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Timber-cancellation brief

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
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FROM: Ellen Athas
Michelle Gilbert

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MESSAGE: Dinah and Elena,
Attached is the latest version of the draft brief,
with all references to the public safety question
removed. We understand that a lot more changes
will be required after we've had a strategy
meeting to discuss which arguments to make.
Nonetheless, I didn't want to put off sending this
to you. Please let us know what time is good for
us to come over on Monday. - Ellen

Mtg 4:30 Thursday

Ellen Athas

DRAFT
(Drafted prior to plaintiff's
filing in Klamath case)
ATTORNEY-CLIENT
WORK-PRODUCT
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,))	
Plaintiff,))	
v. )	)	Civil No. 95-6244-HO
)	)	(lead case)
)	)	Civil No. 95-6267-HO
)	)	(consolidated case)
))	
DAN GLICKMAN, in his capacity )	)	DEFENDANTS' MOTION
as Secretary of Agriculture, )	)	TO CLARIFY OR, IF
BRUCE BABBITT, in his capacity )	)	NECESSARY, MODIFY THE
as Secretary of the Interior, )	)	COURT'S INJUNCTION OF
)	)	[IDENTIFY]
Defendants, )	)	TIMBER SALES; IN THE
)	)	ALTERNATIVE, MOTION
)	)	FOR LIMITED REMAND
OREGON NAT. RES. COUNCIL, et al.,))	
Defendants-Intervenors))	

INTRODUCTION

The Secretary of Agriculture seeks a clarification and review of this Court's injunction[s], directing the award and release of certain timber sales previously withdrawn from the Forest Service's timber program. NFRC v. Glickman, Order (date of relevant order). The Order specifically requires that the Secretary release and [permit to be ^{completely} harvested] [identify relevant sales and location]. By this motion, we seek a ruling from the Court that the Secretary of Agriculture is permitted to modify

No-order
doesn't
say this!

operation of the timber sales that were released pursuant to this Court's injunction, either through unilateral modification, [suspension or termination.] This Court has jurisdiction to entertain this motion under the Court's inherent authority to enforce its own injunctions, or alternatively, under the procedure specified in Crateo, Inc. v. Intermark, Inc. , 536 F.2d 862, 869 (9th Cir. 1976).

[Recent events have prompted this motion.] The Rescissions Act, Section 2001(k)(1), provides for reinstatement of timber sale "contracts" pursuant to the "originally advertised terms, volumes and bid prices." The advertised terms incorporate the terms of the contracts. The relevant sale contracts expressly authorize modification, suspension and termination of the contracts based on environmental harm. [By an interim final rule published on April 3, 1996, Attachment A hereto, the Secretary of Agriculture has expanded the ability of the Forest Service to provide substitute timber without engaging in competitive bidding through modification of the subject contracts, so that the purchasers of these sales can more readily be made whole now upon contract modification and [suspension] than when this Court's injunction issued.] [However, for some sales [identify which sales require termination, rather than modification; limited application], it has now become clear that the only remaining viable solution is termination.]

As set forth in more detail below, defendants request that the [relevant date] injunction requiring the Secretary to permit

the sales to be completed be clarified, or modified to the extent necessary, to confirm the Forest Service's ability to modify contract operations so that the sales, to the extent they are not already cut, will remain unharvested while substitute timber is made available to the contractor pursuant to the new interim final rule. [Alternatively, defendants seek a clarification, or any necessary modification, of prior orders to confirm the agency's right to terminate [identify] contracts.]

If the Court determines that jurisdiction does not lie with the district court to grant a clarification or modification of the injunction, the Secretary respectfully moves, in the alternative, for a limited remand to allow such clarification or modification. Thus, pursuant to Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976), the Secretary formally asks this Court whether it wishes to entertain or grant a postjudgment motion. If the Court grants this motion in the alternative, the Secretary would then file a motion for a limited remand with the Court of Appeals for the Ninth Circuit. See Jenkins v. Whittaker Corp., 785 F.2d 720, 722 n.2 (9th Cir. 1986).

Statement of the Case

Origin of Sales. Pursuant to Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745 ("Section 318"), a number of timber sales were proposed for [the Umpqua National Forest by the Forest Service in 1990; or possibly Siskiyou or Willamette]. Of particular

importance here are [number] sales, named [list sales]. [Explain why sales did not proceed as Section 318 sales.]

[Identify any non-318 sales and explain why they did not proceed.]

Inconsistency of Sales with Pacific Northwest Forest Plan.

In the years following the withdrawal of these sales, the Forest Service worked closely with the Bureau of Land Management to address the problems of the northern spotted owl and logging in the Pacific Northwest. During the period from 1993 through 1994, much progress was made on reaching a solution to the years of litigation and injunctions on the Pacific Northwest forests. The Pacific Northwest Forest Plan provided a new landscape for both protection of the old-growth habitat and sustainable timber harvests. It remains unclear whether these sales were considered to be standing or harvested during the preparation of this Plan. [Confirm re individual sales] The Forest Service, however, had assumed that these sales would not be released. [Confirm]

Under the Pacific Northwest Forest Plan, these sales could not go forward in their original form. The sales lie within Late Successional Reserves and Key Watersheds [check location as to identified sales], as those terms are defined in the Pacific Northwest Plan. See Declaration of XXX.

Late Successional Reserves. A Late Successional Reserve ("LSR") is a land allocation for reserved lands that are to be managed to protect and enhance conditions of late-successional and old-growth related species, including the northern spotted

owl. Very limited timber harvesting is permitted in the LSRs, mostly thinning, which is only permitted if it will positively affect the reserve.

Key Watersheds. A Key Watershed is part of a system of large refugia comprising watersheds that are crucial to at-risk fish species and stocks and provide high quality water. Timber harvest cannot occur in Key Watersheds without a watershed analysis. No new roads are to be built in the unroaded portion of previously inventoried roadless areas. [Identify sales' location in key watershed[s] and whether they have been a part of any aquatic strategy review.]

To date, the Forest Service has not undertaken any review of the timber sales for their compliance or non-compliance with the Umpqua Forest Plan [or other Plan], as amended by the Pacific Northwest Plan.

[describe individual sales]

The Rescissions Act resurrects these abandoned sales. In July 1995, the Rescissions Act was signed into law. Litigation surrounding this statute began almost immediately after passage. In the course of this litigation, the Federal District Court for the District of Oregon issued an injunction directing the Forest Service to release these sales.

Procedural History. On September 13, 1995, this Court held that Section 2001(k) applies to timber sales previously offered or awarded in all national forests in Washington and Oregon and BLM districts in western Oregon up to July 27, 1995. NFRC v.

Glickman, No. 95-6244-HO (D. Or.). On October 17, 1995, the Court entered an order which "compelled and directed" the Secretary of Agriculture and the Secretary of the Interior, "to award, release and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or BLM district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting." The government has appealed the district court's ruling.

After these orders, the Forest Service proceeded to release timber sales to previously identified high bidders. In one category of sales, however, the high bidders were either unwilling, unable or unqualified to take advantage of the renewed offer of the timber sale. In another category of sales, courts had previously issued injunctions preventing the award of the sales, or the Forest Service had rejected bids, suspended, or terminated sales as a result of earlier litigation. For both categories, the Forest Service did not pursue the award or release of timber sales and this was challenged in district court.

At the same time, Pilchuk Audubon Society filed a separate complaint in this Court challenging the release of a number of sales that had been enjoined, cancelled or withdrawn on a number of grounds. [Explain how Pilchuk's motion covered the sales

currently at issue.]¹ They argued that such sales were no longer offered within the meaning of Section 2001(k)(1), and, as to certain of the challenged sales, it would violate the separation of powers principle to require them to proceed in the face of an injunction or judicially-approved withdrawal.

By decision dated January 10, 1996, amended to address typographical errors on January 17, 1996, the Court enjoined the Secretary of Agriculture to "immediately award, release and permit to be completed immediately all sales subject to Section 2001(k)(1) as declared in this order."

Following this Court's January 10 decision, the Secretary of Agriculture sought a stay of the release of all the Section 2001(k)(1) sales covered by the Court's January 10, 1996 injunction whose release the agency had contested. This stay request was denied by the Court and similarly denied by the Ninth Circuit.

¹ Pilchuk's complaint alleged generally that cancelled sales, or those that were no longer in the timber pipeline at the time of passage of the Act, were not subject to the Act's award and release requirements. While Pilchuk did not explicitly identify all the sales it deemed subject to this claim, Pilchuk did clearly contest the release of four sales canceled pursuant to stipulated dismissals, First, Last, Boulder Krab and Elk Fork, as well as specific sales that had been enjoined or subject to orders effectively preventing the sale from proceeding, Cowboy, Nita, South Nita, Garden, Tip, Tiptop and Gaterson. The [identify] sales at issue here appear to fall within Pilchuk's general complaint regarding cancelled sales. Accordingly, they are subject to this Court's January 10, 1996 injunction.

ARGUMENTS

I.

THE INJUNCTION SHOULD BE
CLARIFIED OR MODIFIED IF NECESSARY TO ALLOW
THE SECRETARY TO MODIFY AND SUSPEND
THE SUBJECT SALESA. This Court Has Authority to Clarify or, if Necessary, Modify Its Injunction.

A district court retains full jurisdiction to define the scope of an injunction issued by the court. See New York State NOW v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989). In particular, in cases such as this, where a motion for contempt has already been filed against the United States by plaintiff Northwest Forest Resource Council earlier in this litigation, the seeking of such clarification and definition is prudent and should be allowed. The Ninth Circuit has clearly stated that a district court does not lack jurisdiction to clarify its original injunction and to supervise compliance. Meinhold v. U.S. D.O.D., 34 F.3d 1469, 1480 n.14 (9th Cir. 1994), citing Hoffman v. Beer Drivers Salesman's Local Union No. 888, 536 F.2d 1265, 1276 (9th Cir. 1976) (appeal from a supervisory order does not divest the district court of jurisdiction to continue supervision and modify order as necessary).

