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Timber: NFRC v. Glickman [5]

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5 Of Attorneys for Intervenor Applicant  
Western Timber Co.  
6  
7

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

10	NORTHWEST FOREST RESOURCE	)	
	COUNCIL, an Oregon	)	Civil No. No. 95-6244-HO
11	corporation,	)	Lead Case
		)	
12	Plaintiff,	)	Civil No. 95-6267-HO
		)	Consolidated Cases
13	v.	)	
		)	MOTION TO INTERVENE
14	DAN GLICKMAN, in his capacity	)	
	as Secretary of Agriculture;	)	(Oral Argument Requested)
15	BRUCE BABBITT, in his	)	
	capacity as Secretary of the	)	
16	Interior,	)	
		)	
17	Defendant.	)	
		)	
18		)	

19 Pursuant to Federal Rule of Civil Procedure 24(a),  
20 Western Timber Co. moves this Court for its Order permitting  
21 Western Timber to intervene as a plaintiff in this action as of  
22 right. Western Timber makes this motion on the grounds that it  
23 has an interest relating to the property or transaction which is  
24 the subject matter of the action, it is so situated that  
25 disposition of the action may as a practical matter impair or  
26

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1 impede its ability to protect its interest, and it is  
2 inadequately represented by the existing parties to this action.

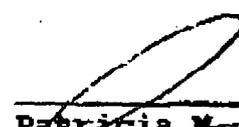
3 In the alternative, pursuant to Federal Rule of Civil  
4 Procedure 24(b), Western Timber moves this Court for its Order  
5 allowing Western Timber to intervene in this action  
6 permissively, on the grounds that Western Timber's claim and the  
7 main action have a question of law or fact in common.

8 Pursuant to Federal Rule of Civil Procedure 24(c),  
9 Western Timber submits with this motion a Complaint setting  
10 forth the claims for which intervention is sought.

11 In support of this motion, Western Timber relies upon  
12 the Memorandum in Support filed herewith.

13 DATED this 7 day of November, 1995.

14 Respectfully submitted,  
15 SCHWABE, WILLIAMSON & WYATT

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

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

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

12 Plaintiff, )

Civil No. 95-6267-HO  
 Consolidated Cases

13 v. )

14 DAN GLICKMAN, in his capacity )  
 as Secretary of Agriculture; )  
 15 BRUCE RABBITT, in his )  
 capacity as Secretary of the )  
 16 Interior, )

**MEMORANDUM IN SUPPORT OF  
 MOTION TO INTERVENE**

17 Defendant. )  
 18 )  
 19 )

20 INTRODUCTION

21 Intervenor-applicant Western Timber Co. was the high  
 22 bidder for the Malt Timber Sale, a United States Forest Service  
 23 sale offered February 22, 1989, some six years prior to the  
 24 enactment of Section 2001(k) of the Emergency Salvage Timber  
 25 Sale Program. To date, defendant Glickman has failed to release  
 26 the Malt Timber Sale for award to Western Timber, as required by  
 Section 2001(k).



1 property or transaction which is the subject of the action.  
 2 Third, the applicant must be so situated that the disposition of  
 3 the action may as a practical matter impair or impede its  
 4 ability to protect that interest. Fourth, the applicant's  
 5 interest must be inadequately represented by the parties to the  
 6 action. Forest Conservation Council v. United States Forest  
 7 Service, \_\_\_ F.3d \_\_\_, 1995 WL 562019 (9th Cir. 1995); Sierra  
 8 Club v. United States Environmental Protection Agency, 995 F.2d  
 9 1478, 1481 (9th Cir. 1993).

10 1. Western Timber's Motion to Intervene is Timely.  
 11 Western Timber's application for intervention is  
 12 timely. On October 17, 1995, less than one month ago, the Court  
 13 issued its Order releasing fiscal year 1991 through 1995 sales  
 14 and directing defendants to compile a list of earlier sales  
 15 subject to the Court's September 13, 1995 Order. Defendant  
 16 Glickman submitted the list of earlier sales he intends to  
 17 release, omitting the Malt sale, on November 1, 1995, only a few  
 18 days ago. Western Timber's intervention now will not delay this  
 19 litigation in any respect, and the existing parties are not  
 20 prejudiced by the intervention. See, Officers For Justice v.  
 21 Civil Service Commission of the City and County of San  
 22 Francisco, 934 F.2d 1092, 1095-96 (9th Cir. 1990) (intervention  
 23 timely one month after intervenor's interests no longer  
 24 adequately protected by parties to litigation).

25  
26

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1 2. Western Timber Has a Significantly Protectable  
2 Interest Relating to the Property or Transaction that  
3 is the Subject of This Suit.

4 This is an action to enforce Section 2001(k) of Public  
5 Law 104-19 (July 27, 1995). See, Amended Complaint ¶ 1.

6 Section 2001(k) directs the Forest Service to

7 award, release, and permit to be completed in fiscal  
8 years 1995 and 1996, with no change in originally  
9 advertised terms, volumes, and bid prices, all timber  
10 sale contracts offered or awarded before that date in  
11 any unit of the National Forest System or District of  
12 the Bureau of Land Management subject to Section 318  
13 of Public Law 101-121 (103 Stat 745). The return of  
14 the bid bond of the high bidder shall not alter the  
15 responsibility of the secretary concerned to comply  
16 with this paragraph.

17 This court has held that Section 2001(k) requires defendants to  
18 award and release all timber sales offered prior to the date of  
19 the enactment of Section 2001(k) in all national forests in  
20 Oregon and Washington and all Bureau of Land Management  
21 districts in Western Oregon, in which no endangered bird species  
22 is known to be nesting. Western Timber was the high bidder on  
23 the Malt Timber Sale, a timber sale offered prior to the date of  
24 the enactment of Section 2001(k) in a national forest in Oregon  
25 and in which no endangered bird species is known to be nesting.

26 See, Harral Affidavit, paragraph 5. Western Timber has a  
substantial economic interest in having the timber sale  
released, and that interest is specifically protected by  
Section 2001(k), the subject of this action. See, Sierra Club  
v. EPA, 995 F.2d at 1485 (permit holder had significantly

1 protectable interest in Clean Water Act citizen's suit where  
2 Clean Water Act explicitly allows permitted discharges).

3 3. The Disposition of this Action May as a Practical  
4 Matter Impair or Impede Western Timber's Ability to  
5 Protect its Interest.

6 "The question of impairment is not separate from the  
7 question of existence of an interest." NRDC v. United States  
8 Nuclear Regulatory Commission, 578 F.2d 1341, 1345 (10th Cir.  
9 1978). Although the Court has granted plaintiff summary  
10 judgment on its claim that defendants have a mandatory duty to  
11 "award and release all timber sales offered prior to July 27,  
12 1995 in all national forest in Oregon and Washington and BLM  
13 districts in Western Oregon . . . , unless the statutory  
14 exception in Section 2001(k)(2) applies," the Court has thus far  
15 ordered defendants to award and release only those sales offered  
16 or awarded in fiscal years 1991 through 1995. Amended Complaint  
17 ¶¶ 17-19; October 17, 1995 Order. By omitting to include the  
18 Malt sale on the Court ordered list of earlier sales subject to  
19 release under Section 2001(k), Defendant Glickman has clearly  
20 indicated his intent not to release the sale. See, Federal  
21 Defendants' November 1, 1995 Report.

22 One possible explanation for defendant Glickman's  
23 failure to list or release the Malt sale is that defendant  
24 Glickman reads the Court's September 13, 1995 order to interpret  
25 Section 2001(k) to require the release of sales offered pursuant  
26 to Section 318 or in fiscal years 1991 through 1995. See,  
Federal Defendants' November 1, 1995 Report, p. 2. The Malt

1 Timber Sale, offered in fiscal year 1989, was rejected for  
 2 release under Section 318. See, Harral Affidavit, paragraph 4.  
 3 If the Court finds that defendants' release of only Section 318  
 4 sales and sales offered in fiscal years 1991 through 1995  
 5 satisfies the Court's September 13, 1995 Order, the Malt Timber  
 6 Sale (a non-318, pre-fiscal 1991 sale) will not be released and  
 7 awarded to the high bidder, Western Timber. At a minimum,  
 8 Western Timber will be forced to relitigate the interpretation  
 9 of Section 2001(k) under the shadow of the Court's apparent  
 10 acquiescence in defendants' interpretation of its September 13,  
 11 1995 Order. See, Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th  
 12 Cir. 1994) (Precedential effect of adverse judgment impaired  
 13 applicant's interest). See also, Feller v. Brock, 802 F.2d 722,  
 14 729 (4th Cir. 1986) (liberal intervention is desirable to  
 15 dispose of as much of the controversy involving as many  
 16 apparently concerned persons as is compatible with efficiency  
 17 and due process).

18 4. Western Timber's Interest is Not Adequately  
 19 Represented by any Existing Party to the Action.

20 "The requirement of inadequacy of representation is  
 21 satisfied if the applicant shows that representation of its  
 22 interests 'may be' inadequate." Sagebrush Rebellion, Inc. v.  
 23 Watt, 713 F.2d 525, 528 (9th Cir. 1983), citing Smith v.  
 24 Pangilinan, 651 F.2d 1320, 1325 (9th Cir. 1981). The burden of  
 25 making the showing is minimal. Id.  
 26

1 September 13, 1995 Order and subsequent Orders to explicitly  
 2 require defendant Glickman to release the Malt Timber Sale, a  
 3 sale offered prior to the date of the enactment of the Emergency  
 4 Salvage Timber Sale Program in a national forest in Oregon, in  
 5 which no endangered bird species is known to be nesting.  
 6 Without expanding the issues in the case, then, Western Timber's  
 7 intervention will "significantly contribute to full development  
 8 of the underlying factual issues in the suit and to the just and  
 9 equitable adjudication of the legal questions presented."  
 10 Spangler v. Pasadena City Board of Education, 552 P.2d 1326,  
 11 1329 (9th Cir. 1977). See also, Nash v. Blunt, 140 F.R.D. 400,  
 12 403 n. 3 (W.D. Mo. 1992) (intervenors' presence will aid the  
 13 court in resolving issues presented in case). This Court should  
 14 exercise its broad discretion to allow Western Timber to  
 15 intervene permissibly.

16 CONCLUSION

17 For all the foregoing reasons, Western Timber's Motion  
 18 to Intervene as a plaintiff in this action should be granted.

19 DATED this 7 day of November, 1995.

20 Respectfully submitted,

21 SCHWABE, WILLIAMSON & WYATT

22  
 23 By:

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

10	NORTHWEST FOREST RESOURCE	)	
	COUNCIL, an Oregon	)	Civil No. No. 95-6244-HO
11	corporation,	)	Lead Case
		)	
12	Plaintiff,	)	Civil No. 95-6267-HO
		)	Consolidated Cases
13	and	)	
		)	<b>COMPLAINT (PROPOSED)</b>
14	WESTERN TIMBER CO.,	)	(Violation of
	an Oregon corporation,	)	Pub. L. 104-19,
15		)	Section 2001(k);
	Plaintiff-	)	Withholding of
16	Intervenor,	)	Agency Action)
		)	
17	v.	)	
		)	
18	DAN GLICKMAN, in his capacity	)	
	as Secretary of Agriculture;	)	
19	BRUCE BABBITT, in his	)	
	capacity as Secretary of the	)	
20	Interior,	)	
		)	
21	Defendant.	)	

22 For its complaint herein, plaintiff-intervenor Western  
 23 Timber Co. alleges as follows:  
 24  
 25  
 26

(SW1/93554/10244/128/127/24-1)  
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1 § 1391(e), because a substantial part of the events or omissions  
2 giving rise to the claims herein occurred in this district. The  
3 Malt Timber Sale, which plaintiff-intervenor asks the Court to  
4 compel defendant Glickman to release, is located in this  
5 district. Plaintiff-intervenor resides in this district.

6 PARTIES

7 3.

8 Plaintiff-intervenor Western Timber Co. is an Oregon  
9 corporation in the business of harvesting and processing timber.  
10 Plaintiff-intervenor was the high bidder on the United States  
11 Forest Service Malt Timber Sale offered February 22, 1989.  
12 Under Section 2001(k) of Public Law 104-19, Western Timber is  
13 statutorily entitled to the award and release of the Malt Timber  
14 Sale.

15 4.

16 Defendant Dan Glickman is the Secretary of  
17 Agriculture, the official in charge of the United States Forest  
18 Service. Defendant Glickman is assigned the responsibility of  
19 complying with Section 2001(k) of Pub. L. 104-19 as it relates  
20 to the Forest Service.

21 BACKGROUND ALLEGATIONS

22 5.

23 On July 27, 1995, the President signed into law Public  
24 Law 104-19, the Rescissions Act of 1995. Section 2001 of this  
25 law contains a series of provisions establishing an "emergency  
26 salvage timber sale program." Subsection (k) directs the award

1 and release of certain previously offered timber sales as  
2 follows:

3 \*(1) AWARD AND RELEASE REQUIRED.

4 Notwithstanding any other provisions of law,  
5 within 45 days after the date of the  
6 enactment of this Act, the Secretary  
7 concerned shall act to award, release and  
8 permit to be completed in fiscal years 1995  
9 and 1996, with no change in originally  
10 advertised terms, volumes, and bid prices,  
11 all timber sale contracts offered or awarded  
12 before that date in any unit of the National  
13 Forest System or District of the Bureau of  
14 Land Management subject to Section 318 of  
15 Public Law 101-121 (103 Stat. 745). The  
16 return of the bid bond of the high bidder  
17 shall not alter the responsibility of the  
18 Secretary concerned to comply with this  
19 paragraph.

20 (2) THREATENED OR ENDANGERED BIRD SPECIES.

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

26 (3) ALTERNATIVE OFFER IN CASE OF DELAY.

27 If for any reason a sale cannot be released  
28 and completed under the terms of this  
29 subsection within 45 days after the date of  
30 the enactment of this Act, the Secretary  
31 concerned shall provide the purchaser an  
32 equal volume of timber, of like kind and  
33 value, which shall be subject to the terms  
34 of the original contract and shall not count  
35 against current allowable sale quantities."

36 6.

37 Section 318 of Pub. L. 101-121, 103 Stat. 745 (1989),  
38 referred to in the Rescissions Act, mandated timber sales in  
39 specified volumes in fiscal year 1990 in Oregon and Washington.  
40 The "unit[s] of the National Forest System or District[s] of the  
41 Bureau of Land Management subject to Section 318 of Public Law

1 101-121 (103 Stat. 745)" referred to in Section 2001(k)(1) are  
2 the national forests of Oregon and Washington and the BLM  
3 administrative districts in Western Oregon.

4 THE MALT TIMBER SALE

5 7.

6 On February 22, 1989, the Forest Service offered for  
7 sale the Malt Timber Sale in the Umpqua National Forest of  
8 Oregon. Plaintiff-intervenor Western Timber was the high bidder  
9 for the Malt Timber Sale.

10 8.

11 On November 8, 1989, the Forest Service advised  
12 plaintiff-intervenor that the Malt Timber Sale had been  
13 considered but rejected for release under Section 318(f) and  
14 that the Malt Timber Sale had been identified as a sale that  
15 would not be sold.

16 9.

17 Defendant Glickman, through his agents and employees,  
18 announced on August 22, 1995, that he would not release any  
19 timber sales except sales sold in fiscal year 1990 under  
20 Section 318(b) through (j). Defendant Glickman does not intend  
21 to release the Malt Timber Sale.

22 10.

23 No endangered bird species is known to be nesting in  
24 the Malt Timber Sale area.

25

26

PLAINTIFF-INTERVENOR'S INJURY

11.

Plaintiff-intervenor will be irreparably injured by defendant Glickman's failure to award and release the Malt Timber Sale, because Congress has granted plaintiff-intervenor an absolute and unconditional statutory right to the award and release of this sale by September 10, 1995. The combined effect of the defendant's interpretation of Section 2001(k) is that defendants intend to release by September 10, 1995 less than 10 percent of the sales Congress ordered released in Section 2001(k). Plaintiff-intervenor has no adequate remedy at law.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

12.

