-1-1-2928

STATEMENT OF RELATED CASES

Currently pending before this Court is an appeal by proposed intervenors, Oregon Natural Resources Council, et al., from the district court's denial of intervention on this issue. The appeal is No. 95-36038. On November 6, 1995, the appellants in that case filed an emergency motion to expedite and consolidate No. 95-36038 with this appeal.