B. The Secretary is Authorized to Modify and Suspend the Subject Sales and, In Lieu, Provide Substitute Timber.

Section 2001(k)(1) limits applicability of environmental statutes to contracts released thereunder by directing the agencies to proceed "notwithstanding any other provision of law."

However, in the same sentence, the statute requires the award of "contracts" under "the originally advertised terms" The advertised terms, which incorporate the terms of the contracts, and the contracts themselves, are creatures of the National Forest Management Act, 16 U.S.C. § 472a. Given the absence of an explicit repeal, the contract terms are to be given effect to avoid an inconsistency between laws. See In re The Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (finding phrase "notwithstanding any other provision of law" is not dispositive where other laws are included by reference). Indeed, as this court has recognized, "[a]gency regulations which operate consistently with section 2001(k) (1) . . . remain in effect."² Jan. 10 Order at 21.

Here, application of those contract clauses authorizes the Secretary unilaterally to modify, suspend or cancel the contracts consistent with the Act.

1. The Contract Terms Allow Modification And Suspension of the Contracts While Substitute Timber Is Provided under the New Interim Final Rule.

All sale contracts contain contract provisions CT8.3 and C6.01. [Confirm once sales are identified.] Provision CT8.3 - CONTRACT MODIFICATION - provides, in relevant part:

Forest Service may make modifications in Timber Specifications in BT2.0, Transportation Facilities in BT5.0, or Operations in BT6.0, or in related Special Provisions, to the extent that such changes are

² In addition, rules of statutory construction require that meaning be provided all terms of the statute, including release of the contracts under "originally advertised terms."

reasonably developed to implement Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended and with land management plans, developed or revised thereunder. Such modifications shall be limited to requirements with which the Purchaser can reasonably comply. . . .

Thus, the Forest Service is authorized to modify sale contracts to the extent necessary to comply with land management plans and standards and guidelines. None of the subject sales comply with the relevant Forest Plans or applicable standards and guidelines. Here, the [relevant forest] Forest Plan[s] was[were] amended to include the standards and guidelines of the Pacific Northwest Forest Plan. Proceeding with the [identify sales] sales would violate several of these standards and guidelines. First, the contemplated type of harvesting would otherwise not be permitted in a Late Successional Reserve. Second, this type of harvesting would not be permitted in a watershed without a watershed analysis. Road construction, such as that planned to enable the sales to go forward, would also not be permitted. [Confirm which points are applicable once sales are identified.]

In light of publication of the new interim final rule, the Forest Service can now proceed with modifications that will permit the sale contracts to be completed, consistent with the intent of the Act. As explained, on April 3, 1996, the Forest Service published an interim final rule revising existing regulations regarding noncompetitive sales of timber based on the Secretary of Agriculture's determination that extraordinary conditions exist. See 61 Fed. Reg. 14618 (April 3, 1996),

Interim Final Rule, Disposal of National Forest System Timber; Modification of Timber Sale Contracts in Extraordinary Conditions. The rule allows forest officers to implement modifications to timber sale contracts awarded or released pursuant to section 2001(k), by substituting timber from outside the sale area specified in the contract for timber within the sale area, without advertisement. Without this regulation, the Forest Service was constrained by the competitive bidding requirement to look within the sale contract area for substitute timber in the event of any contract modification. Such timber was generally unavailable. Thus, the Forest Service is now in a position to provide substitute timber, necessary to make the purchaser whole as a result of any contract modifications, while ensuring that the contracts are permitted to be completed.³

[Confirmation regarding identification of forest officer authorized to make such modifications and ability to do so here

³ Indeed, the agency has already successfully utilized this regulation in reaching an agreement to implement mutual modifications of the First and Last timber sales on the Umpqua National Forest. Unlike the remaining timber in the First and Last sale units, which is in Late Successional Reserves, the substitute harvest units are in matrix lands, as defined in the Northwest Forest Strategy, on the Tiller Ranger District. This agreement, of course, deals with mutual modifications. However, as explained above, the agency also has authority to unilaterally modify the contracts, while agreement as to the location of the substitute timber will continue to be mutual pursuant to the interim final regulation. [NOTE: The interim final rule clearly stresses that it provides authority to make "mutual modifications." Accordingly, to make the above-stated argument, we would have to argue that the rule actually intended mutual agreement on the substitute timber, but was not required for the decision to modify.]

is required. This applies to all actions to be taken under the contract clauses discussed herein.]

In implementing any modifications, Provision C6.01 specifically permits the Forest Service to interrupt a purchaser's operations to prevent environmental damage that requires the contract modification. The provision provides:

C6.01 - INTERRUPTION OR DELAY OF OPERATIONS.
(6/90) Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

(a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2;

(b) To comply with a court order, issued by a court of competent jurisdiction; or

(c) Upon determination of the appropriate Regional Forester, Forest Service, that conditions existing on this sale are the same as, or nearly the same as, conditions existing on sale(s) named in such an order as described in (b). . . .⁴

⁴ The provision continues:
Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (1) Contract Term Adjustment pursuant to B8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to B8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or other documentation to

(continued...)

The Forest Service approved provision C6.01 for use nationally in June 1990, during a time when environmental challenges to Federal timber sales were becoming more common and suspensions of sales for environmental reasons were becoming more frequent. In fact, it appears that certain of these sales [identify] may have been some of the first contracts to include the provision. The clause represents the first time that a timber sale contract provided for suspension of operations specifically to prevent serious environmental degradation or resource damage that requires contract modification under CT8.3 (provision C6.01(a)), or to comply with a court order (provision C6.01(b)).

Allowing these sales to proceed while the Forest Service attempts implement any contract modifications by finding substitute timber acceptable to the purchaser would result in "serious environmental degradation or resource damage." [Describe environmental problems of sales, once identified.] Thus, while the Forest Service is seeking agreement of the purchaser on substitute sales to be provided pursuant to the new interim final rule, the Forest Service can request the operator to interrupt operation. [Confirm who has authority and whether it would be used.]

Finally, prior to the FWS's listing of the marbled murrelet as a threatened species, the United States District Court for the

⁴(...continued)
the Contracting Officer which clearly identify and verify actual expenditures.

Western District of Washington issued a temporary restraining order prohibiting timber harvesting on all Federal timber sales in possible marbled murrelet habitat, including [identify sale areas]. Consequently, the Forest Service possessed express authority to suspend operations on the sale units pursuant to Provision C6.01(b). [Note: This argument conflicts with 2001(k)(2)'s explicit and sole exemption for withholding sales where threatened or endangered bird species are known to be nesting.]

u.s. mandatory exemption - k gives you the choice
"you have to"
"you can"

[Note: There are serious questions as to whether the following contract provision could be used as it draws its authority from the ESA, which became ineffective (except for nesting determinations under k(2)), by reason of "notwithstanding any other provision of law." The statute's explicit exemption for units upon which nesting determinations of threatened or endangered species have been made cuts against relying on ESA related concerns to cancel or suspend other sales.]

2. Contract Provision C6.25 Permits Unilateral Modification or Cancellation.

Provision C6.25 provides that:

Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-5 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract as

stipulated in the List of Controlled Areas on the Sale Area Map.

If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species List, Forest Service may either cancel under C8.2 or unilaterally modify this contract to provide additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.

Declaration of XX. See Janicki Logging Co. v. Bruce Mateer, 42 F.3d 561, 562 (9th Cir. 1994) ("Section C6.25 of the contract expressly permitted the Forest Service to 'either cancel' or 'unilaterally modify [the] contract' in order to provide additional protection for animals that were listed either as threatened or endangered under the Endangered Species Act, or as sensitive by the Regional Forester.") (brackets in original).

The Forest Service has discretion to modify or cancel a timber sale contract under this provision. If the Forest Service chooses to cancel a contract, timber harvesting is brought to an immediate end. In the alternative, if the Forest Service elects to modify the contract, there are various options. The Forest Service can modify the volume of timber available for a specific contract. Or, the Forest Service can modify the term of the contract, suspending operations pending determination of what additional modifications, if any, are necessary to enable a sale to go forward.

The Court's analysis in Thomas Creek Lumber & Log Co. v. United States, 32 Fed. Cl. 787 (1995), appeal pending, 95-5080

(Fed. Cir. filed June 5, 1995), is instructive. That case involved a timber sale dispute between the Bureau of Land Management (BLM) and a timber company concerning the BLM's suspension of two BLM timber sale contracts in order to protect the northern spotted owl. The Court described the BLM's deliberative process as follows:

[A]fter the initial suspension, the BLM begins consultations with the FWS to assess the extent to which continued harvesting under the contract may affect the endangered animal. The purpose of the suspension is therefore prophylactic -- suspension maintains the status quo until an appropriate analysis can be made regarding the effect that continued timber harvesting in the area may have on the endangered animal. Plaintiff's proposed interpretation of Section 41x would negate this prophylactic purpose. It would permit timber harvesting to continue until a new survey could be completed without any consideration of the effect that such continued harvesting would have on the endangered animal previously identified on the contract area. Continued harvesting under such circumstances could potentially destroy an endangered animal and/or its critical habitat. This would seem precisely the type of environmental harm that Section 41x was intended to protect against.

32 Fed. Cl. at 790-91. This reasoning applies with equal force to the present facts.

Here, [identify the sales] sales are in the [describe location], home to [identify threatened or endangered] species. [Include if continues to remain relevant: First, the Oregon Coast Coho Salmon, which was proposed for listing as a threatened species on July 25, 1995, is found there. Second, the Coastal cutthroat trout (resident and sea-run) is found there and was

proposed to be listed as endangered on July 8, 1994. As set forth in the Declaration of XX, on April 14, 1995, the Regional Forester sent a letter to each Forest, including the Umpqua National Forest, stating that any proposal to list a fish species automatically entitles that species to R-5 sensitive species listing.] Accordingly, contract clause C6.25, Protection of habitat of endangered, threatened and sensitive species would apply. Declaration of XX at .

[There is a real question whether the following section which raises questions about termination should be included. Terminating the contract might well be seen as contradicting the terms of Section 2001(k), and as inconsistent with the underlying rationale for implementing the interim final rule. It therefore could impact any argument regarding contract modification.]