(Violation of Mandatory Duty Owed to Plaintiff)

Plaintiff incorporates paragraphs 1-11 as if fully set forth herein.

13.

Defendant has a mandatory duty to plaintiff-intervenor to award and release immediately the Malt Timber Sale, a timber sale offered prior to July 27, 1995 in an Oregon National Forest. Defendant Glickman has failed to perform this duty by the September 10, 1995 deadline imposed by Section 2001(k).

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11	corporation,	)	Lead Case
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12	Plaintiff,	)	Civil No. 95-6267-HO
		)	Consolidated Cases
13	and	)	
		)	MOTION TO CLARIFY ORDER
14	WESTERN TIMBER CO.,	)	
	an Oregon corporation,	)	
15		)	ORAL ARGUMENT REQUESTED
	Plaintiff-	)	
16	Intervenor	)	
		)	
17	v.	)	
		)	
18	DAN CLICKMAN, in his capacity	)	
	as Secretary of Agriculture;	)	
19	BRUCE BABBITT, in his	)	
	capacity as Secretary of the	)	
20	Interior,	)	
		)	
21	Defendant.	)	

22 Pursuant to Federal Rule of Civil Procedure 60(a),  
 23 plaintiff-intervenor Western Timber Co. moves this Court for its  
 24 Order clarifying its Order of September 13, 1995 and subsequent  
 25 Orders to require defendant Clickman to release the Malt Timber  
 26 Sale.

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	COUNCIL, an Oregon	)	Civil No. No. 95-6244-HO
11	corporation,	)	Lead Case
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12	Plaintiff,	)	Civil No. 95-6267-HO
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13	and	)	
		)	MEMORANDUM IN SUPPORT OF
14	WESTERN TIMBER CO.,	)	MOTION TO CLARIFY ORDER
	an Oregon corporation,	)	
15		)	
	Plaintiff-	)	
16	Intervenor,	)	
		)	
17	v.	)	
		)	
18	DAN GLICKMAN, in his capacity	)	
	as Secretary of Agriculture;	)	
19	BRUCE BABBITT, in his	)	
	capacity as Secretary of the	)	
20	Interior,	)	
		)	
21	Defendant.	)	

22 INTRODUCTION

23 Plaintiff-intervenor Western Timber Co. was the high  
 24 bidder for the Malt Timber Sale, a United States Forest Service  
 25 sale offered February 22, 1989 in an Oregon national forest and  
 26 in which no endangered bird species is known to be nesting. To

1 date, defendant Glickman has failed to release the Malt Timber  
 2 Sale for award to Western Timber Co., as required by  
 3 Section 2001(k) of the Federal Rescissions Act of 1995.

4

5

#### STATEMENT OF FACTS

6 On February 22, 1989, the United States Forest Service  
 7 offered for sale the Malt Timber Sale in the Umpqua National  
 8 Forest of Oregon. Harral Affidavit, paragraph 2. Western  
 9 Timber Co. was the high bidder for the Malt Timber Sale. Harral  
 10 Affidavit, paragraph 3.

11 Award of the sale was, however, enjoined by the  
 12 Seattle Audubon Society v. Robertson case. After enactment of  
 13 Section 318 of Pub. L. 101-121, 103 Stat. 745, (1989), the Malt  
 14 Timber Sale was considered but rejected for release in fiscal  
 15 year 1990. Harral Affidavit, paragraph 4. On November 8, 1989,  
 16 the Forest Service advised Western Timber Co. that the Malt  
 17 Timber Sale had been rejected for release under Section 318 and  
 18 it would not be sold. Harral Affidavit, paragraph 4.

19 No endangered bird species is known to be nesting in  
 20 the Malt Timber Sale area. Harral Affidavit, paragraph 5.

21

#### ARGUMENT

22 On July 27, 1995, President Clinton signed into law  
 23 Pub. L. 104-19, the Rescissions Act of 1995. Section 2001 of  
 24 this law contains a series of provisions establishing an  
 25 "emergency salvage timber sale program." Subsection (k)(1)

26

Page 2 - MEMORANDUM IN SUPPORT OF  
 MOTION TO CLARIFY ORDER.

(SUN/9554/102/06 (P) 677682)  
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1 directs the award and release of certain previously-offered  
2 timber sales as follows:

3           **"AWARD AND RELEASE REQUIRED --**  
4           Notwithstanding any other provision of law,  
5           within 45 days after the date of the  
6           enactment of this Act, the Secretary  
7           concerned shall act to award, release, and  
8           permit to be completed in fiscal years 1995  
9           and 1996, with no change in originally  
10          advertised terms, volumes, and bid prices,  
11          all timber sale contracts offered or awarded  
12          before that date in any unit of the National  
13          Forest System or district of the Bureau of  
14          Land Management subject to Section 318 of  
15          Public Law 101-121 (103 Stat. 745). The  
16          return of the bid bond of the high bidder  
17          shall not alter the responsibility of the  
18          Secretary concerned to comply with this  
19          paragraph."

20 This Court has interpreted Section 2001(k) to require defendant  
21 Glickman, the official in charge of the United States Forest  
22 Service, to award or release all timber sales offered prior to  
23 the July 27, 1995 enactment of Section 2001(k) in all national  
24 forests in Oregon and Washington, in which no endangered bird  
25 species is known to be nesting.

26           The Malt Timber Sale was offered on February 22, 1989,  
27 prior to the July 27, 1995 enactment of Section 2001(k). No  
28 endangered bird species is known to be nesting in the Malt  
29 Timber Sale area. Harral Affidavit, paragraph 5. Plainly,  
30 Section 2001(k) requires defendant Glickman to release the Malt  
31 Timber Sale.

32           Defendant Glickman's response to the Court's  
33 October 17, 1995 Order to list all pre-fiscal year 1991 sales  
34 subject to release under the Court's September 13, 1995 Order

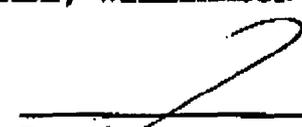
1 fails to name the Malt Timber Sale as a sale that will be  
 2 released. Defendant Glickman clearly does not intend to release  
 3 the Malt Timber Sale, despite the provisions of Section 2001(k)  
 4 and the Court's September 13, 1995 Order. Western Timber Co.  
 5 therefore requests that the Court clarify its September 13, 1995  
 6 Order and subsequent Orders to explicitly require defendant  
 7 Glickman to release the Malt Timber Sale.

8 CONCLUSION

9 Section 2001(k) requires defendant Glickman to release  
 10 the Malt Timber Sale to Western Timber Co., the high bidder.  
 11 Defendant Glickman has refused to do so. For these reasons,  
 12 Western Timber Co. respectfully requests that the Court clarify  
 13 its September 13, 1995 Order and subsequent Orders to explicitly  
 14 require Defendant Glickman to release the Malt Timber Sale.

15 DATED this 7 day of November, 1995.

16 Respectfully submitted,  
 17 SCHWABE, WILLIAMSON & WYATT

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

NORTHWEST FOREST RESOURCE	)	
COUNCIL, an Oregon	)	Civil No. No. 95-6244-HO
corporation,	)	Lead Case
	)	
Plaintiff,	)	Civil No. 95-6267-HO
	)	Consolidated Cases
and	)	
	)	
WESTERN TIMBER CO.,	)	AFFIDAVIT OF
an Oregon corporation,	)	GENE HARRAL
	)	
Plaintiff-	)	
Intervenor	)	
	)	
v.	)	
	)	
DAN GLICKMAN, in his capacity	)	
as Secretary of Agriculture;	)	
BRUCE BABBITT, in his	)	
capacity as Secretary of the	)	
Interior,	)	
	)	
Defendant.	)	
	)	
STATE OF OREGON	)	
	) ss.	
County of Washington	)	

I, GENE HARRAL, being first duly sworn depose and say  
as follows:

(SM1/93554/18244/202/07/07)  
SHERMAN WALKER & WYATT  
Attorneys at Law  
Suite 1000-1000, Pioneer Center  
1211 S.W. Fifth Avenue  
Portland, Oregon 97204-3705  
Telephone (503) 222-3861

1 1. I am the Assistant Secretary of Western Timber  
2 Co. I make this Affidavit in support of Western Timber Co.'s  
3 motion to intervene and motion to clarify order.

4 2. Attached as Exhibit 1 to this Affidavit is a true  
5 and correct copy of the timber sale prospectus for the Umpqua  
6 National Forest Malt Timber Sale, offered February 22, 1989.

7 3. Western Timber Co. was the high bidder for this  
8 sale.

9 4. Attached as Exhibit 2 to this Affidavit is a true  
10 and correct copy of a letter to Western Timber Co. from  
11 Kenneth N. Jensen, contracting officer for the United States  
12 Forest Service, advising Western Timber Co. that the Malt Timber  
13 Sale had been rejected for release under Section 318 of Pub.  
14 L. 101-121 and would not be sold.

15 5. To the best of Western Timber Co.'s knowledge, no  
16 endangered bird species are known to be nesting in the Malt  
17 Timber Sale area. The Forest Service has never indicated to  
18 Western Timber Co. that endangered bird species are nesting in  
19 the Malt Timber Sale area.

20  
21 Gene Harral  
22 GENE HARRAL

23 STATE OF OREGON )  
24 ) ss.  
25 County of Washington)

26 This instrument was acknowledged before me this 7<sup>th</sup> day  
of November, 1995, by GENE HARRAL, Assistant Secretary of  
WESTERN TIMBER CO., an Oregon corporation, on behalf of the  
corporation.

Debra A. Surmech  
NOTARY PUBLIC FOR OREGON  
My Commission Expires: 1/2/97



Page 1 - MY AFFIDAVIT OF GENE HARRAL

(SM1/9355/102466/001/627687-1)  
DEBRA A. SURMECH & WYATT  
Attorneys at Law  
Suits 1800-1800, Pioneer Center  
1211 S.W. Fifth Avenue  
Portland, Oregon 97204-0795  
Telephone (503) 222-8881

**TIMBER SALES PROSPECTUS**  
**Umpqua National Forest**

Malt Timber Sale, Tiller Ranger District, 27612 Tiller Trail Highway, Tiller, Douglas County, Oregon.

Oral Bids: Umpqua National Forest, Room 108, 2900 N.W. Stewart Parkway, Roseburg, Oregon, February 22, 1989, 1:00 P.M.

Termination Date: March 31, 1993  
 Normal Operating Season: June 1 to October 31

Timber Quality Estimate

Species	Vol. (MBF)	Avg. DBH	% Defect	Log Grades %									
				1P	2P	3P	SP	1S	2S	3S	4S	5S	
DF	11,800	22.2	31										
SP	300	34.5	22										
WH	94	15.3	22						1				
WP	6	13.0	15									100	
WRC	41	27.9	34									100	
IC	559	20.4	23	No Grade									
	<u>12,800</u>												

Advertised Rates: See 2400-17.

Midpoint Payment Date: October 31, 1991

Discount Rate: 7%. The discount rate will be applied to the bid rates according to the following schedule:

Species	Discount Period		Discount Rate
Douglas-fir	Period 1	Bid Date to March 31, 1989	90% of Bid Rate
and Other	Period 2	April 1, 1989 to March 31, 1990	90% of Bid Rate
Coniferous	Period 3	April 1, 1990 to March 31, 1991	93% of Bid Rate
Species	Period 4	April 1, 1991 to March 31, 1992	97% of Bid Rate
	Period 5	April 1, 1992 to March 31, 1993	100% of Bid Rate

Bid Guarantee: \$103,200.00

Minimum Performance Bond: \$317,000.00

Specified Roads: Construction 5.1 Mi.

Road Completion Date: September 30, 1990 Road No. All

Purchaser Road Credits: \$346,402.00 Temporary Roads: 0.1 Mi.

Unit Summary

Unit No	Acres	DBH	Species			Unit No	Acres	DBH	Species		
			Pine	Cedar	Hem-Fir				Pine	Cedar	Hem-Fir
1	17	774	---	5	---	9 LTM	19	463	10	4	13
2	14	662	11	23	13	10	5	150	6	9	20
3	30	1160	5	16	4	11	6	281	---	23	---
4	26	1168	15	153	50	12 LTM	34	1290	31	153	21
5 LTM	21	619	15	2	---	13	5	170	5	6	---
6 LTM	31	780	---	94	5	14	8	228	---	5	---
7	20	612	7	16	5	X15	18	694	11	---	5
8	34	1015	84	4	4	X16 LTM	18	744	11	6	---
R/W	18	992	42	58							

324 total Ac =

REPLY TO: 2450

November 8, 1989

SUBJECT: Rejection of Bids on Malt Sale

TO: Western Timber Co.  
P.O. Box 370  
Glade, Or 97443

Pursuant to subsection (f) (1) of Section 318, Department of Interior and Related Agencies Appropriations Act for F.Y. 1990, the Forest Service and the Plaintiffs in Seattle Audubon Society v. Robertson, No. C89-150WD, have reached an agreement for the sale of 1.1 billion board feet of net merchantable timber from timber sales that had been prepared for sale in F.Y. 1989.

The Malt Sale was identified as a sale that will not be sold. Therefore, we have to reject all bids. Your bid bond is enclosed.

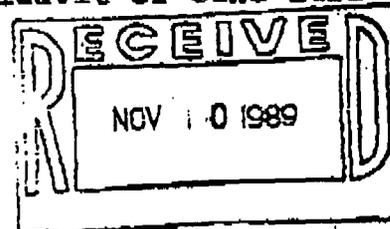
If you have any questions please feel free to call.

  
KENNETH N. JENSEN  
Contracting Officer

Enclosure

cc: Tiller RD

Exhibit 2, Page 1 of 1  
Page 4, Affidavit of Gene Harral



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

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

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	T.J. Glauthier	395-4639
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Thomas Lee (503)	727-1117
	Karen Mouritsen	219-1792
	Roger Nesbit (503)	231-2166
	Chris Nolan	395-4941
	David Shilton,	514-4240
	Al Ferlo, Anne Almy	
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 15

DATE: November 9, 1995

FROM: Lisa Holden, (202) 272-4698, as of 11/13: -8063

MESSAGE: NFRC v. Glickman: Attached is Federal Defendants' November 8, 1995 Compliance Report that provides information on the award and release of FY 1991-1995 sales.

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

4 LOIS J. SCHIFFER  
 5 Assistant Attorney General  
 MICHELLE L. GILBERT  
 6 EDWARD A. BOLING  
 U.S. Department of Justice  
 7 Environment and Natural Resources Division  
 General Litigation Section  
 8 P.O. Box 663  
 Washington, D.C. 20044-0663  
 9 Telephone: (202) 272-8338

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

12	NORTHWEST FOREST RESOURCE COUNCIL, )	
13		)
14	Plaintiff, )	Civil No. 95-6244-HO
15	v. )	(lead case)
16		)
17	GLICKMAN, in his capacity )	Civil No. 95-6267-HO
18	as Secretary of Agriculture, )	(consolidated case)
19	BRUCE BABBITT, in his capacity )	
20	as Secretary of Interior )	FEDERAL DEFENDANTS'
21		NOVEMBER 8, 1995
22	Defendants. )	COMPLIANCE REPORT
23		)
24		)

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

Attached is the Seventh Declaration of William L. Bradley  
 and Fourth Declaration of Jerry Hofer updating the Court on the  
 FEDERAL DEFENDANTS' NOVEMBER 8, 1995  
 COMPLIANCE REPORT - 1

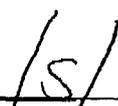
1 actions of the Bureau of Land Management and Forest Service as to  
2 these timber sales.