3. Contract Clause C8.2 Permits Termination Based on Serious Environmental Degradation Or Inconsistency With Land and Resource Management Plan.

Contract Clause C8.2, referred to in the previously discussed contracts clauses, specifically provides for termination of a contract. It provides:

The Chief, Forest Service, by written notice, may terminate this contract, in whole or in part, (1) to comply with a court order, regardless of whether this sale is named in such an order, upon determination that the order would be applicable to the conditions existing on this sale; or (2) upon a determination that the continuation of all or part of this contract would:

- (a) cause serious environmental degradation or resource damage;
- (b) be significantly inconsistent with land management plans adopted or revised in accordance with Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended;
- (c) cause serious damage to cultural resources pursuant to C6.24;
- (d) jeopardize the continued existence of Federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester.

Compensation for termination under this provision shall be calculated pursuant to C9.5, except; compensation for termination under (1) shall be calculated pursuant to C9.51 when included in this contract and compensation for termination under (2) (d) shall be calculated pursuant to C9.52 when included in this contract.

Thus, for the reasons already set forth in C6.01 and C6.25, the contract termination provision authorizes the Forest Service to terminate contracts for several reasons. In addition, Contract Clause C8.2 provides an important, additional ground for termination.

Pursuant to C8.2(b), if a sale is "significantly inconsistent with land management plans," termination can occur. As explained above, these sales are not consistent with the applicable plans. [Identify and explain why these particular sales require termination, rather than modification; any evidence that all other avenues have been exhausted.] The standards and

guidelines, therefore, direct that these sales should not go forward based on their contract terms alone.

4. The Contract Language Survives the Rescission Act.

It is without dispute that a "statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted." 2B Sutherland Stat Const § 51.08 (5th Ed.); United States DOE v. Ohio, 112 S. Ct. 1627 (1992); Somermeier v. District Director of Customs, 448 F.2d 1243 (9th Cir. 1971). As this Court has recognized, "Agency regulations which operate consistently with section 2001(k)(1) . . . remain in effect." NFRC v. Glickman, Order (Jan. 10, 1996), at p. 21. Thus, the Court continued, the Forest Service may look to "applicable regulations" to determine contract issues, such as high bidders. Id.

Moreover, in determining the scope of a statute, this Court has made clear that a "provision's plain meaning should be understood in the context of the entire statute." Id. (citing Rufener Constr., Inc. v. Robertson, 53 F.3d 1064, 1066 (9th Cir. 1994)). Here, Section 2001(k)(1)'s plain meaning is that the Secretary shall "permit to be completed" "contracts" pursuant to their "originally advertised terms." Because contract terms include the right to modify, suspend or terminate, the subsection's simultaneous reference to both the advertised terms, including the contract terms, and the completion of contracts, must be reconciled. [It can be argued that the statute requires the Secretaries to act to resolve contract issues by releasing

the contracts, but that it does not prohibit contract "completion" through exercise of the termination clause and payment of damages as provided in the contract. Under this construction, section 2001(k) only requires resolving the fate of the contracts one way or another, and protects the Secretaries' exercise of contract authority from challenge under other laws.] At the very least, the statute is ambiguous, and the agencies' interpretation is entitled to deference. See Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

For all the above-stated reasons, clarification or, if necessary, modification of the [relevant date] Order and Injunction is warranted.

II.

ALTERNATIVELY, THE ISSUES
DISCUSSED ABOVE
WARRANT THE COURT'S AGREEMENT TO ENTERTAIN
OR GRANT A POSTJUDGMENT MOTION.

If the Court determines that jurisdiction over this matter is vested solely with the Ninth Circuit at this time to modify or clarify the [relevant date] injunction, the Secretary requests that this Court consider a motion pursuant to Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

Pursuant to the Ninth Circuit's instructions in that case, a party seeking relief from a district court's order, at the same time the order is on appeal, must follow a specific procedure. First, the matter must be presented to the district court for a decision as to whether or not the district court would entertain

or grant the motion seeking to alter or modify the order. Second, if the district court indicates that it would entertain or grant a motion, the moving party can then move forward and request the appellate court for a remand. See Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976) (from which came the term "Crateo indication", meaning the district court's indication of whether or not it wishes to entertain or grant a postjudgment motion).

For all the reasons already set forth in support of modification of the injunction, a determination to entertain or grant the modification request is proper. Thus, a Crateo determination is warranted.

Conclusion

A newly-promulgated interim final rule and resurrected contract clauses provide this Court with new arguments involving important old growth timber sales. These provide the foundation to allow the Court to clarify or, to the extent deemed necessary, modify the [relevant date] Order so that the agency may proceed with contract modification and suspension that will result in the provision of substitute timber for the subject sales, [or in a few unique cases, termination.] Alternatively, this information and new issues provide the Court with enough evidence to allow the Court to find that either it will entertain or grant a motion to modify.

Dated:

1. Terminate must be included

2. Just make the argument! Not that K terms to be given effect to avoid inconsistency. K terms to be given effect bc. plain lang of stat says so!

Up front (not on p. 19) + not bc consistent or bc of context! No need to "reconcile"

3. No need to modify (undercuts argument)

4. Credo procedure improper - we are not seeking relief from order.

5. Not record events - USDA rule is irrelevant - go to K remedies

6. Injunction doesn't require 'harvesting' } ask about this?

3.5. Posture (related) - we have auth - under statute + injuncti-.

Out of excess of caution + out of real respect for it, coming in to caution that this is it, understanding as well.

Jurisdictional issue

- answer to enforce our laws

"inherent powers"

suspension

modify

cancel

↳ create

Risk: C/A - remove entire

mtv -

- 12 -

Optimistic

1) Take on administrative -

new filing -

moving forward.

2) R 16 - status conference

app in CT

judge - we want to make sure

we're here to work out of CT.

1. Framing

This means drop Chako stuff: again we are not seeking relief - at worst - say, if Ct disagrees, reh. publicatio?

We are not asking Ct to modify injunction bec of changed cives (not changing our positic, as FN2 r/s/r/h)

We have authority to do this, under both the statute + the injunctioⁿ (did not order harvest - as p. 2 says!)

We are coming to the Ct to say what we intend to do out of an excess of caution + a desire to show respect.

2. Draw out the essential arg from the beginning / ^{remove} clutter

a. Essential arg is: we have auth to do this under K terms, which survive r/den.

This is buried, esp. in intro mat'l

b. All this stuff abt K3 + new rule + changed cives + protests are so much clutter.

↳ Take all this out or at least de-emph.

i. Esqee protesters - makes it sound as if we're asking judge to go aft law bec of fears of disorder.

ii. Also replacement stuff - if we make K terms, aren't we going to pay damages (or would modificatio → offer of rep. timber?)

3. ^{+ supplement} Paraphrase^d argument actic to bring out basic arg.

A. K terms survive under

B. K terms give us auth in following circs

C. These circs are present here.

In making this arg, note which the remedies are!

Make lawyer + shrewder
Don't get 11-12 part.
Punch home plain lang -
not just that courts law
a to ^{circs} w/ context

Don't rely on injunctives - vulnerable here

rely on env harm! ↳ uncertain status of them

What's special about P.2?

that it gives termination?

or that it relies on incertis w/
and input plans?

do we need the second? What's the
problem w/ it?

Conclusion all wrong -

on this clutter

But is basic argument.

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

14 NORTHWEST FOREST RESOURCE COUNCIL,)

15 Plaintiff,)

16 v.)

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

20 Defendants,)

21 OREGON NAT. RES. COUNCIL, et al.,)
 22 Defendants-Intervenors)

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

DEFENDANTS' MOTION
 TO CLARIFY OR MODIFY
 INJUNCTION RE FIRST
 AND LAST TIMBER SALES
 OR, IN THE ALTERNATIVE,
 MOTION FOR LIMITED REMAND

23
 24 INTRODUCTION

25 The Secretary of Agriculture seeks a clarification and
 26 review of this Court's injunction, requiring the award and
 27 release of two timber sales withdrawn from the timber program in
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1 1990. NFRC v. Glickman, Order (Jan. 10, 1996). The Order
2 specifically requires that the Secretary release and permit to be
3 harvested two sales on the Umpqua National Forest, named First
4 and Last. By this motion, we seek a ruling from the Court that
5 the Secretary of Agriculture be permitted to suspend or cancel
6 operation of the First and Last timber sales that were released
7 pursuant to this Court's injunction on March 20, 1996. This
8 court has jurisdiction to entertain this motion under the Court's
9 inherent authority to enforce its own injunctions, or
10 alternatively, under the procedure specified in Crateo, Inc. v.
11 Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

12 Since the January 10, 1996 injunction was entered,
13 implications of environmental harm have increased and
14 considerations of public safety have been raised regarding the
15 First and Last sales. Moreover, the Rescissions Act, Section
16 2001(k)(1), provides for reinstatement of timber sale contracts
17 pursuant to the terms and conditions set out in 1990. The First
18 and Last contracts, by their original terms, allow for suspension
19 and modification of the contracts based on environmental harm.
20 In addition, Section 2001(k)(3) provides additional authority for
21 this request in that it allows the Secretary not to proceed with
22 a sale "for any reason" -- which would include public safety
23 reasons -- and then offer replacement timber. Finally, by an
24 interim final rule issued on _____, Attachment A hereto, the
25 Secretary of Agriculture has expanded the availability of
26 replacement timber sales, so that the purchaser of First and Last
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1 can more readily be made whole now than when this Court's
2 injunction issued.

3 As set forth in more detail below, we request that the
4 January 10, 1996 injunction requiring the Secretary to permit the
5 First and Last sales to be completed be clarified to allow these
6 sales, to the extent they are not already cut, to be left
7 unharvested while replacement timber is made available to the
8 contractor of those two sales. If the Court determines that
9 jurisdiction does not lie with the district court to grant a
10 clarification or modification of the injunction, the Secretary
11 respectfully moves, in the alternative, for a limited remand to
12 allow such clarification or modification. Thus, pursuant to
13 Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir.
14 1976), the Secretary formally asks this Court whether it wishes
15 to entertain or grant a postjudgment motion. If the Court grants
16 this motion in the alternative, indicating a willingness to
17 entertain or grant the postjudgment motion, the Secretary would
18 then file a motion for a limited remand with the Court of Appeals
19 for the Ninth Circuit. See Jenkins v. Whittaker Corp., 785 F.2d
20 720, 722 n.2 (9th Cir. 1986).

21 Statement of the Case

22 Origin of First and Last Sales. Pursuant to Section 318 of
23 the Department of the Interior and Related Agencies
24 Appropriations Act, 1990, 103 Stat. 745 ("Section 318"), a number
25 of timber sales were proposed for the Umpqua National Forest by
26 the Forest Service in 1990. Of particular importance here are
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1 four sales, named (1) Nita; (2) South Nita; (3) First; and (4)
2 Last.¹ In 1990, Seattle Audubon Society challenged these sales
3 as violating the terms of Section 318 and sought to have the
4 sales enjoined. The first two sales -- Nita and South Nita --
5 were litigated, and the court granted summary judgment in favor
6 of the plaintiffs and enjoined the Forest Service from proceeding
7 with those two sales. The First and Last sales, at issue here,
8 were not litigated.

9 The First and Last sale challenges were recognized by the
10 Forest Service as being "an identical matter" to the issues
11 raised in Nita and South Nita. See Defendants' Memorandum in
12 Response to SAS's Motion for Summary Judgment and Permanent
13 Injunction in re First Timber Sale (10/30/90) (Dkt. #670), p. 2.
14 Therefore, following the adverse ruling on Nita and South Nita,
15 the First and Last sales were withdrawn by the Forest Service.
16 When the Forest Service advised the Court that the sales would
17 not be reoffered as part of the Section 318 timber sale program,
18 the Court struck the pending motions for summary judgment and
19 injunctive relief as moot. Minute Order (10/16/90) (Dkt. #675).
20 Thus, for all the parties, including the Forest Service, these
21 sales could not and would not ever go forward.

22 Inconsistency of Sales with Pacific Northwest Forest Plan.

23 In the years following the withdrawal of these sales, the Forest
24 Service worked closely with the Bureau of Land Management to

25 ¹ One other sale, entitled Cowboy, was also part of the
26 timber sales sought to be released under Section 318. That sale,
27 Nita and South Nita are not part of the Court's injunction.
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1 address the problems of the northern spotted owl and logging in
2 the Pacific Northwest. During the period from 1993 through 1994,
3 much progress was made on reaching a solution to the years of
4 litigation and injunctions on the Pacific Northwest forests. The
5 Pacific Northwest Forest Plan provided a new landscape for both
6 protection of the old-growth habitat and sustainable timber
7 harvests. It remains unclear whether these two sales were
8 considered to be standing or harvested during the preparation of
9 this Plan. The Forest Service, however, had assumed that these
10 sales would not be released.

11 Under the Pacific Northwest Forest Plan, the First and Last
12 sales could not go forward in their original form. Both sales
13 lie within Late Successional Reserves and Key Watersheds, as
14 those terms are defined in the Pacific Northwest Plan. See
15 Declaration of Claude C. McLean.

16 Late Successional Reserves. A Late Successional Reserve
17 ("LSR") is a land allocation for reserved lands that are to be
18 managed to protect and enhance conditions of late-successional
19 and old-growth related species, including the northern spotted
20 owl. Very limited timber harvesting is permitted in the LSRs,
21 mostly thinning, which is only permitted if it will positively
22 affect the reserve.

23 Key Watersheds. A Key Watershed is part of a system of
24 large refugia comprising watersheds that are crucial to at-risk
25 fish species and stocks and provide high quality water. Timber
26 harvest cannot occur in Key Watersheds without a watershed
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1 analysis. No new roads are to be built in the unroaded portion
2 of previously inventoried roadless areas.

3 The First and Last sales lie within the South Umpqua Key
4 Watershed and have never been part of any aquatic strategy
5 review. To date, the Forest Service has not undertaken any
6 review of the First and Last timber sales for their compliance or
7 non-compliance with the Umpqua Forest Plan, as amended by the
8 Pacific Northwest Plan.

9 The First Timber Sale. This sale is located on the Tiller
10 Ranger District of the Umpqua National Forest, within the Boulder
11 Creek drainage of the South Umpqua Watershed. The sale is
12 comprised of five cutting units, 1.9 miles of road construction,
13 and 1.2 miles of road reconstruction. The timber to be harvested
14 is predominantly Douglas-fir, sugar pine, western hemlock, white
15 fir and incense cedar. Four of the five cutting units are to be
16 harvested by the clearcut method, leaving no residual standing
17 trees. One unit is to be harvested by the shelterwood method,
18 whereby less than ten trees per acre will remain standing for
19 seed source and shelter.

20 The Last Timber Sale. This sale is also located on the
21 Tiller Ranger District of the Umpqua National Forest within the
22 Boulder Creek drainage of the South Umpqua Watershed. This sale
23 is comprised of seven cutting units, and 1.2 miles of road
24 construction. The timber to be harvested is predominantly
25 Douglas-fir, sugar pine, western hemlock, white fir, and incense

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1 cedar. Six of the seven units are to be clearcut. One unit is
2 to be harvested by the shelterwood method.

3 The Rescissions Act resurrects these abandoned sales. In
4 July, 1995, the Rescissions Act was signed into law. Litigation
5 surrounding this statute began almost immediately after passage.
6 In the course of this litigation, the Federal District Court for
7 the District of Oregon issued an injunction directing the Forest
8 Service to release the First and Last sales.

9 Procedural History. On September 13, 1995, this Court held
10 that Section 2001(k) applies to timber sales previously offered
11 or awarded in all national forests in Washington and Oregon and
12 BLM districts in western Oregon up to July 27, 1995. NFRC v.
13 Glickman, No. 95-6244-HO (D. Or.). On October 17, 1995, the
14 Court entered an order which "compelled and directed" the
15 Secretary of Agriculture and the Secretary of the Interior, "to
16 award, release and permit to be completed in fiscal years 1995
17 and 1996, with no change in originally advertised terms, volumes,
18 and bid prices, all timber sale contracts offered or awarded
19 between October 1, 1990 and July 27, 1995, in any national forest
20 in Oregon and Washington or BLM district in western Oregon,
21 except for sale units in which a threatened or endangered bird
22 species is known to be nesting." The government has appealed the
23 district court's ruling.

24 After these orders, the Forest Service proceeded to release
25 timber sales to previously identified high bidders. In one
26 category of sales, however, the high bidders were either
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1 | unwilling, unable or unqualified to take advantage of the renewed
2 | offer of the timber sale. In another category of sales, courts
3 | had previously issued injunctions preventing the award of the
4 | sales, or the Forest Service had rejected bids, suspended, or
5 | terminated sales as a result of earlier litigation. For both
6 | categories, the Forest Service did not pursue the award or
7 | release of timber sales and this was challenged in district
8 | court.

9 | At the same time, Pilchuk Audubon Society, challenged the
10 | release of First and Last before this Court on a number of
11 | grounds, including that they were withdrawn as sales, and thereby
12 | cancelled. Thus, they argued that they were no longer offered
13 | within the meaning of Section 2001(k)(1), and, even if they were,
14 | it would violate the separation of powers principle to require
15 | them to proceed in the face of the judicially-approved
16 | withdrawal.

17 | By decision dated January 10, 1996, amended to address
18 | typographical errors on January 17, 1996, the Court enjoined the
19 | Secretary of Agriculture to award, release and permit to be
20 | completed immediately, all timber sales that were subject to
21 | Section 2001(k)(1), including the First and Last sales.² After

22 | ² At that time, the Secretary put forth no opposition to
23 | the release of First and Last. This was based on a distinction
24 | between those two sales and other sales, including Nita and South
25 | Nita. In the latter category, the sales had been enjoined from
26 | going forward by other courts in 1990. First and Last, however,
27 | having been withdrawn, never were enjoined. Thus, based on that
28 | distinction, the Secretary had not opposed their release. Since
29 | that time, however, new information, as set forth in this

(continued...)

1 this Court issued its January 10 Order, Pilchuk Audubon Society
2 then moved to reinstate their injunction under Section 318 before
3 the District Court for the Western District of Washington. This
4 motion was also denied.

5 Following this Court's January 10 decision regarding the
6 First and Last sales, the Secretary of Agriculture sought a stay
7 of the release of all the Section 2001(k)(1) sales covered by the
8 Court's January 10, 1996 injunction. This stay request was
9 denied by the Court and similarly denied by the Ninth Circuit.³
10 The Forest Service released the First and Last sales to the
11 purchaser on March 20, 1996, and the purchaser has started to cut
12 the sales.

13 Recent Developments

14 Since the Court's order to allow the First and Last sales to
15 go forward, much has happened. First, the extent of damage to a
16 key watershed has become more recognized. Second, a large
17 segment of the public has become so outraged about these

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19 ²(...continued)
20 pleading, has altered the Secretary's position to one now
21 actively seeking to allow the First and Last sales to go
22 unharvested, while replacement timber is provided to the sales'
23 contractor. Now that replacement timber is a possible option,
24 this argument is appropriate.

25 ³ Prior to the release of First and Last, however, the
26 Forest Service sought to negotiate and modify the terms of the
27 contract with the sales purchaser. Thus, on March 8, 1996, an
28 agreement to negotiate to seek a settlement by exploring
alternative sales was reached. Pursuant to that agreement, the
purchaser agreed to do no harvesting until March 20. At that
time, if no settlement on alternative timber had been reached,
the purchaser would proceed. Unfortunately, no settlement was
reached.

1 environmentally unsound sales, that protesters are seeking to
2 stop the logging through demonstrations, as well as civil
3 disobedience. Third, the Forest Service has promulgated a new
4 interim final rule, which allows the Forest Service to make
5 replacement timber available outside the competitive bidding
6 context so that far more timber is now available as replacement
7 timber.