3 Dated this 8th day of November, 1995.

4 Respectfully submitted,

5 KRISTINE OLSON  
6 United States Attorney

7 LOIS J. SCHIFFER  
8 Assistant Attorney General

9  
10   
11 MICHELLE L. GILBERT  
12 EDWARD BOLING  
13 United States Department of Justice  
14 Environment and Natural  
15 Resources Division  
16 General Litigation Section  
17 P.O. Box 663  
18 Washington, DC 20044-0663  
19 (202) 272-8338

20 Attorneys for Defendants

21 OF Counsel:

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

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



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

3. In my fourth and fifth declarations to the court, I provided two tables showing the status of BLM sales which are covered under Section 2001(k). I also described the process used by the BLM to award these sales or portions of sales.

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

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

Executed at Portland, Oregon, on November 7, 1995.



William L. Bradley

NOVEMBER 7, 1995

NOVEMBER REPORT 1995

TABLE 1

SECOND BI-WEEKLY PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL. (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL. (MBF)	REMAINING VOL. (MBF)	STATUS	
91 LOWER DUDLEY'S SUMMIT	BOISE CASCADE	2340	71				2340	Executed
91 MILLERS VIEW	DR JOHNSON	3863	53				3863	Executed
ANOTHER FARVIEW	DOUGLAS CO. FP	4589	53				4589	Executed
BATTLE AXE	RESERVATION RANCH	1205	44				1205	Executed
BIRDSEYE ROGUE	CROMAN	3876	671				3876	Executed
CAMP	TIMBER PRODUCTS	7127	548				7127	Executed
CAT TRACKS	SENECA	472	45				472	Awarded October 26, 1995
CHERRY TREE PLUM	HULL-OAKES	1039	10				1039	Executed
CORNER SOCK	LONE ROCK	1721	52				1721	Awarded October 26, 1995
CRAZY 8'S	CLR	3957	140				3957	Awarded October 26, 1995
DAFFIDORA	SCOTT	4654	87				4654	Executed
DEAD MIDDLEMAN	DR JOHNSON	7154	197				7154	Executed
DEEP CREEK	CLR	3120	130	MM OCC. - #1,2	3120		0	Sale will not be awarded
GOLDEN SUCKER	ROUGH & READY	4367	160				4367	Executed
JEFFERS REVENGE	LONE ROCK	3914	74				3914	Awarded October 26, 1995
LICK II	WESTERN TIMBER	811	218				811	Executed
LOBSTER HILL	SCOTT	8471	211				8471	Executed
LOST SOCK	LONE ROCK	3596	47	MM OCC. - #4	1069		2536	Awarded October 26, 1995
MARTEN POWER	ROSBORO	9668	127				9668	Executed
NORTH FORK CHETCO	CLR	7372	267	MM OCC. - #1	1070		6302	Awarded October 26, 1995
PARK RIDGE BASIN	HULL-OAKES	2710	34				2710	Executed
POND VIEW	DR JOHNSON	4777	84				4777	Executed
PP&J	BOISE CASCADE	6387	269				6387	Executed
ROCKY ROAD	THOMAS CREEK	1574	23				1574	Executed
SHADY	TIMBER PRODUCTS	7635	588				7635	Executed
TOBE WEST	HULL-OAKES	4807	78				4807	Executed
UGLY ECKLEY	LONE ROCK	5815	217				5815	Awarded October 26, 1995
WREN 'N DOUBT	SCOTT	8803	163	MM OCC. - #2,3,5,7	4937		3866	Accepted
TOTALS		125823	4661		19187		115636	

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

11/09/95 11:16 11/07/95 14:01 006/015

NOVEMBER 7, 1985

ANNE ARBOR REPORTING

TABLE 2

SECOND BI-WEEKLY PROGRESS REPORT - BUREAU OF LAND MANAGEMENT

SALE NAME	CURRENT PURCHASER	ORIGINAL VOL (MBF)	ORIG. ACRES	T & E BIRDS NESTING STATUS	SEE #1 BELOW	SEE #2 BELOW	SEE #3 BELOW	SEE #4 BELOW
					AFFECTED VOL (MBF)	REMAINING VOL (MBF)	STATUS	
88 BLACK JACK	WEYCO	6863	98				6863	EXECUTED
90 PITCHER PERFECT THINNING	SWANCO	2438	180				2438	EXECUTED
90 ROMAN DUNN	HULL-OAKES	10646	142	MM OCC. - #1,2	5264		5382	EXECUTED
BEAR AIR	MURPHY TIMBER	11584	201	MM OCC. - #2	4617		6947	AWARDED
BIG WINDS	SPALDING	6864	236				6864	EXECUTED
CANTON CREEK II	DOUGLAS CO. FP	3440	47				3440	EXECUTED
CHANEY ROAD	LONE ROCK	3800	75				3800	EXECUTED
HOXIE GRIFFIN	CROMAN	2809	255				2809	EXECUTED
SUMMIT CREEK	SCOTT	7910	126				7910	EXECUTED
SWINGLOG THINNING	SWANCO	1542	95				1542	EXECUTED
TEXAS GULCH	DR JOHNSON	6212	119				6212	EXECUTED
UPPER RENHAVEN	BOHEMIA	1796	45				1796	EXECUTED
WHITT'S END	SENECA	1097	38				1097	EXECUTED
YELLOW CR. MTN.	SCOTT	7080	141				7080	EXECUTED
TOTALS		74061	1796		9881		64180	

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

11/09/95 11:17 11/07/95 14:02 DIV. OF LAND MGMT. 007/015

KRISTINE OLSON  
United States Attorney  
888 SW Fifth Avenue  
Suite 1000  
Portland, OR 97204-2024  
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ANDREA L. BERLOWE  
EDWARD BOLING  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 663  
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

FOURTH 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.

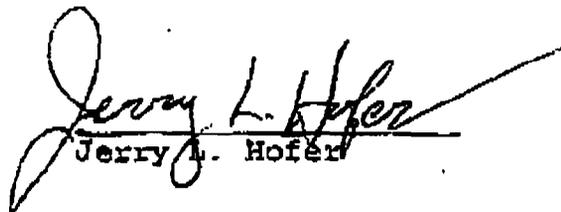
2. On October 30, 1995, Jay McWhirter's Second Declaration included a report describing the status of 33 timber sales in five separate categories which are subject to the Court's Order of October 17, 1995.

3. As required by the Court's October 17, 1995, Order, I have updated the October 30, 1995, status report. It is attached herewith as Exhibit 1.

4. The only change in status is that Nicholson Salvage 1 on the Okanogan National Forest was awarded to Vaagen Bros. on November 3, 1995.

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

Executed at Portland, Oregon, on November 8, 1995.

  
Jerry L. Hofer

STATUS AS OF 11/08/95 11:30AM

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

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

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

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

SENT TO HIGH BIDDER  
10/30/95.

5. NELSON WIN 7,400 MBF DAW

NOTICE TO PARTIES IN QNRG  
V. LOWE, 92-1121AS,  
DISTRICT OF OR. 10/19/95  
OF INTENT TO AWARD ON OR  
AFTER OCTOBER 30, 1995;  
REGIONAL FORESTER  
DISMISSED ADMINISTRATIVE  
APPEALS 10/25/95. LETTER  
SENT TO HIGH BIDDER  
10/30/95.

6. BILL WIN 5,800 MBF HOFFMAN/WRIGHT

NOTICE TO PARTIES IN QNRG  
V. LOWE, 92-1121AS,  
DISTRICT OF OR. 10/19/95  
OF INTENT TO AWARD ON OR  
AFTER OCTOBER 30, 1995.  
LETTER SENT TO HIGH BIDDER  
10/30/95.

7. CINDER WIN 5,300 SCOTT

NOTICE TO PARTIES IN QNRG  
V. LOWE, 92-1121AS,  
DISTRICT OF OR. 10/19/95  
OF INTENT TO AWARD ON OR  
AFTER OCTOBER 30, 1995;  
REGIONAL FORESTER  
DISMISSED ADMINISTRATIVE  
APPEALS 10/25/95. LETTER  
SENT TO HIGH BIDDER  
10/30/95.

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

<u>SALE</u>	<u>NE</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
8. GATORSON	COL	11,860 MBF	VAGEN BRO	SALE AWARDED 5/6/93; SALE SUSPENDED 5/20/93; USFS AWAITING DETERMINATION OF LEGAL COURSE OF ACTION UNDER <u>SMITH V. USES</u> , 93-0178-JLQ (R.D.Wa), REPORTED IN 33 FED 1072 (9TH CIR. 1994). PURCHASER HAS SUBMITTED AN OPERATING SCHEDULE, REQUESTED RELEASE OF 3 PAYMENT UNITS, AND ALLOCATED PAYMENT BOND TO THIS SALE.

- 9. TIP WEN 751 MBF LONGVIEW FIBER SALE AWARDED 9/9/94;  
ENJOINED 3/3/95. USFS  
AWAITING DETERMINATION OF  
LEGAL COURSE OF ACTION  
UNDER LEAF et al v.  
FERRARO, 94-1025 (W.D. WA)
- 10. TIPTOP WEN 2,200 MBF ST. JOE LUMBER SALE AWARDED 2/16/94;  
ENJOINED 3/3/95. USFS  
AWAITING DETERMINATION OF  
LEGAL COURSE OF ACTION  
UNDER LEAF et al v.  
FERRARO, 94-1025 (W.D. WA)

III. SALE NO LONGER EXISTS AS OFFERED

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

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

<u>SALE</u>	<u>NF</u>	<u>VOLUME</u>	<u>HIGH BIDDER</u>	<u>ACTION</u>
15. BLUE FORD FRE		6,500 MBF	BOISE-CASCADE	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.

16.	BANTY SLV	WAW	610 MBF	ELLINGSON LDM.	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
17.	JOHNSON SLV	WAW	3,600 MBF	ROSBORO LUMBER	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
18.	PARK HFR	WAW	700 MBF	BOISE CASCADE	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
19.	RD SLV	WAW	3,300 MBF	DODGE LOGGING	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
20.	HILTON	WAW	5,300 MBF	MALHEUR LUMBER	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
21.	SWEET PRA	WAW	1,280 MBF	ELLINGSON LUM	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
22.	TANHORSE	WAW	1,340 MBF	BOISE CASCADE	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
23.	TANYA	WAW	585 MBF	BOISE CASCADE	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
24.	LOCUST	MAL	1,000 MBF	SMERSKI LOG.	NOTICE OF INTENT TO AWARD WAS SENT TO HIGH BIDDER VIA CERTIFIED MAIL BY COB 10/27/95.
25.	NICHOLSON SLVG I	OKA	890 MBF	VAGAN BRO.	SALE AWARDED 11/03/95

V. SALES CANNOT BE AWARDED TO HIGH BIDDER

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

SEN: BT

REQUIREMENTS OF A RESPONSIBLE BIDDER. 36 CFR 223.101.

32. HORN SLV WAW 1,340 MBF

KINZUA CORP

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

33. PRONG SLV WAW 3,800 MBF

ROGGE WOOD

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

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

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

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	David Gayer	
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman	514-0557
	Lois Schiffer	
	Jim Simon	
	Greg Frazier	720-5437
	Mike Gippert,	690-2730
	Jay McWhirter	
	Jim Perry	
	T.J. Glauthier	395-4639
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	Chris Nolan	395-4941
	Dave Shilton	514-4240
	Al Ferlo	
	Anne Almy	
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 2

DATE: November 8, 1995

FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached are Civil Minutes in NERC v. Glickman, ordering that certain motions have been taken under advisement, and that a briefing schedule has been agreed upon.

*Jim Sutherland*

**RECEIVED**  
NOV 7 1995  
UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
CIVIL MINUTES

U.S. ATTORNEY  
EUGENE ORE

CASE NO. 95-6244-HO (Lead); 95-6267-HO (Consol.)

DATE: November 7, 1995

CASE TITLE: Northwest Forest Resource v. Glickman

PRESIDING JUDGE: MICHAEL R. HOGAN

DEPUTY CLERK: Pat Mermis

COURT REPORTER: Amanda Essner

Record of oral argument: Ordered following motions TAKEN UNDER ADVISEMENT: Plaintiff Scott Timber's motions: for summary judgment [0-1], to strike [153-1]; defendant Glickman's motions: to strike [44-1], for summary judgment [46-1], for reconsideration [71-1] to change venue/stay [72-1, 72-2], for summary judgment [99-1], for summary judgment [112-1], for protective order [127-1], to sever [132-1, 132-2]; plaintiff NWFR's motions: to clarify [209-1, 209-2]; intervenor ONRC's motions: to sever [68-1, 68-2], for summary judgment [105-1], to clarify [156-2]. Parties have agreed to the following briefing schedule on whether the sales enjoined or withdrawn in the face of litigation in other courts are within Section 2001(k): Responses by November 21 and reply by November 28, 1995. Ordered oral argument of plaintiff NWFR's motion [64-1] for summary judgment continued to December 12, 1995 at 1:30 p.m.

*what  
72-1?*

PLAINTIFF'S COUNSEL

Mark Rutzick  
Scott Horngren

DEFENDANT'S COUNSEL

Jean Williams  
Michelle Gilbert  
Lois Schiffer  
James Sutherland

INTERVENOR'S and AMICI'S COUNSEL

Patti Goldman  
Kristen Boyles  
Also present: Chris West; Allison Campbell

cc: Chambers  
Counsel of Record

DOCUMENT NO: \_\_\_\_\_



U.S. Department of Justice

Environment and Natural Resources Division

General Litigation Section

Washington, D.C. 20530

November 7, 1995

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

Re: Northwest Forest Resource Council v. Glickman

Dear Mark:

I am in receipt of your letter of October 28, 1995, in which you raise questions about various representations set forth in the Declaration of Jay McWhirter. Further, your letter sets forth your client's continuing concerns. We address those below.

To begin, the representations made and reports provided to the court in Northwest Forest Resource Council v. Glickman, Civil No. 95-6244, continue to demonstrate the agencies' full compliance with the Court's orders and the mandates of Section 2001. Nonetheless, your client's first objection is to the government's use of the language "on or after October 30, 1995" in referring to the date the award letters will be sent to the high bidders for the seven sales subject to litigation in Oregon Natural Resources Council v. Lowe, (D. Oregon) Civil No. 92-1121-AS. In fact, on October 19, 1995, two days after the Court issued the injunction and pursuant to representations made in 1993 during the Lowe litigation, the Forest Service notified the parties to the litigation of its intent to award the sales on or after October 30, 1995. The Second Declaration of Jay McWhirter attached to Defendants' Amended Compliance Report confirms that award letters were sent to the high bidders for these seven sales on October 30, 1995. See Second Declaration at ¶2, attached chart at Category I.

As your client is well aware, Judge Hogan's October 17, 1995 Order contains language that directs the Secretaries, on or before October 25, 1995 to "award, release, or permit to be completed" sales subject to the September 13, 1995 Order. These seven sales were subject to a prior agreement in litigation that obligated the Forest Service to provide 10 days advance written notice prior to award. Accordingly, the notice of intent sent out on October 19, 1995 responds to an agreement reached in the

Lowe litigation, as well as the requirements of the October 17, 1995 Order.

As to your client's second objection concerning the Gatorson, Tip and Tiptop sales addressed in Category II of Mr. McWhirter's First and Second Declarations, the agency's position on these sales is both very clear and consistent. See First Declaration of McWhirter at ¶4; Second Declaration at ¶3. These three sales are awarded FY 1991-1995 sales that were enjoined or suspended as a result of court action. Thus, as we have already explained to the court, these sales will not be released under Section 2001 pending action from the court that originally issued the orders or direction from another court with jurisdiction over these matters.

Finally, your client maintains that the Forest Service must unconditionally award sales in which the high bidder has either gone out of business or refused to accept the bid. The Forest Service's position is that the plain language of the statute does not require the award of those sales when either the high bidder does not meet the requirements of a responsible bidder as set forth in 36 C.F.R. 223.101 or the apparent high bidder has indicated an unwillingness to accept the sale. First Declaration of McWhirter at ¶7.

Your letter suggests Rule 11 sanctions or contempt proceedings. Neither is appropriate or justified under the circumstances. If, in fact, specific disputes on specific sales remain, and you represent the timber company involved, we can consider jointly asking the Court to approve a reasonable briefing schedule.