8 In addition, the Secretary has authority to suspend or
9 cancel these contracts. Contract provisions for the First and
10 Last sales that were resurrected by Section 2001(k)(1) permit
11 suspension and modification of those sales when such sales would
12 result in environmental harm. Also, Section 2001(k)(3) allows
13 for the offering of replacement timber after a sale cannot go
14 forward "for any reason."

15 Because of this new information and the risk posed to
16 loggers, demonstrators and Forest Service employees alike, and
17 new legal provisions expanding available replacement timber, the
18 United States respectfully requests a clarification of the
19 January 10, 1996 injunction to allow for the protection of the
20 old-growth stands and all trees still remaining within the
21 boundaries of the First and Last sale areas. Alternatively, the
22 United States requests that this Court indicate its willingness
23 to entertain or grant a modification to the injunction under the
24 Crateo procedures specified above, so that the Secretary may seek
25 a limited remand from the Ninth Circuit regarding such a
26 postjudgment motion.
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2 ARGUMENTS

3 I.

4 THE INJUNCTION SHOULD BE
5 CLARIFIED OR MODIFIED TO ALLOW
6 THE SECRETARY TO SUSPEND
7 THE FIRST AND LAST SALES

8 A. This Court Has Authority to Clarify or Modify Its
9 Injunction.

10 A district court retains full jurisdiction to define the
11 scope of an injunction issued by the court. See New York State
12 NOW v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989). In particular,
13 in cases such as this, where a motion for contempt has already
14 been filed against the United States by plaintiff Northwest
15 Forest Resource Council earlier in this litigation, the seeking
16 of such clarification and definition is prudent and should be
17 allowed. The Ninth Circuit has clearly stated that a district
18 court does not lack jurisdiction to clarify its original
19 injunction and to supervise compliance. Meinhold v. U.S. D.O.D.,
20 34 F.3d 1469, 1480 n.14 (9th Cir. 1994), citing Hoffman v. Beer
21 Drivers Salesman's Local Union No. 888, 536 F.2d 1265, 1276 (9th
22 Cir. 1976) (appeal from a supervisory order does not divest the
23 district court of jurisdiction to continue supervision and modify
24 order as necessary).

25 B. The Secretary is Authorized to Suspend the First and Last
26 Sales and, In Lieu, Provide Replacement Timber.

27 Section 2001(k) (1) requires that the terms and conditions
28 set forth in the original contract are applicable to the former
Section 318 sales. However, Section 2001(k) (1) also limits

1 application of statutes to those contract terms by commencing
2 with "Notwithstanding any other law." Thus, a contract clause
3 based upon another law could not be acted upon pursuant to
4 Section 2001(k)(1). However, by reference to original contract
5 terms, Section 2001(k)(1) contemplates that all contract clauses
6 that do not invoke a statute outside the contract authority
7 remain valid. Here, application of these contract clauses
8 authorizes the Secretary unilaterally to modify or suspend the
9 contracts.

10 1. Contract Provision C6.25 Permits Unilateral
11 Modification or Suspension.

12 Provision C6.25 provides that:

13 Location of areas needing special measures
14 for protection of plants or animals listed as
15 threatened or endangered under the Endangered
16 Species Act of 1973 and R-5 Sensitive Plant
17 and Animal Species List are shown on Sale
Area Map and identified on the ground. Mea-
sures needed to protect such areas have been
included elsewhere in this contract as
stipulated in the List of Controlled Areas on
the Sale Area Map.

18 If protection measures prove inadequate, if
19 other such areas are discovered, or if new
20 species are listed on the Endangered Species
21 List, Forest Service may either cancel under
22 C8.2 or unilaterally modify this contract to
provide additional protection regardless of
when such facts become known. Discovery of
such areas by either party shall be promptly
reported to the other party.

23 Declaration of XX. See Janicki Logging Co. v. Bruce Mateer, 42
24 F.3d 561, 562 (9th Cir. 1994) ("Section C6.25 of the contract
25 expressly permitted the Forest Service to 'either cancel' or
26 'unilaterally modify [the] contract' in order to provide
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1 additional protection for animals that were listed either as
2 threatened or endangered under the Endangered Species Act, or as
3 sensitive by the Regional Forester.") (brackets in original).

4 The Forest Service has discretion to cancel or modify a
5 timber sale contract under this provision. If the Forest Service
6 chooses to cancel a contract, timber harvesting is brought to an
7 immediate end. In the alternative, if the Forest Service elects
8 to modify the contract, there are various options. The Forest
9 Service can modify the volume of timber available for a specific
10 contract. Or, the Forest Service can modify the term of the
11 contract, suspending operations pending determination of what
12 additional modifications, if any, are necessary to enable a sale
13 to go forward.

14 The Court's analysis in Thomas Creek Lumber & Log Co. v.
15 United States, 32 Fed. Cl. 787 (1995), appeal pending, 95-5080
16 (Fed. Cir. filed June 5, 1995), is instructive. That case
17 involved a timber sale dispute between the Bureau of Land Manage-
18 ment (BLM) and a timber company concerning the BLM's suspension
19 of two BLM timber sale contracts in order to protect the northern
20 spotted owl. The Court described the BLM's deliberative process
21 as follows:

22 [A]fter the initial suspension, the BLM
23 begins consultations with the FWS to assess
24 the extent to which continued harvesting
25 under the contract may affect the endangered
26 animal. The purpose of the suspension is
27 therefore prophylactic -- suspension main-
28 tains the status quo until an appropriate
analysis can be made regarding the effect
that continued timber harvesting in the area
may have on the endangered animal. Plain-

1 tiff's proposed interpretation of Section 41x
2 would negate this prophylactic purpose. It
3 would permit timber harvesting to continue
4 until a new survey could be completed without
5 any consideration of the effect that such
6 continued harvesting would have on the endan-
7 gered animal previously identified on the
8 contract area. Continued harvesting under
9 such circumstances could potentially destroy
10 an endangered animal and/or its critical
11 habitat. This would seem precisely the type
12 of environmental harm that Section 41x was
13 intended to protect against.

14 32 Fed. Cl. at 790-91. This reasoning applies with equal force
15 to the present facts where suspension of Scott's 11 timber sales
16 was necessary to prevent harm to the habitat of a newly listed,
17 threatened species -- the marbled murrelet.

18 Here, First and Last sales are in the South Umpqua River
19 Sub-Basin, home to two sensitive species. First, the Oregon
20 Coast Coho Salmon, which was proposed for listing as a threatened
21 species on July 25, 1995, is found there. Second, the Coastal
22 cutthroat trout (resident and sea-run) is found there and was
23 proposed to be listed as endangered on July 8, 1994. As set
24 forth in the Declaration of XX, on April 14, 1995, the Regional
25 Forester sent a letter to each Forest, including the Umpqua
26 National Forest, stating that any proposal to list a fish species
27 automatically entitles that species to R-5 sensitive species
28 listing. Accordingly, contract clause C6.25, Protection of
habitat of endangered, threatened and sensitive species would
apply. Declaration of XX at .

2. Contract Provision C6.01 Allows Suspension,
Modification or Termination to Protect the Environment.

1 Both First and Last contracts contain provision C6.01.
2 Provision C6.01 specifically permits the Forest Service to
3 interrupt a purchaser's operations in order to protect the
4 environment. The provision provides:

5 C6.01 - INTERRUPTION OR DELAY OF OPERATIONS.
6 (6/90) Purchaser agrees to interrupt or delay
7 operations under this contract, in whole or
8 in part, upon the written request of
9 Contracting Officer:

10 (a) To prevent serious environmental degrada-
11 tion or resource damage that may require
12 contract modification under C8.3 or termina-
13 tion pursuant to C8.2;

14 (b) To comply with a court order, issued by a
15 court of competent jurisdiction; or

16 (c) Upon determination of the appropriate
17 Regional Forester, Forest Service, that condi-
18 tions existing on this sale are the same as,
19 or nearly the same as, conditions existing on
20 sale(s) named in such an order as described
21 in (b).

22 Purchaser agrees that in event of interrup-
23 tion or delay of operations under this provi-
24 sion, that its sole and exclusive remedy
25 shall be (1) Contract Term Adjustment pursu-
26 ant to B8.21, or (2) when such an interrup-
27 tion or delay exceeds 30 days during Normal
28 Operating Season, Contract Term Adjustment
pursuant to B8.21, plus out-of-pocket
expenses incurred as a direct result of
interruption or delay of operations under
this provision. Out-of-pocket expenses do
not include lost profits, replacement cost of
timber, or any other anticipatory losses
suffered by Purchaser. Purchaser agrees to

1 provide receipts or other documentation to
2 the Contracting Officer which clearly identify and verify actual expenditures.

3 The Forest Service approved provision C6.01 for use nation-
4 ally in June 1990, during a time when environmental challenges to
5 Federal timber sales were becoming more common and suspensions of
6 sales for environmental reasons were becoming more frequent. In
7 fact, it appears that First and Last may have been one of the
8 first contracts to include the provision. The clause represents
9 the first time that a timber sale contract provided for
10 suspension of operations specifically to comply with a court
11 order (provision C6.01(b)) or to prevent serious environmental
12 degradation or resource damage (provision C6.01(a)).

13 Not only does provision C6.01 refine the terms of modifica-
14 tion set forth in provision C6.25, but it expands the contrac-
15 tor's remedy to include out-of-pocket expenses if the suspension
16 exceeds thirty days. By its express terms, provision C6.01(b)
17 authorizes the Forest Service to suspend or delay operations to
18 comply with a court order. Moreover, provision C6.01(c)
19 recognizes that if a particular sale has the same conditions as
20 those on a sale that was ordered to be halted by a court of
21 competent jurisdiction, the first sale -- which was never
22 enjoined by a court -- should also cease operations.

23 Here, the United States has admitted in court and elsewhere
24 that First and Last sales are the "identical matter" to the
25 issues raised in Nita and South Nita. See Defendants' Memorandum
26 in Response to SAS's Motion for Summary Judgment and Permanent
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1 Injunction in re First Timber Sale (10/30/90) (Dkt. #670), p. 2.
2 Based on that identity of issues and locale, following the
3 adverse ruling on Nita and South Nita, the First and Last sales
4 were withdrawn by the Forest Service. Under C6.01(c), the Forest
5 Service can, after finding that conditions on First and Last are
6 nearly the same as those on Nita and South Nita, demand a
7 suspension of contract operations.

8 As discussed above, prior to the FWS's listing of the
9 marbled murrelet as a threatened species, the United States
10 District Court for the Western District of Washington issued a
11 temporary restraining order prohibiting timber harvesting on all
12 Federal timber sales in possible marbled murrelet habitat, includ-
13 ing Scott's 11 sale areas. Consequently, the Forest Service
14 possessed express authority to suspend Scott's operations
15 pursuant to Provision C6.01(b).

16 In addition, C6.01(a) itself provides for suspension,
17 modification or termination to prevent "serious environmental
18 degradation or resource damage." Here, where the South Fork of
19 the Umpqua River, in whose watershed both First and Last sales
20 are found, is a severely degraded watershed, serious degradation
21 and resource damage would clearly result if the harvesting went
22 forward. Declaration of Jacqueline Wyland, National Marine
23 Fisheries Service, at pp. 19-20. Moreover, the clearcutting and
24 shelterwood harvesting of Late Successional Reserves within a Key
25 Watershed would undoubtedly degrade and damage the environment
26 and the resource. Declaration of XX.
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2 [There is a real question whether the following section which
3 raises questions about termination should be included.
4 Terminating the contract might well be seen as contradicting the
5 terms of Section 2001(k), and we may need to focus only on
6 modification.]

7 3. Contract Clause C8.2 Permits Termination Based on
8 Serious Environmental Degradation Or Inconsistency
9 With Land and Resource Management Plan.

9 Contract Clause C8.2, referred to in the previously
10 discussed contracts clauses, specifically provides for
11 termination of a contract. It provides:

12 The Chief, Forest Service, by written notice,
13 may terminate this contract, in whole or in
14 part, (1) to comply with a court order,
15 regardless of whether this sale is named in
16 such an order, upon determination that the
17 order would be applicable to the conditions
18 existing on this sale; or (2) upon a
19 determination that the continuation of all or
20 part of this contract would:

17 (a) cause serious environmental degradation
18 or resource damage;

18 (b) be significantly inconsistent with land
19 management plans adopted or revised in
20 accordance with Section 6 of the Forest and
21 Rangeland Renewable Resources Planning Act of
22 1974, as amended;

21 (c) cause serious damage to cultural
22 resources pursuant to C6.24;

23 (d) jeopardize the continued existence of
24 Federally listed threatened and endangered
25 species or, cause unacceptable adverse
impacts on sensitive species, identified by
the appropriate Regional Forester.

26 Compensation for termination under this
27 provision shall be calculated pursuant to
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1 C9.5, except; compensation for termination
2 under (1) shall be calculated pursuant to
3 C9.51 when included in this contract and
4 compensation for termination under (2) (d)
5 shall be calculated pursuant to C9.52 when
6 included in this contract.

7 Thus, for the reasons already set forth in C6.01 and C6.25, the
8 contract termination provision authorizes the Forest Service to
9 terminate contracts for several reasons. In addition, Contract
10 Clause C8.2 provides an important, additional ground for
11 termination.

12 Pursuant to C8.2(b), if a sale is "significantly
13 inconsistent with land management plans," termination can occur.
14 Here, the Umpqua Forest Plan was amended to include the standards
15 and guidelines of the Pacific Northwest Forest Plan. Proceeding
16 with the First and Last sales would violate several of these
17 standards and guidelines. First, this type of harvesting would
18 not be permitted in a Late Successional Reserve. Second, this
19 type of harvesting would not be permitted in a watershed without
20 a watershed analysis. Road construction, such as that planned to
21 enable the First and Last sales to go forward, would also not be
22 permitted. The standards and guidelines, therefore, direct that
23 these sales should not go forward based on their contract terms
24 alone.

25 4. The Contract Language Survives the Rescission Act.

26 It is without dispute that a "statute which refers to a
27 subject generally adopts the law on the subject as of the time
28 the law is enacted." 2B Sutherland Stat Const § 51.08 (5th Ed.);
United States DOE v. Ohio, 112 S. Ct. 1627 (1992); Somermeier v.

1 District Director of Customs, 448 F.2d 1243 (9th Cir. 1971). As
2 this Court has recognized, "Agency regulations which operate
3 consistently with section 2001(k)(1) . . . remain in effect."
4 NFRC v. Glickman, Order (Jan. 10, 1996), at p. 21. Thus, the
5 Court continued, the Forest Service may look to "applicable
6 regulations" to determine contract issues, such as high bidders.
7 Id.

8 Moreover, in determining the scope of a statute, this Court
9 has made clear that a "provision's plain meaning should be
10 understood in the context of the entire statute." Id., citing,
11 Rufener Constr., Inc. v. Robertson, 53 F.3d 1064, 1066 (9th Cir.
12 1994). Here, Section 2001(k)(1)'s plain meaning is to permit the
13 original high bidders to complete their contracts pursuant to
14 their "originally advertised terms." These "originally
15 advertised terms" would include all the terms of the contract
16 unless specifically excluded by statute. Here, where Congress
17 clearly intended to exclude the application of any additional
18 statutes -- beyond the Rescissions Act itself -- the Secretary's
19 discretion to administer the contracts under the original terms
20 and conditions is retained. See Chevron (Secretary's
21 interpretation of statute is entitled to deference).

22
23 C. Environmental Harm and Public Safety Considerations
24 Warrant Suspension and Replacement of First and Last.

25 The environmental damage that would be caused by the
26 harvesting of the First and Last sales raises serious concerns.
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1 These concerns have given rise to yet another concern -- one of
2 public safety.

3 As set forth in the attached Declaration of XX, as soon as
4 harvest activity began on the First and Last sales, law
5 enforcement was necessary. The Forest Service Law Enforcement
6 team is striving to achieve three goals: (1) ensure the safety of
7 the public, Forest Service employees, and timber operators; (2)
8 respect the right of lawful protests and demonstrations; and (3)
9 ensure lawful timber harvest operations. This has not been easy,
10 however.

11 Demonstrators -- protesting against the harvest of such
12 valued old-growth reserves -- have blocked roads, using disabled
13 vehicles, tepee sitters and persons chained to vehicles, to try
14 to prohibit access to the sale areas. Forest Development Roads,
15 which access the First and Last sales, have been dug up, and
16 Forest Service signs near those roads have been destroyed. The
17 demonstrations have necessitated area closures, but that has only
18 resulted in trespass into the closure area to impede the timber
19 harvesting and law enforcement activities. During these
20 protests, law enforcement officers, logging personnel and
21 campground visitors have been harassed. One federal officer had
22 urine thrown onto him. A total of eight persons have been
23 arrested during the course of these activities. But, the
24 harvesting is not even near completion.

25 The harvesting of these sales represents the demise of an
26 ecologically significant old growth portion of Late Successional
27
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1 Reserves in Tier 1 Key Watersheds. Harvest of these sales, in
2 conjunction with the four other sales in the area⁴ would
3 severely impair the function of the western portions of the
4 ecologically significant Late Successional Reserve. First, Last,
5 Cowboy, Nita, and South Nita sales would remove a total of 921
6 acres of old growth. All but a portion of the South Nita sale
7 are within Fish & Wildlife Service Designated Critical Habitat
8 boundaries.

9 The watershed in which these sales are found, has been
10 designated a Tier 1 Key Watershed because of the presence of
11 cutthroat trout, a proposed endangered species, and the coastal
12 coho salmon, a proposed threatened species. The South Fork of
13 the Umpqua River, in whose watershed both First and Last sales
14 are found, is now a severely degraded watershed. This is due to:
15 (1) elevated temperatures; (2) high sedimentation; and (3)
16 excessive channel widening from past timber harvesting and
17 grazing activities. See Declaration of Jacqueline Wyland,
18 National Marine Fisheries Service, at pp. 19-20.

19 This watershed was intended to form the backbone of a large-
20 scale recovery program. However, continued harvesting will
21 result in further adverse effects and will retard effective and
22 timely restoration. See Declaration of Jeffrey Dose, Forester
23 Fisheries Biologist.

26 ⁴ These four other sales are Nita, South Nita, Cowboy and
27 Garden sales.
28

1 For all the above-stated reasons, clarification or
2 modification of the January 10, 1996, Order and Injunction is
3 warranted. Comprehending the extent of damage to be done by
4 these sales, and further acknowledging the concerns of hundreds
5 of demonstrators, it is appropriate for the Secretary to seek now
6 for the first time to replace the timber that would have been
7 harvested by the First and Last sales, with other less
8 environmentally harmful sales. These sales would hopefully be
9 less likely to provoke demonstrations and risks of harm to the
10 public, loggers and Forest Service employees.

11 II.

12 ALTERNATIVELY, ISSUES OF PUBLIC SAFETY,
13 ENVIRONMENTAL HARM, AND REPLACEMENT TIMBER
14 WARRANT THE COURT'S AGREEMENT TO ENTERTAIN
OR GRANT A POSTJUDGMENT MOTION.

15 While the United States has not before in this Court opposed
16 the First and Last sales' release, changed circumstances provide
17 a basis for seeking this Court's intervention. If the Court
18 determines that jurisdiction over this matter is vested solely
19 with the Ninth Circuit at this time to modify or clarify the
20 January 10 injunction, the Secretary requests that this Court
21 consider a motion pursuant to Crateco, Inc. v. Intermark, Inc.,
22 536 F.2d 862, 869 (9th Cir. 1976).

23 Pursuant to the Ninth Circuit's instructions in that case, a
24 party seeking relief from a district court's order, at the same
25 time the order is on appeal, must follow a specific procedure.
26 First, the matter must be presented to the district court for a
27 decision as to whether or not the district court would entertain
28

1 or grant the motion seeking to alter or modify the order.
2 Second, if the district court indicates that it would entertain
3 or grant a motion, the moving party can then move forward and
4 request the appellate court for a remand. See Crateo, Inc. v.
5 Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976) (from which
6 came the term "Crateo indication", meaning the district court's
7 indication of whether or not it wishes to entertain or grant a
8 postjudgment motion).