Sincerely,



Ellen M. Athas  
Assistant Section Chief  
General Litigation Section

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

DATE: November 6, 1995

FROM: Lisa Holden, (202) 272-4698

MESSAGE: NFRC v. Glickman. Attached is Defendants' Response to NFRC's Motions for Leave to File Supplemental Brief and For Clarification of October 17, 1995 Injunction.

Oral Argument is scheduled on November 7th at 1:30 for NFRC's Second Motion for Summary Judgment (nesting issue) and NFRC's Third Motion for Summary Judgment (130mmbf of 318 Sales).

1 KRISTINE OLSON  
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Portland, OR 97204-2024  
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4 LOIS J. SCHIFFER  
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ELLEN J. KOHLER  
7 U.S. Department of Justice  
Environment and Natural Resources Division  
8 P.O. Box 663  
Washington, D.C. 20044-0663  
9 Telephone: (202) 272-8338

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

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

Civil No. 95-6244-HO  
(lead case)  
Civil No. 95-6267-HO  
(consolidated case)  
DEFENDANTS' RESPONSE  
TO NFRC'S MOTIONS FOR  
LEAVE TO FILE  
SUPPLEMENTAL BRIEF AND  
FOR CLARIFICATION OF  
OCTOBER 17 INJUNCTION

19 Defendants hereby respond to plaintiff Northwest Forest  
20 Resource Council's (NFRC's) recently filed motions for: (1) leave  
21 to file a supplemental brief in support of its third motion for  
22 summary judgment; and (2) clarification of the Court's October 17  
23 injunction. NFRC seeks expedited consideration of these motions.  
24 As to the first motion, NFRC argues that a supplemental brief in  
25

26 DEFENDANTS' RESPONSE TO  
NFRC'S MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
AND FOR CLARIFICATION OF  
COURT'S OCTOBER 17, 1995  
ORDER - 1

UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
P.O. BOX 663  
WASHINGTON, D.C. 20044-0663  
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1 support of its third motion for summary judgment, scheduled to be  
2 heard on November 7, is necessary allegedly because the  
3 defendants have taken inconsistent positions in this case and  
4 another case proceeding before Judge Dwyer in the Western  
5 District of Washington.<sup>1</sup> At the time of filing of this  
6 response, defendants received Judge Dwyer's Order staying a  
7 pending motion filed by other parties to consider the effect of  
8 subsection 2001(k) on his previous orders relating to six sales  
9 that are at issue in NFRC's third motion for summary judgment,  
10 pending further orders by this Court. While defendants do not  
11 oppose addressing the issues raised in NFRC's supplemental  
12 memorandum, defendants strongly contest the grounds upon which  
13 NFRC's motion for leave to file the memorandum is based. As  
14 demonstrated below, NFRC's allegation seriously mischaracterizes  
15 positions taken by the defendants in the two cases. Defendants  
16 do request an opportunity to file a supplemental brief on matters  
17 raised in plaintiff's motion. As to the second motion, which  
18 raises questions as to the applicability of subsection 2001(k) to  
19 three fiscal year 1991-95 sales that are the subject of  
20 injunctions or orders of other courts, defendants request a  
21 reasonable opportunity to provide a response prior to a hearing  
22

---

23  
24 <sup>1</sup> See NFRC's Supplemental Memorandum in Support of Third  
25 Motion for Summary Judgment and in Support of Motion for Further  
26 Clarification or Enforcement of the Court's October 17 Injunction  
at 1 (hereafter "NFRC's Supp. Memo.").

26 DEFENDANTS' RESPONSE TO  
NFRC'S MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
AND FOR CLARIFICATION OF  
COURT'S OCTOBER 17, 1995  
ORDER - 2

UNITED STATES DEPARTMENT OF JUSTICE  
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GENERAL LITIGATION SECTION  
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1 on the matter, and therefore oppose NFRC's attempt to rush the  
2 matter to a decision on November 7.

3 **FACTS**

4 The 11 sales that are the subject of NFRC's two most recent  
5 motions fall into the following categories.

- 6 1. Three sales, Cowboy, Nita, South Nita, located on the  
7 Umpqua National Forest, and one sale, Garden, located  
8 on the Siskiyou National Forest, were enjoined by Judge  
9 Dwyer of the Western District of Washington. These  
10 sales had initially been offered under Section 318 but  
11 were found to violate the fragmentation requirements of  
12 Section 318(b)(2). The sales were enjoined "until  
13 such time as the agency shows that a non-ESOG-  
14 fragmenting sale . . . cannot be substituted feasibly  
15 and consistently with existing management plans." See  
16 Exhibit C to Defendants' Opposition to Plaintiff's  
17 Third Motion for Summary Judgment and in Support of  
18 Defendants' Cross Motion (hereafter Defendants'  
19 Opposition). The conditions of the injunction were  
20 never satisfied.
- 21 2. Two sales, First and Last, which were located on the  
22 Umpqua National Forest, had been challenged on similar  
23 grounds as those four noted above for failure to comply  
24 with the fragmentation requirements of Section  
25 318(b)(2). Based upon stipulations of the parties, the  
26 actions against the First and Last timber sales were  
stricken as moot. See Exhibit C to Defendants'  
Opposition.
3. Two other sales initially offered under section 318,  
Boulder Krab and Elk Fork, were the subject of  
proceedings before Judge Fanner of the United States  
District Court for the District of Oregon, Civil No.  
90-969-PA. The complaint involving those sales was  
dismissed without prejudice on March 25, 1991 on the  
basis of a stipulation by the parties. See Exhibit C  
to Defendants' Opposition.
4. Three sales were fiscal year 1991-95 sales, including  
the Tip and Tiptop sales, which were enjoined by Judge  
Coughenour of the Western District of Washington in  
Leavenworth Audubon v. Ferraro, 881 F.Supp. 1482 (W.D.

DEPENDANTS' RESPONSE TO  
NFRC'S MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
AND FOR CLARIFICATION OF  
COURT'S OCTOBER 17, 1995  
ORDER - 3

UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
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1 Wash. 1005), and the Gatorson sale, which is the  
 2 subject of outstanding orders in the Eastern District  
 3 of Washington in Smith v. United States Forest Service,  
 No. 93-1178-JLQ (E.D. Wash.) (see 33 F.3d 1072 (9th Cir.  
 1994)).

#### 4 ARGUMENT

##### 5 I. Defendants Have Acted Consistent With Prior 6 Representations Relating To The Proposed Treatment 7 Of The Eight Pre-Fiscal Year 1991 Sales

8 NFRC's claim that it must file a supplemental memorandum in  
 9 support of its third motion for summary judgment, allegedly  
 10 because defendants have not acted consistent with representations  
 11 made in connection with that proceeding, is completely without  
 12 support. By its third motion for summary judgment, NFRC has  
 13 sought the release of 24 pre-fiscal year 1991 timber sales that  
 14 originally had been offered pursuant to section 318 of Public Law  
 15 101-121, but which, at that time, had not gone forward. The  
 16 Forest Service previously had advised this Court that these 24  
 17 sales were undergoing further review to determine what action was  
 18 required under subsection 2001(k). In its opposition to NFRC's  
 19 third motion for summary judgment, the Forest Service explained  
 20 that it was taking action, where possible, to release the sales  
 21 consistent with subsection 2001(k).<sup>2</sup> In particular, as to the  
 22 sales at issue in NFRC's latest two motions, the Forest Service  
 23 explained that certain of the sales are "subject to outstanding

24 <sup>2</sup> See Defendants' Opposition at 2.

1 injunctions and cannot be released by the Forest Service."  
2 Defendants' Opposition at 11. Defendants further stated that  
3 before the enjoined sales could proceed, "a court would have to  
4 determine that the sales fall within the scope of section 2001(k)  
5 and therefore should be released from the injunction. That  
6 determination has not been made." *Id.* at note 8. This position  
7 was reconfirmed in Defendants' Reply, where the Forest Service  
8 explicitly stated that:

9           As to the enjoined sales, these cannot be released by  
10           the Forest Service; accordingly, the Forest Service  
11           will await direction from the relevant courts before  
12           taking further action. As NFRC notes, intervenor  
13           Oregon Natural Resource Council already has filed a  
14           motion before the Western District of Washington  
15           seeking clarification of the effect of section 2001(k)  
16           on the enjoined sales, as well as the First and Last  
17           sales.

18  
19 Thus, contrary to NFRC's accusations, defendants have not  
20 conceded that these sales must immediately be released pursuant  
21 to subsection 2001(k)(1).<sup>3</sup>

22  
23 <sup>3</sup> NFRC contends that the declaration of Richard Prausa,  
24 which refers to a category of section 318 sales "subject to the  
25 provision of section 2001(k)" must be interpreted as a concession  
26 by the Forest Service that the subject sales are required to be  
released under the statute. NFRC's Supp. Memo. at 4. However,  
Mr. Prausa's declaration further states that a category of sales,  
including the sales at issue here, were "undergoing" further  
review and "may" be released. Prausa Declaration at ¶ 2.  
Defendants' subsequent filings further clarified that as to the  
enjoined sales at issue here, the question of applicability of  
subsection 2001(k) had not been finally determined.

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DEFENDANTS' RESPONSE TO  
NFRC'S MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
AND FOR CLARIFICATION OF  
COURT'S OCTOBER 17, 1995  
ORDER - 5

UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
P.O. BOX 663  
WASHINGTON, D.C. 20044-0663  
(202) 272-8056

1 The Forest Service further explained that as to certain  
2 sales that were not enjoined but had been the subject of other  
3 court action, the Forest Service had "determined that such sales  
4 cannot be released without, at a minimum, alerting the interested  
5 parties and relevant court of the potential applicability of  
6 section 2001(k) . . . ." Defendants' Opposition at 11.

7 Consistent with this representation, on October 16, 1995,  
8 defendants filed notices with the Western District of Washington  
9 and this court, and served said notices on the affected parties,  
10 relating to such sales. For two sales, Elk Fork and Boulder  
11 Krab, the defendants provided notice of intent to release the  
12 sales following the expiration of 15 days from the date of the  
13 Notice. See Notice of Filing dated October 16, 1995. Consistent  
14 with that notice, the Forest Service has directed the region to  
15 issue the appropriate award letters. See Declaration of Jerry  
16 Hofer attached hereto as Ex. A. As to two other sales, the  
17 first and last sales which were the subject of a pending motion  
18 before another court, defendants provided notice of intent to  
19 release the sales upon resolution of the pending legal issues.  
20 See Notice of Filing dated October 16, 1995.

21 On October 3, 1995, Oregon Natural Resources Council,  
22 Portland Audubon Society, Pilchuck Audubon Society, Washington  
23 Environmental Council, Lane County Audubon Society and Seattle  
24 Audubon Society, filed a motion to clarify how subsection

25  
26 DEFENDANTS' RESPONSE TO  
NFRS' MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
AND FOR CLARIFICATION OF  
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ORDER - 6

UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
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1 2001(k)(1) affects previous orders issued by Judge Dwyer of the  
2 Western District of Washington relating to six of the sales  
3 discussed above, the Cowboy, Nita, South Nita, Garden, First and  
4 Last sales. The position taken by defendants in that proceeding  
5 is entirely consistent with representations made in proceedings  
6 before this Court. In the proceeding before Judge Dwyer,  
7 defendants informed the court of this Court's rulings and argued  
8 that it was defendants' position that the enjoined sales were not  
9 covered by subsection 2001(k) and alternatively, that the action  
10 should be stayed pending a decision on defendants' appeal to the  
11 Ninth Circuit of this court's October 17 injunction.<sup>4</sup> The  
12 industry intervenors in that action filed a motion to transfer  
13 the proceeding to this Court. On November 1, 1995, Judge Dwyer  
14 heard oral argument on the motion and indicated that the court  
15 would attempt to issue an order before November 7, 1995.

16 At the time of this filing, defendants received a ruling by  
17 Judge Dwyer. In light of that ruling, defendants request the  
18

19  
20 <sup>4</sup> See Federal Defendants' Response to Motion to Clarify  
21 and Enforce Judgment at 8, 17 n. 6 (Defendants' Response);  
22 Transcript of Proceedings before the Honorable William L. Dwyer,  
23 attached as Exhibit B. Defendants incorporate their arguments as  
24 to the inapplicability of subsection 2001(k) to the enjoined  
25 sales set forth in Defendants' Response and the November 1  
hearing before Judge Dwyer herein. As to the First and Last  
sales, defendants explained to Judge Dwyer that the defendants  
had sent out the notices of intent to release upon resolution of  
the legal issues, and that accordingly, the federal defendants  
could not accede to plaintiff's motion with respect to those  
sales. Id. at 21.

26 DEFENDANTS' RESPONSE TO  
NPRC'S MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
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COURT'S OCTOBER 17, 1995  
ORDER - 7

UNITED STATES DEPARTMENT OF JUSTICE  
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P.O. BOX 663  
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1 opportunity to file a supplemental brief in this Court to address  
2 issues relating to these sales.

3 **II. Defendants Request A Reasonable Time**  
4 **To Respond To NFR's Motion For Clarification**  
5 **Relating To The Three Fiscal Year 1991-95 Sales**

6 Following issuance of this Court's October 17 orders,  
7 defendants filed a report with the Court identifying sales that  
8 had been offered in fiscal years 1991 through 1995, but which had  
9 not proceeded for a variety of reasons. That report identified  
10 three other sales that had been enjoined or were subject to  
11 outstanding orders. These three sales are the Tip and Tiptop  
12 sales, that were enjoined in Leavenworth Audubon v. Ferraro, 881  
13 F. Supp. 1482 (W.D.Wash. 1995), and the Gatorson sale, subject to  
14 outstanding orders in Smith v. United States Forest Service, 33  
15 F.3d 1072 (9th Cir. 1994). The question of whether these three  
16 sales must be released pursuant to subsection 2001(k), given the  
17 ongoing injunctions and orders, has not been addressed in any  
18 proceeding as of yet. Consistent with this Court's October 17

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26 DEFENDANTS' RESPONSE TO  
NFR'S MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
AND FOR CLARIFICATION OF  
COURT'S OCTOBER 17, 1995  
ORDER - 8

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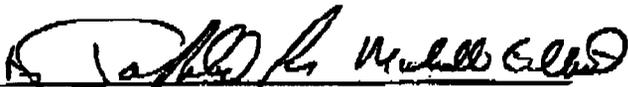
1 order authorizing the parties to present issues relating to the  
2 applicability of subsection 2001(k) to specific sales, defendants  
3 request an opportunity to file a brief on these sales prior to a  
4 hearing.

5 Dated this 3rd day of November, 1995.

6 Respectfully submitted,

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8 United States Attorney

9 LOIS J. SCHIFFER  
10 Assistant Attorney General

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DEPENDANTS' RESPONSE TO  
NPRC'S MOTIONS FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF  
AND FOR CLARIFICATION OF  
COURT'S OCTOBER 17, 1995  
ORDER - 9

UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 3, 1995, she caused one copy of the foregoing DEFENDANTS' RESPONSE TO NYC'S NOTICES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND FOR CLARIFICATION OF OCTOBER 17 INJUNCTION to be served via facsimile, without exhibits, and by Federal Express, with exhibits, upon the counsel of record hereinafter named:

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

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 the Interior, )  
18 )  
Defendants. )  
19 )

Civil No. 95-6244-HO  
FEDERAL DEFENDANTS'  
NOVEMBER 1, 1995 REPORT  
RE: TIMBER SALE  
CONTRACTS OFFERED OR  
AWARDED PRIOR TO  
FISCAL YEAR 1991

20 Pursuant to this Court's October 17, 1995 Order requesting  
21 information as to timber sale contracts offered or awarded prior  
22 to Fiscal Year 1991 (October 1, 1990) that fall within the scope  
23 of this Court's September 13, 1995, federal defendants hereby  
24 attach the declaration of Jay McWhirter of the Forest Service and  
25 William L. Bradley of the Bureau of Land Management as to the  
26 status of those timber sale contracts.

27 FEDERAL DEFENDANTS'  
28 NOVEMBER 1, 1995 REPORT - 1

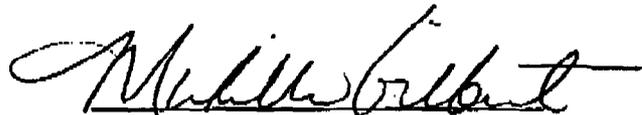
1 The attached list supplements federal defendants' previous  
2 response on the status of timber sales that had been originally  
3 offered or awarded prior to October 1, 1990 pursuant to the  
4 provisions of Section 318, but which had not gone forward. See  
5 Declaration of Richard Prausa (9/8/95) and Declaration of Jerry  
6 Hofer (9/29/95) (attached to Defendants' Opposition to Plaintiff's  
7 Third Motion for Summary Judgment and In Support of Defendants'  
8 Cross-Motion); Fourth Declaration of William L. Bradley  
9 (10/25/95) (attached to Defendants' Notice of Filing of October  
10 25, 1995 Compliance Report); and Fifth Declaration of William L.  
11 Bradley (10/27/95) (attached to Defendants' Amended Compliance  
12 Report).

13 Dated this 1st day of November 1995.

14 Respectfully submitted,

15 KRISTINE OLSON  
16 United States Attorney

17 LOIS J. SCHIFFER  
18 Assistant Attorney General

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9 | Washington, DC

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FEDERAL DEFENDANTS'  
NOVEMBER 1, 1995 REPORT - 3

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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  
 THIRD DECLARATION  
 OF JAY MCWHIRTER

I, Jay McWhirter, do hereby depose and say that:

1. My name is Jay McWhirter. I am an attorney for the United States Department of Agriculture's Office of the General Counsel. I submitted declarations in this matter on October 25, 1995, and October 30, 1995, which described the status of 33 sales in five separate categories which are subject to the Court's Order of October 17, 1995.

2. Based on information I received from the Forest Service, Pacific Northwest Region (Forest Service) as of 6:30pm E.S.T.

1 today, the Forest Service has found two timber sales which were  
 2 offered or awarded in years prior to Fiscal Year 1991. Those sales  
 3 are:

4	<u>SALE</u>	<u>NF</u>	<u>BID DATE</u>	<u>VOLUME</u>
5	1. SQUEEGEE	OLYMPIC	9/15/88	4,400MBF
6	2. AUGER	FREMONT	9/6/89	11,500MBF

7 3. The Forest Service is conducting an additional review  
 8 which will require a search for archived material. The Forest  
 9 Service will supplement the information in this report as soon as  
 10 that information is available, but no later than November 15, 1995.

11 4. Information on other sales offered or awarded prior to  
 12 Fiscal Year 1991 that are not contained in this report may be found  
 13 in the attachment to Jerry Hofer's declaration filed with this  
 14 court on September 29, 1995.

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

17

18 Executed in Washington, D.C., on November 1, 1995.

19

20

21

22

  
 Jay McWhirter

23

24

25

26

27

28 DECLARATION OF JAY MCWHIRTER PAGE 2

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WELLS D. BURGESS  
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Environment and Natural Resources Division  
General Litigation Section  
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Washington, D.C. 20044-0663  
Telephone: 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 Interior

Defendants.

Civil No. 95-6244-HO

SIXTH DECLARATION OF  
WILLIAM L. BRADLEY

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

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

2. I am familiar with the Rescissions Act, Public Law 104-19 (109 Stat. 194), including the provisions regarding "Award and Release of Previously Offered and Unawarded Timber Sale Contracts," Section 2001(k). In my second declaration, I provided a list of fourteen Section 318 sales (sales originally offered during Fiscal Years 1989 and 1990 (between October 1, 1988 and September 30, 1990)) which were subject to the provisions of Section 2001(k) of the Act.

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

4. These four sales are Olalla Wildcat, Twin Horse, Frosty Johnson, and Rocky Glade. Olalla Wildcat was offered for sale on April 24, 1990, Lone Rock Timber Co. was the high bidder; Twin Horse was offered for sale on July 27, 1990, Douglas County Lumber was the high bidder; Frosty Johnson was offered for sale on August 29, 1990, Douglas County, Inc. was the high bidder; and Rocky Glade was offered for sale on June 28, 1990, Murphy Creek Lumber Company was the high bidder. All four sales were

SIXTH DECLARATION OF WILLIAM L. BRADLEY, Page 2

submitted for formal consultation on the northern spotted owl prior to award.

5. Under contract law principles, it has been the BLM's policy to inform high bidders that in order for them to be bound by their bid of a contract, it must have been accepted within a reasonable amount of time. This amount of time has been defined in the Uniform Commercial Code as usually 90 days. All three of the high bidders requested that their bid bonds be returned. Bid bonds for Olalla Wildcat, Twin Horse, and Frosty Johnson were returned between October 1990 and December 1990. In the case of Rocky Glade, the sale was awarded to Murphy Creek Lumber Company. However, Murphy Creek Lumber did not accept the award and returned the contract. The BLM then returned their bid bond. Murphy Creek Lumber went out of business and closed its office on December 31, 1991.

6. Under our procedures, when the award is not accepted by the high bidder within a reasonable amount of time, the sale is advertised and reoffered.

7. The Frosty Johnson sale was subsequently reworked and a portion of it was offered in September 27, 1995, under the name of Frosty 1. The sale contained 2,852 MBF and was purchased by Burrill Timber Co. Another portion of the original sale is being reworked and is scheduled to be offered in December 1995 under

the name of Too Frosty. This proposed sale contains 2,461 MBF and 149 acres.

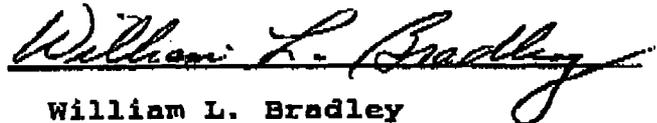
8. The Rocky Glade sale was subsequently reworked and a portion of it (1,421 MBF) was sold on August 31, 1995, as the Panther Gap timber sale. It was purchased by Superior Lumber Co.

9. The remaining two sales were eventually dropped from the consultation process when it became evident that they would no longer be viable sales after being revised to comply with the Endangered Species Act.

10. Based upon a further review of sales offered or awarded before October 1, 1990 (other than originally offered 318 sales), the BLM has discovered no information to date showing any additional sales offered or awarded before October 1, 1990, which had not preceded.

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

Executed at Portland, Oregon, on November 1, 1995.

  
William L. Bradley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 1, 1995, she caused one copy of the foregoing FEDERAL DEFENDANTS NOVEMBER 1, 1995 REPORT RE: TIMBER SALE CONTRACTS OFFERED OR AWARDED PRIOR TO FY 1991, to be served via facsimile and by first-class United States mail upon the counsel of record hereinafter named:

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Lisa A. Holden

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
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PLEASE DELIVER TO:

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	Ted Boling	514-4231
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	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 15

DATE: October 31, 1995

FROM: Lisa Holden, (202) 272-4698

MESSAGE: NFRC v. Glickman. Attached is NFRC's Motion for Further Clarification or Enforcement of October 17 Injunction. This motion is to 11 Forest Service sales that are either enjoined or suspended. NFRC has requested that the court grant an expedited hearing on these sales on same date that a hearing is set for NFRC's third motion for summary judgment - November 7, 1995.

NO1-9506\10890825.189

1 Mark C. Rutzick, OSB #84336  
 2 Alison Kean Campbell, OSB #93011  
 3 MARK C. RUTZICK LAW FIRM  
 4 A Professional Corporation  
 5 500 Pioneer Tower  
 6 888 S.W. Fifth Avenue  
 7 Portland, Oregon 97204-2089  
 8 (503) 499-4573  
 9  
 10 Attorneys for Plaintiff

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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.	)	
	)	MOTION FOR FURTHER
DAN GLICKMAN, in his capacity	)	CLARIFICATION OR
as Secretary of Agriculture;	)	ENFORCEMENT OF OCTOBER 17
BRUCE BABBITT, in his capacity	)	INJUNCTION
as Secretary of the Interior,	)	
	)	Expedited Consideration
Defendants.	)	Requested
	)	

18 Plaintiff Northwest Forest Resource Council ("NFR") moves  
 19 for further clarification or enforcement of the court's October  
 20 17 injunction. The government has failed to award and release  
 21 three FY 1991-95 Forest Service timber sales listed in its  
 22 October 25 compliance report that are within the scope of the  
 23 court's injunction because these sales are either enjoined by  
 24 another court or voluntarily suspended pending litigation. NFR  
 25 seeks clarification that these three sales must be awarded and  
 26 released under the terms of the court's October 17 injunction and

Page

1 - MOTION FOR FURTHER CLARIFICATION OR ENFORCEMENT  
OF OCTOBER 17 INJUNCTION

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NO1-9506\18890825.189

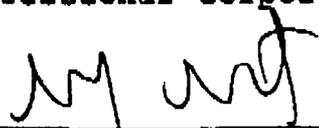
1 § 2001(k) (1) .

2 NFRC requests expedited hearing on this motion, and requests  
3 oral argument on the motion at the presently scheduled hearing  
4 set for November 7, 1995, because the issues on this motion  
5 relate directly to the issues already before the court that day  
6 on NFRC's third motion for summary judgment. There are eight  
7 section 318 fiscal year 1990 sales subject to the third motion  
8 for summary judgment that are or may be similarly enjoined or  
9 suspended. The related issues should all be heard together.

10 NFRC asks the court to direct that any opposition to this  
11 motion be filed by noon on November 3, 1995, and any reply by  
12 noon on November 6, 1995.

13 Dated this 30th day of October, 1995.

14 MARK C. RUTZICK LAW FIRM  
15 A Professional Corporation

16  
17 By:   
18 Mark C. Rutzick  
19 Alison Kean Campbell  
20 Attorneys for Plaintiff  
21  
22  
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24  
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26

Page

2 - MOTION FOR FURTHER CLARIFICATION OR ENFORCEMENT  
OF OCTOBER 17 INJUNCTION

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NO1-9506\18890824.188

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

10	NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
11	COUNCIL, an Oregon corporation,	)	Lead Case
		)	
	Plaintiff,	)	Civil No. 95-6267-HO
12		)	Consolidated Cases
		)	
13	vs.	)	MOTION FOR LEAVE TO FILE
		)	SUPPLEMENTAL MEMORANDUM IN
14		)	SUPPORT OF NFRC'S THIRD
	DAN GLICKMAN, in his capacity	)	MOTION FOR SUMMARY JUDGMENT
15	as Secretary of Agriculture,	)	AND IN SUPPORT OF MOTION
	BRUCE BABBITT, in his capacity	)	FOR FURTHER CLARIFICATION
16	as Secretary of the Interior,	)	OR ENFORCEMENT OF THE
		)	COURT'S OCTOBER 17
17		)	INJUNCTION
	Defendants.	)	
18		)	Expedited Consideration
		)	Requested
19		)	

20 Plaintiff Northwest Forest Resource Council ("NFRC") moves  
 21 for leave to file a supplemental memorandum in support of NFRC'S  
 22 third motion for summary judgment and in support of its motion  
 23 for further clarification of the Court's October 17 injunction.  
 24 Since this memorandum supports both the motion for further  
 25 clarification or enforcement of the October 17 injunction and the  
 26 previously-filed third motion for summary judgment, as to which

Page

1 - MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN  
 SUPPORT OF NFRC'S 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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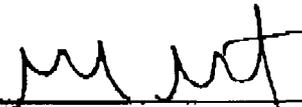
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1 briefing is otherwise completed, leave of court is being request-  
2 ed for the filing of the memorandum.

3 Expedited hearing on this motion is justified because the  
4 hearing on the third motion for summary judgment is scheduled for  
5 November 7, 1995, and this supplemental memorandum results from  
6 actions taken by the government in another case on October 25,  
7 1995. Expedited hearing is also being requested on the motion  
8 for further clarification or enforcement of the October 17  
9 injunction since the issues on that motion relate directly to the  
10 issues on the third motion for summary judgment.

11 Dated this 30th day of October, 1995.

12 MARK C. RUTZICK LAW FIRM  
13 A Professional Corporation

14  
15 By:   
16 Mark C. Rutzick  
17 Alison Kean Campbell  
18 Attorneys for Plaintiff  
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Page

2 - MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF NERC'S 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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N01-9506\1890823.186

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

10	NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
11	COUNCIL, an Oregon corporation,	)	Lead Case
12		)	Civil No. 95-6267-HO
13	Plaintiff,	)	Consolidated Cases
14		)	
15	vs.	)	NFRC'S SUPPLEMENTAL
16		)	MEMORANDUM IN SUPPORT OF
17	DAN GLICKMAN, in his capacity	)	THIRD MOTION FOR SUMMARY
18	as Secretary of Agriculture;	)	JUDGMENT AND IN SUPPORT OF
19	BRUCE BABBITT, in his capacity	)	MOTION FOR FURTHER
20	as Secretary of the Interior,	)	CLARIFICATION OR
21		)	ENFORCEMENT OF THE COURT'S
22	Defendants.	)	OCTOBER 17 INJUNCTION

**INTRODUCTION**

Recent actions by the government in another case - which directly contradict the position taken by the government in response to Northwest Forest Resource Council's ("NFRC's") third motion for summary judgment in this case - require NFRC to file this supplemental reply brief, and to seek further clarification or enforcement of the October 17 injunction.

NFRC must now ask the court to decide an issue that the government seemingly had conceded in its September 29, 1995 brief

Page

1 - NFRC'S SUPPLEMENTAL 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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N01-9506\1R990023.186

1 on the third summary judgment motion: whether Section 318 sales  
2 that were previously enjoined by a court must be awarded and  
3 released under § 2001(k) (1). After conceding the issue in this  
4 case - and expressly stating that the enjoined sales are subject  
5 to the statute - the government has taken the opposite position  
6 before Judge Dwyer in the Western District of Washington, arguing  
7 that § 2001(k) does not apply to four sales previously enjoined  
8 by that court.

9 NFRS is also asking the court to resolve two related issues:  
10 (1) whether the defendants are excused from complying with the  
11 court's October 17, 1995 injunction with respect to two FY 1991-  
12 95 timber sales that were previously enjoined by a court, and (2)  
13 whether the court's October 17 injunction, or § 2001(k), exempt  
14 the award and release of five otherwise covered timber sales that  
15 were withdrawn or suspended in the face of court challenge.

16 All 11 of these sales - which collectively contain 65  
17 million board feet of timber volume - must be awarded and  
18 released under the plain terms of § 2001(k) as confirmed in the  
19 court's declaratory and injunctive order of October 17. Section  
20 2001(k) is plain on its face, as this court has now concluded  
21 several times, and requires, "notwithstanding any other provision  
22 of law," *id.*, the award and release of "all timber sale contracts  
23 offered prior to July 27, 1995, in any national forest in Oregon  
24 and Washington or BLM district in western Oregon, except for sale  
25 units in which a threatened or endangered bird species is known  
26 to be nesting." Order, October 17, 1995, ¶ 1. There is no

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2 - NFRS'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIRD  
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COURT'S OCTOBER 17 INJUNCTION

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1 exception for otherwise releasable sales that were previously  
2 enjoined or were withdrawn in the face of litigation.<sup>1</sup>

3 The industry intervenor in Judge Dwyer's case, in consulta-  
4 tion with NFRC, has asked Judge Dwyer to transfer the case to  
5 this court or to stay the case pending decision by this court.  
6 NFRC seeks to avoid duplication and inconsistency, and also seeks  
7 to prevent the government from interfering with this court's  
8 jurisdiction and its injunctive orders by relitigating in another  
9 court issues it has already lost here. NFRC has no objection if  
10 this court wishes to consult with Judge Dwyer to determine how  
11 best to proceed on these issues.