9 For all the reasons already set forth in support of
10 modification of the injunction, a determination to entertain or
11 grant the modification request is proper. Thus, based on
12 environmental harm, public safety and other statutory and
13 contractual interpretations, a Crateo determination is warranted.

14 Conclusion

15 Information about environmental harm, new concerns over
16 public safety, a newly-promulgated interim final rule,
17 resurrected contract clauses, and Section 2001(k)(3)'s provision
18 for replacement timber provide this Court with new arguments
19 involving two important old growth timber sales. These provide
20 the foundation to allow the Court to modify or clarify the
21 January 10 Order to allow substitution of replacement timber for
22 the First and Last sales. Alternatively, this information and
23 new issues provide the Court with enough evidence to allow the
24 Court to find that either it will entertain or grant a motion to
25 clarify or modify.

26 Dated: April 2, 1996
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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BARNETT BANK OF MARION COUNTY, N. A.

v.

NELSON, FLORIDA INSURANCE COMMISSIONER, et al.

Certiorari to the United States Court of Appeals for the Eleventh Circuit.

No. 94-1837.

Argued January 16, 1996

Decided March 26, 1996

A 1916 federal law (Federal Statute) permits national banks to sell insurance in small towns, but a Florida law (State Statute) prohibits such banks from selling most types of insurance. When petitioner Barnett Bank, a national bank doing business in a small Florida town, bought a state licensed insurance agency, respondent State Insurance Commissioner ordered the agency to stop selling the prohibited forms of insurance. In this action for declaratory and injunctive relief, the District Court held that the State Statute was not pre-empted, but only because of the McCarran-Ferguson Act's special insurance-related anti-pre-emption rule. That rule provides that a federal law will not pre-empt a state law enacted "for the purpose of regulating the business of insurance"-unless the federal statute "specifically relates to the business of insurance." 15 U. S. C. Section(s) 1012(b) (emphasis added). The Court of Appeals affirmed.

Held: The Federal Statute pre-empts the State Statute. Pp. 4-17.

(a) Under ordinary pre-emption principles, the State Statute would be pre-empted, for it is clear that Congress, in enacting the Federal Statute, intended to exercise its constitutionally delegated authority to override contrary state law. The Federal and State Statutes are in "irreconcilable conflict," Rice v. Norman Williams Co., 458 U. S. 654, 659, since the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition would seem to "stan[d] as an obstacle to the accomplishment" of one of the Federal Statute's purposes, Hines v. Davidowitz, 312 U. S. 52, 67, unless, as the State contends, Congress intended to limit federal permission to sell insurance to those circumstances permitted by state law. However, by providing, without

T- Is he running to some thing? If so, it's part of the campaign and it can avoid. of his selected party which is relevant, I'll be glad to provide it

relevant qualification, that national banks "may . . . act as the agent" for insurance sales, 12 U. S. C. Section(s) 92, the Federal Statute's language suggests a broad, not a limited, permission. That this authority is granted in "addition to the powers now vested . . . in national [banks]," *ibid.* (emphasis added), is also significant. Legislative grants of both enumerated and incidental "powers" to national banks historically have been interpreted as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law. See, e.g., *First Nat. Bank of San Jose v. California*, 262 U. S. 366, 368-369. Where, as here, Congress has not expressly conditioned the grant of power upon a grant of state permission, this Court has ordinarily found that no such condition applies. See *Franklin Nat. Bank v. New York*, 347 U. S. 373. The State's argument that special circumstances surrounding the Federal Statute's enactment demonstrate Congress' intent to grant only a limited permission is unpersuasive. Pp. 4-11.

(b) The McCarran-Ferguson Act's anti-pre-emption rule does not govern this case, because the Federal Statute "specifically relates to the business of insurance." This conclusion rests upon the Act's language and purposes, taken together. The word "relates" is highly general; and in ordinary English, the Federal Statute—which focuses directly upon industry-specific selling practices and affects the relation of insured to insurer and the spreading of risk—"specifically" relates to the insurance business. The Act's mutually reinforcing purposes—that state regulation and taxation of the insurance business is in the public interest, and that Congress' "silence . . . shall not be construed to impose any barrier to [such] regulation or taxation," 15 U. S. C. Section(s) 1011 (emphasis added)—also support this view. This phrase, especially the word "silence," indicates that the Act seeks to protect state regulation primarily against inadvertent federal intrusion, not to insulate state insurance regulation from the reach of all federal law. The circumstances surrounding the Act's enactment also suggest that the Act was passed to ensure that generally phrased congressional statutes, which do not mention insurance, are not applied to the issuance of insurance policies, thereby interfering with state regulation in unanticipated ways. The parties' remaining arguments to the contrary are unconvincing. Pp. 11-17. 43 F. 3d 631, reversed.

Breyer, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 94-1837

BARNETT BANK OF MARION COUNTY, N. A.,

PETITIONER

v.

BILL NELSON, FLORIDA INSURANCE COMMISSIONER, et al.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

[March 26, 1996]

Justice Breyer delivered the opinion of the Court.

The question in this case is whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so. To answer this question, we must consider both ordinary pre-emption principles, and also a special federal anti-pre-emption rule, which provides that a federal statute will not pre-empt a state statute enacted "for the purpose of regulating the business of insurance"-unless the federal statute "specifically relates to the business of insurance." McCarran-Ferguson Act, 15 U. S. C. Section(s) 1012(b) (emphasis added). We decide that the McCarran-Ferguson Act's special anti-pre-emption rule does not govern this case, because the federal statute in question "specifically relates to the business of insurance." We conclude that, under ordinary pre-emption principles, the federal statute pre-empts the state statute, thereby prohibiting application of the state statute to prevent a national bank from selling insurance in a small town.

I.

In 1916 Congress enacted a federal statute that says that certain national banks "may" sell insurance in small towns. It provides in relevant part:

"In addition to the powers now vested by law in national [banks] organized under the laws of the United States any such [bank] located and doing business in any place [with a population] . . . [of not more than] five thousand . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State . . . to do business [there], . . . by soliciting and selling insurance . . . Provided, however, That no such bank shall . . . guarantee the payment of any premium . . . And provided further, That the bank shall not guarantee the truth of any statement made by an assured [when applying] . . . for insurance." Act of Sept. 7, 1916 (Federal Statute), 39 Stat. 753, 12 U. S. C. Section(s) 92 (emphases changed).

In 1974 Florida enacted a statute that prohibits certain banks from selling most kinds of insurance. It says:

"No [Florida licensed] insurance agent . . . who is associated with, . . . owned or controlled by . . . a financial institution shall engage in insurance agency activities . . ." Fla. Stat. Ann. Section(s) 626.988(2) (Supp. 1996) (State Statute).

The term "financial institution" includes

"any bank . . . [except for a] bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 . . ." Section(s) 626.988(1)(a).

Thus, the State Statute says, in essence, that banks cannot sell

insurance in Florida—except that an unaffiliated small town bank (i.e., a bank that is not affiliated with a bank holding company) may sell insurance in a small town. *Ibid.*

In October 1993 petitioner Barnett Bank, an "affiliate[d]" national bank which does business through a branch in a small Florida town, bought a Florida licensed insurance agency. The Florida State Insurance Commissioner, pointing to the State Statute, (and noting that the unaffiliated small town bank exception did not apply), ordered Barnett's insurance agency to stop selling the prohibited forms of insurance. Barnett, claiming that the Federal Statute pre-empted the State Statute, then filed this action for declaratory and injunctive relief in federal court.

The District Court held that the Federal Statute did not pre-empt the State Statute, but only because of the special insurance-related federal anti-pre-emption rule. The McCarran-Ferguson Act, which creates that rule, says:

"No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . ."
McCarran-Ferguson Act (or Act), Section(s) 2(b), 59 Stat. 34, 15 U. S. C. Section(s) 1012(b).

The District Court decided both (1) that the Federal Statute did not fall within the McCarran-Ferguson Act's exception because it did not "specifically relat[e] to the business of insurance"; and (2) that the State Statute was a "law enacted . . . for the purpose of regulating the business of insurance." *Barnett Bank of Marion County, N. A. v. Gallagher*, 839 F. Supp. 835, 840-841, 843 (MD Fla. 1993) (internal quotation marks omitted). Consequently, the McCarran-Ferguson Act, in the District Court's view, instructs courts not to "constru[e]" the Federal Statute "to invalidate" the State Statute. 15 U. S. C. Section(s) 1012(b). The Eleventh Circuit Court of Appeals, for similar reasons, agreed that the Federal Statute did not pre-empt the State Statute. *Barnett Bank of Marion County, N. A. v. Gallagher*, 43 F. 3d 631, 634-637 (1995).

We granted certiorari due to uncertainty among lower courts about the pre-emptive effect of this Federal Statute. See *Owensboro Nat. Bank v. Stephens*, 44 F. 3d 388 (CA6 1994) (pre-emption of Kentucky statute that prevents national banks from selling insurance in small towns); *First Advantage Ins., Inc. v. Green*, 652 So. 2d 562 (La. Ct. App.), rev. den., 654 So. 2d 331 (1995) (no pre-emption). We now reverse the Eleventh Circuit.

II.

We shall put the McCarran-Ferguson Act's special anti-pre-emption rule to the side for the moment, and begin by asking whether, in the absence of that rule, we should construe the Federal Statute to pre-empt the State Statute. This question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law. U. S. Const., Art. VI, cl. 2; see *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U. S. 272, 280-281

(1987) (reviewing pre-emption doctrine).

Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. E.g., *Jones v. Rath Packing Co.*, 430 U. S. 519, 525, 530-531 (1977). More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. *Id.*, at 525; *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 152-153 (1982). A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Alternatively, federal law may be in "irreconcilable conflict" with state law. *Rice v. Norman Williams Co.*, 458 U. S. 654, 659 (1982). Compliance with both statutes, for example, may be a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963); or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941).