12 **STATEMENT OF FACTS**

13 In sworn testimony submitted on September 8, 1995 the  
14 government conceded that four Section 318 timber sales on the  
15 Umpqua National Forest in Oregon that were previously enjoined by  
16 Judge Dwyer in the Western District of Washington in Seattle  
17 Audubon Society v. Evans, No. C89-160WD (the Cowboy, Nita, South  
18 Nita and Garden sales) are subject to § 2001(k): "The Forest  
19

20 <sup>1</sup> Despite press reports that the government released all the  
21 FY 1991-95 sales on October 26, it appears that in fact the  
22 Forest Service did not release approximately 75 million board  
23 feet of its 115 million feet of FY 1991-95 sale volume for a  
24 variety of reasons that are outlined in its October 25 compliance  
25 report. Some of those issues are addressed in this pleading;  
26 NFRC is currently investigating some of the other issues and will  
bring them to the attention of the court if necessary in the  
future. In contrast to the Forest Service's disappointing  
performance, it appears that the Bureau of Land Management  
complied with the October 17 injunction fully by awarding and  
releasing all required units of its FY 1991-95 timber sales on  
October 26, 1995.

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3 - NFRC'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIRD  
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1 Service has determined that the 75 section 318 sales shown on the  
 2 attached chart are subject to the provision of section 2001(k) of  
 3 the Act," and listing the Cowboy, Nita, South Nita and Garden  
 4 sales on the chart. Declaration of Richard A. Prausa (September  
 5 8, 1995). The Forest Service also agreed that two other Umpqua  
 6 National Forest section 318 timber sales - called First and Last  
 7 - that were withdrawn by the Forest Service when challenged in  
 8 the same case are also subject to § 2001(k). *Id.*

9 The four Umpqua sales were enjoined in 1990 based on a  
 10 finding that they did not comply with the special requirement in  
 11 section 318 to minimize fragmentation of old-growth forests.

12 When NFRC moved for injunctive relief to release these  
 13 sales, the government claimed the motion was moot because it was  
 14 already doing everything it could to release the sales.  
 15 Defendants' Opposition To Plaintiff's Third Motion For Summary  
 16 Judgment And In support Of Defendants' Cross-Motion (September  
 17 29, 1995) at 7-12. It conceded that the enjoined sales are  
 18 subject to § 2001(k), but claimed: "As to the three [sic]  
 19 subject sales that were enjoined, the Forest Service has deter-  
 20 mined that the sales are subject to outstanding injunctions and  
 21 cannot be released by the Forest Service." *Id.* at 11. It asked  
 22 the court to deny NFRC's motion on the ground that the government  
 23 was taking all necessary actions to seek the release of the four  
 24 sales. *Id.*

25 Upon seeing the government's concession that the four sales  
 26 are subject to release under § 2001(k), the plaintiffs in Seattle

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4 - NFRC'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIRD  
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N01-9506\1R890823.186

1 Audubon Society v. Evans (the same parties that are the interve-  
2 ners in this case) went back to Judge Dwyer to ask him to rule  
3 that § 2001(k) would be unconstitutional if applied to release  
4 the four sales. See Defendants' Notice of Filing (October 3,  
5 1995).

6 The government's response in Seattle Audubon filed October  
7 25, 1995 directly contradicts its position here: it argues to  
8 Judge Dwyer that these four sales are not subject to § 2001, need  
9 not be awarded and released, and therefore there is no constitu-  
10 tional issue. Far from seeking the award and release of the four  
11 sales, as it promised this court it would on September 29, the  
12 government proposes to acquiesce in the plaintiffs' motion to  
13 prevent the award and release of the four sales.

14 The government bases its position before Judge Dwyer on the  
15 same interpretation of the phrase "subject to section 318" that  
16 this court has already rejected. It argues that Congress did not  
17 intend to release enjoined sales - for the same reasons (in the  
18 government's view) it did not intend to release FY 1991-95 sales.  
19 In proposing to abandon the four sales, the government also  
20 ignored the fact that the final judgment in the Seattle Audubon  
21 Society v. Evans case does not in fact appear to enjoin any of  
22 the four sales, in which case even its flawed interpretation of  
23 § 2001(k) would not bar release of the sales.

24 The industry intervenor in that case, the Washington  
25 Contract Loggers Association, is apprising Judge Dwyer of the  
26 government's contradictory positions and of this motion, and is

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5 - NFRG'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIRD  
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NO1-9506\1RB90823.186

1 asking Judge Dwyer to transfer his case to this district, or to  
2 stay the case pending ruling by this court on NFRC's pending  
3 motions.<sup>2</sup> Exhibit A.

4 **ARGUMENT**

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

7 The government's unceasing attempts to find hidden limita-  
8 tions in the broad language of § 2001(k) (1) are no more success-  
9 ful on this issue than on the FY 1991-95 sale issue. Very  
10 simply, "all sales" means "all sales." There is no hidden  
11 exemption for sales previously enjoined by another court.

12 The government's argument to Judge Dwyer that the phrase  
13 "subject to section 318" in subsection (k) (1) contains a hidden  
14 exemption for enjoined sales fails for the same reasons its  
15 argument for a hidden exemption for FY 1991-95 sales failed: the  
16 phrase "subject to section 318" serves only to define the  
17 geographic area in which "all sales offered or awarded" prior to  
18 July 27, 1995 must be released. That phrase does not contain any  
19 of the hidden meanings suggested by the government: it means  
20 only what its plain language indicates.

21 Nothing in the statute or legislative history gives any hint  
22 of an implied exemption for previously enjoined sales. To the  
23 contrary, the unqualified "notwithstanding any other provision of

24 <sup>2</sup> The Washington Contract Loggers Association is represented  
25 by the same law firm that represents NFRC in this case. The  
26 Contract Loggers are filing their motion papers with Judge Dwyer  
simultaneously with the filing of this memorandum.

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6 - NFRC'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIRD  
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1 law" clause in subsection (k)(1) shows Congress' clear intent  
2 that other laws could not stand in the way of awarding and  
3 releasing timber sales. The Conference Report on the Rescissions  
4 Act states:

5 For emergency timber salvage sales, Option 9,  
6 and sales in Section 318 areas, the bill  
7 contains language which deems sufficient the  
8 documentation on which the sales are based,  
9 and significantly expedites legal actions and  
10 virtually eliminates dilatory legal challeng-  
11 es. Environmental documentation, analysis,  
12 testimony, and studies concerning each of  
13 these areas are exhaustive and the suffi-  
14 ciency language is provided so that sales can  
15 proceed.

16 H. Conf. Rep. 104-124 at 136, reprinted at 141 Cong. Rec. H5013  
17 (May 16, 1995) (Exhibit 1) (filed with NFRC's August 25, 1995  
18 summary judgment motion). Congress intended to provide legal  
19 sufficiency so that all the "sales in Section 318 areas" could  
20 proceed whether or not they may have complied with the previous  
21 environmental laws. In the case of the four Umpqua sales, the  
22 only environmental law they violated was section 318, which  
23 expired September 30, 1990. § 318(k).

24 Thus, even if the four Umpqua National Forest sales are  
25 still enjoined by an order in *Seattle Audubon Society v. Evans*,  
26 they must be awarded and released under § 2001(k).

The government has also failed to award and release two  
previously-offered FY 1991-95 Forest Service sales that were  
enjoined in another action in the Western District of Washington  
(*Leavenworth Audubon v. Ferraro*, No. C94-1025C) based on a  
violation of the National Environmental Policy Act. The govern-

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7 - NFRC'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIRD  
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NO1-9506\1R890823.1B6

1 ment did not request an exemption for these two sales in the  
2 October 17 injunction, and there is no exemption for those two  
3 sales in the statute or the injunction. These sales must also be  
4 awarded and released under the statute and the injunction.

5 **II. SECTION 2001(k) COMPELS THE AWARD AND RELEASE OF**  
6 **TIMBER SALES SUSPENDED OR WITHDRAWN IN THE FACE OF**  
7 **LITIGATION.**

8 The government has also refused to award and release five  
9 previously-offered Forest Service timber sales - four section 318  
10 sales and a FY 1991-95 sale - that are not subject to any court  
11 injunction on the ground that the Forest Service "suspended" or  
12 "withdrew" the sales in the face of litigation. Two section 318  
13 sales - the First and Last sales on the Umpqua National Forest -  
14 were involved in the Seattle Audubon litigation; two section 318  
15 sales (Boulder Krab and Elk Fork on the Siskiyou National Forest)  
16 were involved in a case in Oregon before Judge Panner (*Friends of*  
17 *Elk River v. Forest Service*, Civil No. 90-969-PA (dismissed March  
18 20, 1991); and one sale (the Gaterson sale on the Colville  
19 National Forest in eastern Washington) is involved in an ongoing  
20 case in the Eastern District of Washington (*Smith v. Forest*  
21 *Service*, No. C93-0178-JLQ).

22 These sales must all be awarded and released under  
23 § 2001(k).<sup>3</sup> Since even enjoined sales must be awarded and

24 <sup>3</sup> There are another six Forest Service FY 1991-95 timber  
25 sales subject to the court's October 17 injunction that the  
26 government has not released because they are involved in litigation although they are neither enjoined nor suspended. The government suggested in its October 25 compliance report that

(continued...)  
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8 - NFRF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THIRD  
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NO1-9506\18890823.186

1 released, as shown above, it follows a *fortiori* that sales that  
2 are not enjoined must be awarded and released even if the sale  
3 was suspended or withdrawn in the face of litigation.

4 In addition, the FY 1991-95 Gaterson sale involved in the  
5 Smith case must also be released under the court's October 17  
6 injunction, since the government did not request, and this court  
7 did not grant, any exemption for that sale.

8 **III. THE RELIEF REQUESTED BY NFRC DOES NOT INTERFERE**  
9 **WITH THE JURISDICTION OF ANY OTHER COURT.**

10 NFRC is not asking this court to interfere with the juris-  
11 diction of any court that has issued an injunction against an  
12 individual timber sale. NFRC is asking this court to interpret  
13 § 2001(k): to rule that § 2001(k) applies to a timber sale  
14 otherwise subject to the statute even if it was previously  
15 enjoined by a court under another environmental law.

16 This ruling would require the government to return to any  
17 court that issued an existing injunction against a sale to ask  
18 that court to lift the injunction. The court issuing the  
19 injunction would retain jurisdiction to determine whether to lift  
20 the injunction.\*

21 <sup>2</sup> (...continued)

22 these six sales, which contain 34 million board feet of timber,  
23 will be released "on or after October 30." If the sales are not  
24 released on October 30, NFRC will ask the court to exercise its  
25 enforcement powers as to these sales.

26 \* In the alternative the government may conclude that it can  
permissibly proceed to award and release an enjoined sale without  
returning to the court that issued the injunction. This court  
need not address that issue.

NO1-9506\1R990823.1B6

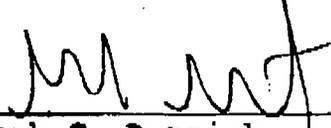
1 This procedure preserves the jurisdiction of this court to  
2 interpret § 2001(k) uniformly with its other rulings on the  
3 statute, and also preserves the jurisdiction of the courts that  
4 issued the original injunctions.

5 **CONCLUSION**

6 The 11 enjoined, suspended or withdrawn timber sales must  
7 all be awarded and released under § 2001(k). The injunction of  
8 October 17, 1995 already requires the award and release of the  
9 three FY 1991-95 timber sales in this group of sales. The court  
10 should clarify that order, and expand it to cover the section 318  
11 sales in the group, by ordering the government to award and  
12 release all the suspended or withdrawn sales within two working  
13 days, and by ordering the government to release any currently  
14 enjoined sales promptly after taking all necessary steps to  
15 vacate any existing injunction issued by another court.

16 Dated this 30th day of October, 1995.

17 MARK C. RUTZICK LAW FIRM  
18 A Professional Corporation

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

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**ALMON KEAN CAMPBELL**

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October 28, 1995

Admitted to practice in  
Oregon and Washington  
\*Also admitted in New York

Ellen Athas  
Assistant Section Chief  
General Litigation Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
601 Pennsylvania Avenue N.W.  
8th Floor  
Washington, D.C. 20044

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

Dear Ellen:

I am writing to provide the defendants in the above-captioned case *NFRC's* current position as to the Forest Service timber sales described in Jay McWhirter's declaration filed with the court on October 25, 1995. You of course understand that we are closely monitoring the government's compliance with Judge Hogan's injunction of October 17, 1995, and that we expect full compliance.

Mr. McWhirter's declaration raises serious questions about the Department of Agriculture's intended compliance with the injunction. However, since the declaration was filed before the injunction became effective, we do not in every case know what the Forest Service actually did. We did read Peter Coppelman's general statement to the media on October 26, 1995 that the administration would release the sales, and we hope that is true.

Mr. McWhirter's first category of sales are those that are the subject of litigation in *ONRC v. Lowe*, 92-1121AS (D. Or.). There is no injunction outstanding against any of these sales. Mr. McWhirter states that "the sales are currently scheduled for release on or after October 30, 1995." McWhirter Declaration, ¶ 4.

Although releasing these sales on October 30 rather than October 26 is a violation of the October 17 injunction, and shows an indifference to the legal duties arising from a court

Ellen Athas  
October 28, 1995  
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order that seems undue, and is surely unwise, in the circumstances this case, we will not make an issue of the time between October 26 and October 30 if the sales are in fact awarded on October 30.

But we are suspicious about the words "or after" in Mr. McWhirter's declaration. "On or after" October 30, 1995 could be the year 2550, and at this point we simply have no tolerance for linguistic cuteness by government spokesmen.

So let me be clear. We will go back to Judge Hogan for another contempt order, and will pursue another Rule 11 sanction, if those sales are not awarded on October 30, 1995.

Mr. McWhirter's second category of sales are really two categories: sales suspended or enjoined. We are appalled at the government's dishonest and manipulative handling of this issue between Judge Hogan's court and Judge Dwyer's court. We are taking immediate steps to secure a ruling from the court on this issue. I strongly urge you to compare the Department's filings with Judge Hogan and Judge Dwyer to determine whether corrective steps are required to avoid Rule 11 exposure.

Mr. McWhirter's fifth category of sales are those where the high bidder is no longer in business or, in one case, has declined to execute a contract. There is nothing in § 2001(k) that excuses the award of a sale otherwise subject to the statute because the high bidder is out of business or declines the sale. The Forest Service has standard procedures for awarding sales when the high bidder is not financially responsible or declines the sale: the standard procedure is to award the sale to the second high bidder at the high bid price, if the second high bidder is willing to accept the sale at the high bid price.

The Forest Service has followed this practice regularly, even in cases where the high bidder has gone out of business while award of a sale was delayed due to a court injunction. The Winema National Forest recently awarded the Ace timber sale to the second high bidder, following an extensive delay in awarding the sale due to a court injunction, after it determined the high bidder had gone out of business in the interim.

Section 2001(k) does not excuse award of a sale if the high bidder has gone out of business. It requires the award of sales, unconditionally, for those sales that are subject to

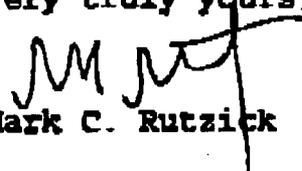
Ellen Athas  
October 28, 1995  
Page 3

NO1-9506\ARLSON16.1AZ

the statute. We will not accept the refusal to award these contracts. We will seek contempt sanctions if these sales are not offered to the second high bidder, and additional bidders if necessary, until the sales are awarded.

We hope that further litigation before Judge Hogan will not be necessary to secure the award and release of each of these categories of sales, although it is already apparent that some enforcement action is required. I hope you will be able to inform me promptly that some or all of these categories of sales have been awarded and released.

Very truly yours,

  
Mark C. Rutzick

cc: Scott Horngren

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
P.L.S.L., ROOM 2133  
WASHINGTON, D.C. 20530

FAX NUMBER (202) 616-8543  
CONFIRMATION NUMBER (202) 514-1442

DATE: October 31, 1995  
FROM: Edward A. Boling  
PHONE NUMBER: 202-514-2715  
NUMBER OF PAGES TO BE TRANSMITTED (including cover): 30  
TO: Elena Kagan  
PHONE NUMBER: 456-7594  
MESSAGE: 9th Circuit Order in NFRC  
Complaints on the Thunderbolt salvage sale  
You should receive NFRC's 10/30 motion to enforce  
the injunction this morning.  
RECEIVING FAX NUMBER: 456-1647

SENT BY:US COURT OF APPEALS ;10-25-95 ; 16:35 ; OFC OF STAFF ATTYS-

FILED

OCT 25 1995

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

NORTHWEST FOREST RESOURCE COUNCIL, )  
 an Oregon corporation, )  
 )  
 Plaintiff-Appellee, )  
 vs. )  
 DAN GLICKMAN, in his capacity as Secretary )  
 of Agriculture, et al., )  
 )  
 Defendants-Appellants, )  
 and )  
 OREGON NATURAL RESOURCES COUNCIL, INC., )  
 et al., )  
 )  
 Interveners. )

No. 95-36042  
DC# CV-95-6244-MRH  
Oregon (Eugene)

ORDER

Before: BEEZER, THOMPSON and T.G. NELSON, Circuit Judges

We have considered the emergency motion for a stay of the district court's order pending appeal and the response of the parties, and we have heard oral argument. Although some hardship may result from either a grant or a denial of a stay pending appeal, the balance of hardships does not tip sharply in favor of one party or the other. See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir.), rev'd in part on other grounds, 463 U.S. 1328, 464 U.S. 879 (1983). The potential for appellants' success is negligible, for the reasons stated by the district court. This appeal does not present a serious legal question. See id. We cannot say the public interest factor predominates on either side of the case. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

No. 95-36042

-2-

The emergency motion for a stay is DENIED. The October 24, 1995 order temporarily granting a stay is VACATED.

The motion to expedite is GRANTED. The opening brief is due November 13, 1995; the answering brief is due December 4, 1995; the optional reply brief is due December 11, 1995. No requests for extension of time to file briefs will be granted. Filing and service of briefs shall be by hand or overnight mail delivery.

The Clerk shall schedule oral argument in Portland for the week of January 8 - 12, 1996.

MEMORANDUM TO THE CLERK  
I hereby certify that the  
information contained herein  
is true and correct  
and that I am a  
member of the  
Bar of the  
United States District  
Court for the  
District of Columbia  
10-24-95/mg/7  
erbut 4105413

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
601 PENNSYLVANIA AVENUE, N.W.  
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FAX NUMBER (202) 272-6817, 6815, 5775  
CONFIRMATION NUMBER (202) 272-8056

PLEASE DELIVER TO:

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	Al Ferlo, Anne Almy	
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 10

DATE: October 16, 1995

FROM: Lisa Holden, (202) 272-4698

MESSAGE: NFRC v. Glickman. Attached is Motion and Memorandum for entry of appealable order. This was filed Friday. A hearing is scheduled for Tuesday October 17, 1995 for this motion and for NFRC's motion for order of contempt.

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

13	NORTHWEST FOREST RESOURCE COUNCIL,	)	
		)	
14	Plaintiff,	)	Civil No. 95-6244-HO
		)	(Lead Case)
15	v.	)	
		)	Civil No. 95-6267-HO
16		)	(Consolidated Cases)
17	GLICKMAN and BABBITT,	)	
		)	MEMORANDUM IN
18	Defendants.	)	SUPPORT OF MOTION
		)	FOR ENTRY OF
19		)	APPEALABLE ORDER

20 INTRODUCTION

21 The federal defendants respectfully submit that they should  
 22 be afforded an opportunity for expeditious, but orderly,  
 23 appellate review of the interpretation of Section 2001(k)(1)  
 24 before the timber in issue is actually cut. Clearly, until the  
 25 court of appeals speaks to the proper interpretation of the scope  
 26 of sales covered under Section 2001(k)(1), the issue will not be  
 27 finally resolved. Because the court's September 13 opinion was  
 28 not final, and contained no injunction, the federal defendant

1 have to date not been in a position to take an appeal. By the  
2 same token, as explained in our October 6, 1995, response to  
3 Plaintiff's motion for contempt or in the alternative for  
4 imposition of an injunction, the motion for contempt was not well  
5 taken, and lacked both legal and factual support.

6 There are three ways in which the court can provide for  
7 immediate appellate review of the meaning of Section 2001(k)(1),  
8 while it disposes of plaintiffs remaining claims.<sup>1</sup> First, the  
9 court can enter a final declaratory judgment on its  
10 interpretation of 2001(k)(1) under Rule 54(b) of the Federal  
11 Rules of Civil Procedure, while refraining for the time being,  
12 from entering injunctive relief. See 28 U.S.C. 2201, 2202.  
13 Injunctive relief, like a declaratory judgment is equitable in  
14 nature. Entry of only a declaratory judgment would in fact act  
15 to preserve the status quo pending appeal. Second, the court can  
16 certify its determination of the scope of 2001(k)(1) for  
17 interlocutory appeal under 28 U.S.C. 1292(b), as an issue  
18 "involving a controlling question of law as to which there is  
19 substantial ground for differences of opinion and that an  
20 immediate appeal from the order may materially advance the  
21 ultimate termination of the litigation." Finally, the court may  
22 grant an injunction covering the plaintiff's claims under  
23 2001(k)(1). Any injunctive order, however, would be subject to  
24 further modification, given that plaintiff's claim concerning the  
25 proper interpretation of Section 2001(k)(2) "known to be nesting"  
26

---

27 <sup>1</sup> By filing this motion defendants do not abandon any of  
28 the arguments made heretofore, concerning the proper scope of  
Section 2001(k)(1).

1 exemption remains to be decided. Should the court grant  
2 injunctive relief, however, the defendants would seek a stay of  
3 that order, pending appeal, in order to avoid irreparable harm to  
4 natural resources within the forests.

## I

6 ENTRY OF A FINAL DECLARATORY JUDGMENT UNDER F.R.C.P 54 (b)  
7 IS APPROPRIATE IN THIS CASE IN ORDER TO EXPEDITE APPELLATE REVIEW

8 Rule 54(b) of the Federal Rules of Civil Procedure<sup>2</sup>  
9 provides that the District Court may enter a judgment that is  
10 appealable based on a decision that terminates less than the  
11 entire dispute if three tests are met. The first requirement, in  
12 the case in which there are not multiple parties, is that there  
13 be multiple claims. The second requirement is that at least one  
14 of the claims be finally decided. The third requirement is that  
15 the District Court find that there is no just reason for delaying  
16 an appeal. Wright, Miller & Kane, Federal Practice and  
17 Procedure: Civil 2d section 2656. The standard for entering Rule  
18 54(b) judgments is liberal and focuses on the severability of the  
19 claim as to which appeal is sought and in efficient judicial  
20 administration. Continental Airlines v. Goodyear Tire & Rubber  
21 Co., 819 F.2d 1519, 1524-25 (9th Cir. 1987); Texaco, Inc. v.  
22 Ponsoldt, 939 F.2d 794, 797-98 (9th Cir. 1991); Sheehan v.

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23 <sup>2</sup> Rule 54(b) states in relevant part:

24 When more than one claim for relief is presented in an  
25 action, whether as a claim, counterclaim, cross-claim,  
26 or third-party claim or when multiple parties are  
27 involved, the court may direct the entry of a final  
28 judgment as to one or more but fewer than all of the  
claims or parties only upon an express determination  
that there is no just reason for delay and upon an  
express direction for the entry of judgment.

1 Atlanta International Insurance Co., 812 F.2d 465, 468 (9th Cir.  
2 1987); U.S. for Use of I.E.B.E.W v. United Pacific Insurance  
3 Co., 697 F.Supp. 378 (D. Id. 1988).

4 The three requirements are satisfied here. First, the  
5 filing of the amended complaint by defendant, including two new  
6 counts, creates the necessary "multiple claims." These two new  
7 counts address the proper interpretation of Section 2001(k)(2).  
8 Second, regardless of the resolution of these two new counts, for  
9 which a motion for partial summary judgment is pending, we  
10 assume, based on the court's September 13, 1995, opinion, that it  
11 would be prepared to enter a judgment finally deciding the  
12 legal question raised in Counts I and II of the complaint, i.e.,  
13 the interpretation of the scope of section 2001(k)(1). The third  
14 requirement is also satisfied. There is simply no reason to  
15 delay appellate review of the interpretation of the scope of  
16 Section 2001(k)(1). Indeed, the defendants strongly desire to  
17 obtain appellate review of the question addressed in the Court's  
18 Order of September 13, 1995, and urge the Court to make the  
19 necessary finding and direct entry of judgment. There is no just  
20 reason for delay in review of this important issue.

21 Should the court enter a final declaratory judgment under  
22 Rule 54(b), and continue to refrain from entering injunctive  
23 relief, the declaratory judgment would not compel the release, at  
24 this time, of any sales brought within the scope of Section  
25 2001(k)(1) by the court's September 13, 1995 order. See Steffel  
26 v. Thompson, 415 U.S. 452, 471 (1974); Kennedy v. Mendoza-  
27 Martinez, 372 U.S. 144, 155 (1963). This course would not, of  
28

1 course prevent the court from entertaining a request for  
2 injunctive relief at a later time.

3 II

4 CERTIFICATION OF THE ISSUE OF THE PROPER INTERPRETATION OF  
5 THE SCOPE OF 2001(k)(1) WOULD BE APPROPRIATE

6 Under 28 U.S.C. 1292(b), this court may certify the issue of  
7 the proper interpretation of the scope of section 2001(k)(1) as a  
8 "controlling question of law as to which there is substantial  
9 ground for difference of opinion" and that an immediate appeal  
10 from the September 13, 1995 opinion "may materially advance the  
11 ultimate termination of the litigation." In this circuit, all  
12 that must be shown to establish that the issue is a "controlling  
13 question of law" is that the resolution of the issue on appeal  
14 could materially affect the outcome of the litigation in the  
15 district court. See In re Cement Antitrust Litigation, 673 F.2d  
16 1020 (9th Cir. 1981). Here, there can be no doubt that the  
17 resolution of the issue of the scope of section 2001(k)(1) by the  
18 court of appeals will materially affect the outcome of the  
19 litigation in this court. Should the court of appeals reverse  
20 this court's September 13, 1995, interpretation of the scope of  
21 Section 2001(k)(1), the approximately 60 timber sales that would  
22 otherwise be released under that order would remain in their  
23 current status. Also, as the summary judgment briefs  
24 demonstrate, there can be no doubt that there is substantial  
25 ground for a difference of opinion on the issue. The defendants  
26 and the plaintiff offered starkly contrasting interpretations of  
27 the language of the statute, each claiming that their particular  
28 interpretation was supported by the plain language of the

1 statute. By certifying the issue at this time, the court will  
2 allow an early appellate review of the central issue of the case  
3 -- a result that all parties to this dispute surely desire.

4 III

5 IN THE ALTERNATIVE, DEFENDANTS DO NOT OPPOSE  
6 THE ENTRY OF AN INJUNCTION

7 The federal defendants stated in the October 6, 1995  
8 memorandum in opposition to plaintiff's motion for contempt that  
9 they did not oppose entry of an injunction as an alternative to a  
10 contempt sanction -- although, as we have previously argued, the  
11 district court's September 13 opinion was both declaratory and  
12 non-final and could not be the basis for contempt sanctions.  
13 Defendants here reaffirm that position. However, as noted in the  
14 October 6, memorandum, defendants believe that any injunctive  
15 relief ordered by the court on the sales within the geographic  
16 scope of 2001(k) (1) as interpreted by this court must allow  
17 defendants at least (45) days from entry of the September 13, 1995,  
18 opinion in which to release sales covered by that decision.  
19 Plaintiff's request that the sales be immediately released is  
20 unreasonable and not supported by the language of the statute  
21 itself. Given the clear disagreement in the interpretation of  
22 the scope of the statute, and the fact that the defendants did  
23 not become aware of the court's interpretation until after the  
24 statutorily mandated release date, allowing 45 days from the  
25 court's order is in keeping with the intent of the statute  
26 itself.  
27  
28

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statute?

CONCLUSION

In order to allow the United States to pursue an appeal, this court should either enter a separate declaratory judgment pursuant to F.R.C.P. 54(b), or certify the issue of the proper interpretation of the scope of section 2001(k)(1) under 28 U.S.C. 1292(b). In the alternative, an injunction allowing the defendants 45 days from entry of the September 13, 1995 opinion to comply with the terms of section 2001(k)(1) as interpreted by the court. Should the court an injunction in this case, the defendants would request that the court issue a stay pending appeal.

Dated this \_\_\_\_ day of October, 1995.

Respectfully Submitted,

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

13	NORTHWEST FOREST RESOURCE COUNCIL,	)	
14	Plaintiff,	)	Civil No. 95-6244-HO
15	v.	)	(Lead Case)
16	GLICKMAN and BABBITT,	)	Civil No. 95-6267-HO
17	Defendants.	)	(Consolidated Cases)
18		)	DEFENDANTS' MOTION
		)	FOR ENTRY OF
		)	APPEALABLE ORDER

19 Defendants Dan Glickman, Secretary of Agriculture, and Bruce  
20 Babbitt, Secretary of Interior, move the Court to (1) enter an  
21 appellable judgment pursuant to Rule 54(b) of the Fed. R. Civ. P.  
22 or (2) certify its determination of the scope of section  
23 2001(k) (1) for interlocutory appeal under 28 U.S.C. 1292(b) or  
24 (3) enter an injunction in the form attached in order to allow  
25 defendants to pursue an appeal of the decision contained in the  
26 Court's Order of September 13, 1995. Given the urgent need to  
27 decide the legal issue finally one way or the other, defendants  
28

1 request that the Court expedite the argument on the Motion for  
2 Entry of Appealable Order to coincide with the argument now set  
3 for Tuesday October 17, 1995 on plaintiff's Motion for an Order  
4 of Contempt. In support of this motion, defendants rely on the  
5 Memorandum in Support of Defendants' Motion for Entry of  
6 Appealable Order. By the filing of this motion and the  
7 submission of the proposed Declaration and Injunction in the form  
8 which we believe fairly reflects the Order of September 13th,  
9 defendants do not abandon any of the arguments made heretofore,  
10 including that the geographical scope of the proposed Declaration  
11 and Injunction are broader than provided for in the law.

12 Dated this \_\_\_\_ day of October, 1995.

13  
14 Respectfully Submitted,

15  
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NUMBER OF PAGES: 15

DATE: October 12, 1995

FROM: Paula Clinedinst, Legal Assistant, (202) 272-8019

MESSAGE: Attached is NFRC's Reply in Support of Motion  
for an Order of Contempt.

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

12 NORTHWEST FOREST RESOURCE ) Civil No. 95-6244-HO  
13 COUNCIL, an Oregon corporation, ) Lead Case  
14 )  
15 Plaintiff. ) Civil No. 95-6267-HO  
16 ) Consolidated Cases  
17 vs. )  
18 )  
19 DAN GLICKMAN, in his capacity ) NFRC'S REPLY MEMORANDUM IN  
20 as Secretary of Agriculture; ) SUPPORT OF MOTION FOR ORDER  
21 BRUCE BABBITT, in his capacity ) OF CONTEMPT TO ENFORCE  
22 as Secretary of the Interior, ) SEPTEMBER 13, 1995 ORDER OR  
23 ) IN ALTERNATIVE TO CLARIFY  
24 Defendants. ) ORDER  
25 )  
26 )

27 INTRODUCTION

28 The defendants admit they have not awarded or released any  
29 of the FY 1991-95 timber sales subject to this court's Order of  
30 September 13, 1995. They do not claim they are unable to release  
31 the sales, or that they do not understand what to do. They  
32 merely argue the Order does not contain the proper technical  
33 phrases to be an injunction.

34 To avoid a finding of contempt, the defendants have the  
35 burden of proof to show that could not comply with the order.

Page

1 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
ORDER OF CONTEMPT TO ENFORCE SEPTEMBER 13, 1995 ORDER  
OR IN ALTERNATIVE TO CLARIFY ORDER

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1 They made no attempt to meet this burden. The government has not  
2 even identified an official who is responsible for complying with  
3 the order, nor given any reasons why compliance is impossible.  
4 The defendants are in contempt of court.

5 The defendants' delay in awarding and releasing these sales  
6 is causing increasing harm to NFRC's members by depriving them of  
7 the right to operate the sales during the limited period the  
8 sales are legally protected by § 2001(k) - the period ending  
9 September 30, 1996.

10 This court should take firm and prompt action to compel the  
11 defendants to comply forthwith with the September 13 Order, and  
12 should order the defendants to supply a weekly compliance report  
13 describing the actions taken to award and release each of the  
14 sales until every sale is awarded and released.

15 **STATEMENT OF FACTS**

16 The facts are not in dispute: the government still has not  
17 awarded or released any of the approximately 50 FY 1991-95 timber  
18 sales that it admits are subject to this Court's order of Septem-  
19 ber 13, 1995. It does not state that it will ever release the  
20 sales.

21 The government announced its intention to release no sales  
22 in response to the court's order in a media statement by Mr.  
23 Tuchmann's office on September 14, see NFRC's Opening Memorandum,  
24 Exhibit A, and then officially confirmed that position in its  
25 Memorandum In Support of Motion for Reconsideration of Consolida-  
26 tion Order and Motion to Transfer filed in this court on Septem-

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1 ber 15, 1995. It reaffirmed that position in the declarations it  
2 filed with the court on September 20, 1995.

3 Thus, when NFRC filed its contempt motion, the government's  
4 position was already on record: it did not view this court's  
5 September 13, 1995 order as an injunction, and would not release  
6 any sales in response to the order.

7 Its position is unchanged. The government's opposition to  
8 the contempt motion takes the same posture, and the declaration  
9 of Stephen J. Paulson dated October 4 and the third declaration  
10 of Lyndon Werner dated October 5 both show that the government  
11 still has not released any of the FY 1991-95 sales.

12 Mr. Paulson's declaration merely states that the Forest  
13 Service began in late September to prepare to identify the sales  
14 to be released. Yet when NFRC filed this case on August 9 and  
15 sought a temporary restraining order compelling the agencies to  
16 identify and review these sales so they could be released by  
17 September 10, the government claimed it had already begun that  
18 process. In response to NFRC's motion the government assured the  
19 court that it was taking the necessary steps to be able to comply  
20 with the statute if necessary, and that no injunction was  
21 required. At the hearing on August 15, the court expressed to  
22 government counsel its expectation that the sales would be in a  
23 position to be released by September 10 if the court ordered that  
24 result to occur.

25 Now, almost two months later, the government advises the  
26 court that it did nothing in August to identify and prepare these

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3 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
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OR IN ALTERNATIVE TO CLARIFY ORDER

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1 sales for release, and that the Forest Service took no action  
2 until September 20 to begin to identify or prepare the sales for  
3 release. Paulson Declaration, ¶ 4. The BLM may have identified  
4 the sales a little earlier, but still has not completed an  
5 unspecified "analysis" of the sales. Third Werner Dec., ¶ 5.

6 ARGUMENT

7 I. THE SEPTEMBER 13 ORDER IS AN INJUNCTION.

8 The government's primary defense to the contempt motion is  
9 not that it does not believe the September 13 Order is an injunc-  
10 tion. The government concedes the court decided that § 2001(k)  
11 applies to the FY 1991-95 sales, and concedes that NFRC is  
12 entitled to injunctive and declaratory relief (indeed, the  
13 government asks the court to enter that relief now). But it  
14 asserts the September 13 Order did not contain the precisely  
15 proper phrases to translate the court's decision into injunctive  
16 relief under Fed. R. Civ. P. 65(d), or even into declaratory  
17 relief. Defendants' Opposition at 9 and n.1.

18 This technical, disingenuous interpretation of Rule 65(d)  
19 should not be accepted. Rule 1 of the Federal Rules of Civil  
20 Procedure states that the rules "shall be construed to secure the  
21 just, speedy, and inexpensive determination of every action."  
22 NFRC respectfully believes that this court entitled its September  
23 13 ruling an "Order" because it intended the ruling to grant the  
24 injunctive relief which it ruled NFRC is entitled to receive.  
25 Rule 1 supports this view.

26 There is nothing in the September 13 Order suggesting that

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4 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
ORDER OF CONTEMPT TO ENFORCE SEPTEMBER 13, 1995 ORDER  
OR IN ALTERNATIVE TO CLARIFY ORDER

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1 the court contemplated another round of litigation over the terms  
2 or content of the injunctive relief, or that there is any doubt  
3 about the nature of the injunctive relief that should be granted.  
4 The September 13 Order makes it perfectly clear what § 2001(k)(1)  
5 means, and what the defendants must do to comply with it.

6 NFRC recognizes that there is no single paragraph in the  
7 order containing the words "The court orders the defendants to  
8 award and release the sales." Yet the court's intent is unmis-  
9 takable. The court recited at the beginning of the Order that  
10 NFRC was seeking injunctive relief to compel the award and  
11 release of the sales, Order at 1, and recited at the end of the  
12 order that it was allowing NFRC's motion for summary judgment.  
13 Order at 11. There is Ninth Circuit authority that an injunctive  
14 order complies with Rule 65(d) even if it is based in part on  
15 another document such as findings of fact. *Ross-Whitney Corp.*  
16 *Smith Kline & French Lab.*, 207 F.2d 190, 198 (9th Cir. 1953).  
17 The September 13 Order read as a whole satisfies Rule 65(d).

18 The government's refusal to obey the command of the court  
19 because the court's direction results from two paragraphs of the  
20 order rather than one is contrary to any sense of justice,  
21 fairness or common sense. This posture is especially repugnant  
22 for a party as experienced in federal court litigation as the  
23 federal government.

24 The court will have to decide if the September 13 Order  
25 satisfies Fed. R. Civ. P. 65(d). If the court decides it does  
26 not, then perhaps the government's version of "gotcha" will

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1 prevail in the short term. But that result is not consonant with  
2 Fed. R. Civ. P. 1 or with justice. NFRC respectfully urges that  
3 the September 13 Order is an injunction and the defendants are  
4 obligated to comply with it.

5 **II. THE COURT SHOULD ISSUE AN ORDER OF CONTEMPT TO**  
6 **ENFORCE THE SEPTEMBER 13, 1995 ORDER.**

7 The government concedes that this court has the authority to  
8 enforce its order with contempt powers. Besides denying that the  
9 September 13 Order is an injunction, its defense to the contempt  
10 motion is that contempt is not appropriate here because it has  
11 taken "reasonable steps" to comply and is in "substantial  
12 compliance" with the September 13 Order. The government's  
13 compliance with the September 13 Order is neither "reasonable"  
14 nor "substantial." Indeed, it is nonexistent.

15 The first step to obtaining an order of contempt is that  
16 NFRC must show by clear and convincing evidence "that the  
17 contemnors violated a specific and definite order of the court."  
18 *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 n.9  
19 (9th Cir. 1992), cert. denied, 113 S. Ct. 1050 (1993).

20 NFRC has met that burden here. While the government still  
21 does not admit the September 13 Order is an injunction, it  
22 concedes that it has not awarded and released the sales. Yet a  
23 party subject to a court order "has a duty to make in good faith  
24 all reasonable efforts to comply." *United States v. Hayes*, 722  
25 F.2d 723, 725 (11th Cir. 1984). Merely making "some effort" is  
26 not sufficient. *Id.* Indeed, not even "substantial" compliance

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1 is sufficient if more can be accomplished. *Combs v. Ryan's Coal*  
 2 *Co.*, 785 F.2d 970, 984 (11th Cir.), cert. denied 479 U.S. 853  
 3 (1986). In this case, the court's order does not direct the  
 4 government to identify and study the sales - it orders the  
 5 government to award and release the sales as § 2001(k) requires.  
 6 The government admits it has not done so, and makes no claim that  
 7 it ever will. The government's conduct in identifying sales  
 8 while taking no action to award them is like "the tuning up of a  
 9 band that never intended to play," *Sekaquaptrewa v. MacDonald*,  
 10 544 F.2d 396, 406-07 (9th Cir. 1976), cert. denied, 430 U.S. 931  
 11 (1977), which constitutes contempt.

12 With NFRC having met its burden to show that the order has  
 13 been violated, "[t]he burden then shifts to the contemnors to  
 14 demonstrate why they were unable to comply." *Stone v. City and*  
 15 *County of San Francisco*, 968 F.2d at 856 n.9.

16 Here, the government does not argue that is unable to comply  
 17 with the September 13 Order. Its declarants have identified no  
 18 impediments to releasing the sales, and have offered no reason  
 19 why the sales have not been released.

20 The agencies cannot claim they do not understand what the  
 21 Court ruled, or that they do not know exactly what sales should  
 22 be awarded and released: on September 1 the government filed  
 23 declarations from the Forest Service and BLM stating the precise  
 24 volume of sales at issue, which were based on exact knowledge of  
 25 the names of the sales involved.

26 In the case of the BLM, the 27 sales at issue, containing

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7 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
 ORDER OF CONTEMPT TO ENFORCE SEPTEMBER 13, 1995 ORDER  
 OR IN ALTERNATIVE TO CLARIFY ORDER

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1 125 million board feet of timber, have been identified at least  
2 since April 1995 when the BLM Oregon state office gave NFRC a  
3 list of the very sales. Ragon Declaration (August 8, 1995),  
4 Exhibit 1, Tables 2 and 3. The government gives no reason why  
5 these sales have not been released.

6 Similarly, on September 1 the Forest Service identified 109  
7 million board feet of sales, five million in the Option 9 region  
8 and 104 million in eastside Oregon and Washington forests, to be  
9 released. Although it has not disclosed to NFRC the names of the  
10 sales, it obviously must know them. The government also gives no  
11 reason why these sales have not been released.

12 The process of awarding timber sales is not novel to these  
13 agencies. They have awarded thousands of timber sales over many  
14 decades. These sales are no different.

15 The defendants have not met their burden of showing "why  
16 they were unable to comply." *Stone v. City and County of San*  
17 *Francisco*, 968 F.2d at 856 n.9. Accordingly, the court should  
18 find them in contempt.

19 Nor is there any discretionary justification for the court  
20 to withhold use of its contempt power, as the government argues.  
21 Perhaps the court might choose to give deference to an affidavit  
22 from one of the defendant Secretaries explaining the reasons why  
23 full compliance was not possible - but there is no such affidavit  
24 in this case. Neither Secretary has evidenced any personal  
25 involvement in this matter, which is why NFRC has not sought  
26 personal contempt sanctions against the two cabinet officers.

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1           Instead, the court has been given nothing but cursory  
 2           declarations from low-level career employees explaining the  
 3           ministerial duties they have been directed to perform. No  
 4           administration appointee has stepped forward to accept responsi-  
 5           bility or offer a justification for the administration's inac-  
 6           tion. To the contrary, the response of E. Thomas Tuchmann to the  
 7           contempt motion is "an each man for himself" declaration denying  
 8           his personal culpability.<sup>1</sup> James R. Lyons, Under Secretary of  
 9           Agriculture for Natural Resources and Environment, whose line  
 10          responsibility to implement § 2001 has not been denied, has  
 11          remained silent.<sup>2</sup>

12           The Administration's attempt to sidestep the court's order,  
 13           and its refusal to come forward with an appointee who is in fact  
 14           responsible to comply with the court's order, makes it even more  
 15           important for the court to take firm action to enforce the order  
 16           through its contempt powers.

17           The administration's delay in releasing these sales is  
 18           frustrating the intent of Congress, which compelled action in 45

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20           <sup>1</sup> While putting Mr. Tuchmann's duties and responsibilities  
 21           at issue, Defendants' Opposition at 14, the government has  
 22           refused to produce Mr. Tuchmann for a deposition, and has refused  
 23           to produce any documents relating to his duties and responsibili-  
 24           ties in relation to § 2001(k). The court should not absolve Mr.  
 25           Tuchmann of responsibility without permitting NFRC to conduct  
 26           discovery necessary to verify or refute the government's conten-  
 27           tions.

28           <sup>2</sup> The government has also refused to produce Mr. Lyons at  
 29           a deposition, and has refused to produce documents relating to  
 30           his duties and responsibilities relating to § 2001(k).

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1 days in order to put the timber in the sales back into the market  
2 immediately for processing by companies that have been waiting  
3 years for the timber.

4 The delay is also irrevocably denying the companies the  
5 right to operate the sales during the limited period of legal  
6 protection granted by Congress. The sales may be operated to  
7 completion "notwithstanding any other provision of law" only  
8 until September 30, 1996. After that date, other legal con-  
9 straints will come back into play.

10 Congress intended the companies to have one year and 21 days  
11 of freedom to operate the sales: from September 10, 1995 to  
12 September 30, 1996. The defendants' delay in awarding these  
13 sales has already reduced this window of legally-protected  
14 operation by more than one month. Further delay increases the  
15 harm to the companies.

16 NFRC asks the court to impose monetary sanctions in the  
17 amount of \$50,000 per day for the first week of noncompliance,  
18 with the fines doubling every week thereafter that the sales are  
19 not awarded and released, and additionally requests incarceration  
20 of Mr. Lyons and other government officials responsible for  
21 compliance with the court's September 13 Order.

22 **III. IF THE COURT DETERMINES THAT CLARIFICATION OF THE**  
23 **INJUNCTIVE TERMS OF THE SEPTEMBER 13 ORDER IS**  
24 **NECESSARY, IT SHOULD ORDER THE SALES RELEASED**  
25 **"FORTHWITH".**

26 If the court determines that additional injunctive language  
is necessary, the court should issue an order with necessary

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1 language as requested in NFRC's opening brief. The government  
2 does not oppose this additional injunctive language: "defendants  
3 have no objection to entry of an injunction at this time."  
4 Defendants' Opposition at 15.

5 NFRC strongly disagrees with the defendants' request to be  
6 given 45 days from September 13 to award and release the sales.  
7 More delay will further harm NFRC's members by denying them the  
8 rights granted by Congress.

9 The administration wasted the initial 45 day release period  
10 granted by Congress, doing nothing to begin preparation to award  
11 and release these sales until a week after the September 13  
12 Order. The administration should not be rewarded for its  
13 idleness with another 45 day period for compliance. The court  
14 should order the defendants to award and release every sale  
15 "forthwith." The court should also order the defendants to  
16 supply a weekly compliance report describing the actions taken to  
17 award and release each of the sales until every sale is awarded  
18 and released.

19 **CONCLUSION**

20 NFRC's motion for an order of contempt, or in the alterna-  
21  
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Page

11 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
ORDER OF CONTEMPT TO ENFORCE SEPTEMBER 13, 1995 ORDER  
OR IN ALTERNATIVE TO CLARIFY ORDER

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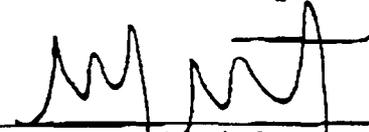
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tive for an order clarifying the September 13, 1995 Order, should  
be granted.

Dated this 12th day of October, 1995.

MARK C. RUTZICK LAW FIRM  
A Professional Corporation

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

Page

12 - NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR  
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OR IN ALTERNATIVE TO CLARIFY ORDER

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing NFRC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER OF CONTEMPT TO ENFORCE SEPTEMBER 13, 1995 ORDER OR IN ALTERNATIVE TO CLARIFY ORDER on:

Wells D. Burgess  
Michelle L. Gilbert  
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Attorneys for Proposed Intervenors-Defendants

on October 12, 1995, by facsimile and by delivering to said attorneys via Federal Express true copies thereof, certified by me as such, contained in sealed envelopes, prepaid, addressed to said attorneys at said attorneys' last known addresses, and deposited with Federal Express in Portland, Oregon, on said day, and on:

Scott Horngren  
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on October 12, 1995, by mailing to said attorney a true copy