In this case we must ask whether or not the Federal and State Statutes are in "irreconcilable conflict." The two statutes do not impose directly conflicting duties on national banks-as they would, for example, if the federal law said, "you must sell insurance," while the state law said, "you may not." Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition of those activities would seem to "stan[d] as an obstacle to the accomplishment" of one of the Federal Statute's purposes-unless, of course, that federal purpose is to grant the bank only a very limited permission, that is, permission to sell insurance to the extent that state law also grants permission to do so.

That is what the State of Florida and its supporting amici argue. They say that the Federal Statute grants national banks a permission that is limited to circumstances where state law is not to the contrary. In their view, the Federal Statute removes only federal legal obstacles, not state legal obstacles, to the sale of insurance by national banks. But we do not find this, or the State's related, ordinary pre-emption arguments convincing.

For one thing, the Federal Statute's language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks "may . . . act as the agent" for insurance sales. 12 U. S. C. Section(s) 92. It specifically refers to "rules and regulations" that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency. *Ibid.* It also specifically refers to state regulation, while limiting that reference to licensing-not of banks or insurance agents, but of the insurance companies whose policies the bank, as insurance agent, will sell. *Ibid.*

For another thing, the Federal Statute says that its grant of authority to sell insurance is an "addition to the powers now vested by law in national [banks]." *Ibid.* (emphasis added). In using the word "powers," the statute chooses a legal concept that, in the context of

national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law. See, e.g., *First Nat. Bank of San Jose v. California*, 262 U. S. 366, 368-369 (1923) (national banks' "power" to receive deposits pre-empts contrary state escheat law); *Easton v. Iowa*, 188 U. S. 220, 229-230 (1903) (national banking system normally "independent, so far as powers conferred are concerned, of state legislation"); cf. *Waite v. Dowley*, 94 U. S. 527, 533 (1877) ("[W]here there exists a concurrent right of legislation in the States and in Congress, and the latter has exercised its power, there remains in the States no authority to legislate on the same matter"). Thus, this Court, in a case quite similar to this one, held that a federal statute permitting, but not requiring, national banks to receive savings deposits, pre-empts a state statute prohibiting certain state and national banks from using the word "savings" in their advertising. *Franklin Nat. Bank v. New York*, 347 U. S. 373, 375-379 (1954) (Federal Reserve Act provision that national banks "may continue . . . to receive . . . savings deposits" read as "declaratory of the right of a national bank to enter into or remain in that type of business"). See also *De la Cuesta*, supra, at 154-159 (1982) (federal regulation permitting, but not requiring, national banks to include in mortgage contracts a debt accelerating "due on sale" clause, pre-empts a state law forbidding the use of such a clause); cf. *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U. S. 256 (1985) (federal statute providing that local government units "may" expend federal funds for any governmental purpose pre-empts state law restricting their expenditure).

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. See, e.g., *Anderson Nat. Bank v. Lueckett*, 321 U. S. 233, 247-252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroach[h] on the rights and privileges of national banks"); *McClellan v. Chipman*, 164 U. S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destroy or hamper" national banks' functions); *National Bank v. Commonwealth*, 9 Wall. 353, 362 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government").

Nor do these cases control the interpretation of federal banking statutes that accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law. See, e.g., 12 U. S. C. Section(s) 36(c) (McFadden Act) (authorizing national banks to operate branches, but only where state law authorizes state banks to do so); Section(s) 92(a) (Comptroller of Currency may grant fiduciary powers "by special permit to national banks applying therefor, when not in contravention of State or local law"). Not surprisingly, this Court has interpreted those explicit provisions to mean what they say. See, e.g., *First Nat. Bank in Plant City v. Dickinson*, 396 U. S. 122, 131 (1969) (under McFadden Act, state branching restrictions apply to national banks); *First Nat. Bank of Logan v. Walker Bank & Trust Co.*,

385 U. S. 252, 260-261 (1966) (same); see also Van Allen v. Assessors, 3 Wall. 573, 586 (1866) (enforcing 1864 amendments to National Bank Act expressly authorizing state taxation of national bank shares).

But, as we pointed out, *supra*, at 6-7, where Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done by express language in several other instances." 347 U. S., at 378, and n. 7 (emphasis added) (collecting examples).

The Federal Statute before us, as in *Franklin Nat. Bank*, explicitly grants a national bank an authorization, permission, or power. And, as in *Franklin Nat. Bank*, it contains no "indication" that Congress intended to subject that power to local restriction. Thus, the Court's discussion in *Franklin Nat. Bank*, the holding of that case, and the other precedent we have cited above, strongly argue for a similar interpretation here—a broad interpretation of the word "may" that does not condition federal permission upon that of the State.

Finally, Florida and its supporters challenge this interpretation by arguing that special circumstances surrounding the enactment of the Federal Statute nonetheless demonstrate Congress' intent to grant only a limited permission (subject to State approval). They point to a letter to Congress written by the Comptroller of the Currency in 1916. The Comptroller attached a draft of what became the Federal Statute, and the letter explains to Congress why the Comptroller wants Congress to enact his proposal. The letter says that, since 1900, many small town national banks had failed; that some States had authorized small town state banks to sell insurance; that providing small town national banks with authority to sell insurance would help them financially; and that doing so would also improve their competitive position vis-a-vis state banks. The relevant language in the letter (somewhat abridged) reads as follows:

"[Since 1900, of 3,084 small national banks, 438] have either failed or gone into liquidation. . . . [T]here are many banks located in [small towns] . . . where the small deposits which the banks receive may make it somewhat difficult [to earn] . . . a satisfactory return

"For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking. . . .

"[The federal banking laws, while granting national banks certain "incidental powers," do not give them] either expressly nor by necessary implication the power to act as agents for insurance companies. . . .

....

"My investigations lead me respectfully to recommend to Congress

an amendment to the national-bank act by which national banks located in [small towns] . . . may be permitted to act as agents for insurance companies

"It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return

"I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers

"I inclose . . . a draft . . . designed to empower national banks located in [small] towns . . . under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller of the Currency, to act as agents for the placing of insurance policies" 53 Cong. Rec. 11001 (1916) (Letter from Comptroller Williams to the Chairman of the Senate Bank and Currency Committee).

Assuming for argument's sake that this letter is relevant, and in response to the arguments of Florida and its supporters, we point out that the letter does not significantly advance their cause. Although the letter mentions that enlarging the powers of small national banks will help them "better compete with local State banks," it primarily focuses upon small town national banks' need for added revenue-an objective met by a broad insurance-selling authority that is not limited by state law. The letter refers to limitations that federal regulation might impose, but it says nothing about limitations imposed by state regulation or state law. The letter makes clear that authority to sell insurance in small towns is an added "incidental power" of a national bank-a term that, in light of this Court's then-existing cases, suggested freedom from conflicting state regulation. See *Easton*, 188 U. S., at 229-230; *First Nat. Bank*, 262 U. S., at 368-369. The letter sets forth as potential objections to the proposal, (or to its extension to larger national banks), concerns about distracting banking management or inhibiting the development of banking expertise-not concerns related to state regulatory control.

We have found nothing elsewhere in the Federal Statute's background or history that significantly supports the State's arguments. And as far as we are aware, the Comptroller's subsequent interpretation of the Federal Statute does not suggest that the statute provides only a limited authority subject to similar state approval. Cf. 12 CFR Section(s) 7.7100 (1995); OCC Interpretive Letter No. 366, CCH Fed. Banking L. Rep. 85,536, p. 77,833 (1986).

In light of these considerations, we conclude that the Federal Statute means to grant small town national banks authority to sell insurance, whether or not a State grants its own state banks or national banks similar approval. Were we to apply ordinary legal principles of pre-emption, the federal law would pre-empt that of the State.

III.

We now must decide whether ordinary legal principles of pre-emption, or the special McCarran-Ferguson Act anti-pre-emption rule,

governs this case. The lower courts held that the McCarran-Ferguson Act's special anti-pre-emption rule applies, and instructs courts not to "construe" the Federal Statute to "invalidate, impair, or supersede" that of the State. 15 U. S. C. Section(s) 1012(b). By its terms, however, the Act does not apply when the conflicting federal statute "specifically relates to the business of insurance." *Ibid.* (emphasis added). In our view, the Federal Statute in this case "specifically relates to the business of insurance"-therefore the McCarran-Ferguson Act's special anti-pre-emption rule does not apply.

Our conclusion rests upon the McCarran-Ferguson Act's language and purpose, taken together. Consider the language-"specifically relates to the business of insurance." In ordinary English, a statute that says that banks may act as insurance agents, and that the Comptroller of the Currency may regulate their insurance-related activities, "relates" to the insurance business. The word "relates" is highly general, and this Court has interpreted it broadly in other pre-emption contexts. See, e.g., *Pilot Life Ins. Co. v. Dedeaux*, 481 U. S. 41, 47 (1987) (words "'relate to'" have "'broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan ' . . . if it has a connection with or reference to such a plan'"") (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U. S. 724, 739 (1985), and *Shaw v. Delta Air Lines Inc.*, 463 U. S. 85, 97 (1983)); *Morales v. Trans World Airlines, Inc.*, 504 U. S. 374, 383-384 (1992) (interpreting similarly the words "'relating to'" in the Airline Deregulation Act).

More importantly, in ordinary English, this statute "specifically" relates to the insurance business. "Specifically" can mean "explicitly, particularly, [or] definitely," *Black's Law Dictionary* 1398 (6th ed. 1990), thereby contrasting a specific reference with an implicit reference made by more general language to a broader topic. The general words "business activity," for example, will sometimes include, and thereby implicitly refer, to insurance; the particular words "finance, banking, and insurance" make that reference explicitly and specifically.

Finally, using ordinary English, one would say that this statute specifically relates to the "business of insurance." The statute explicitly grants national banks permission to "act as the agent for any fire, life, or other insurance company," to "solic[it] and sel[l] insurance," to "collec[t] premiums," and to "receive for services so rendered . . . fees or commissions," subject to Comptroller regulation. 12 U. S. C. Section(s) 92. It also sets forth certain specific rules prohibiting banks from guaranteeing the "payment of any premium on insurance policies issued through its agency . . ." and the "truth of any statement made by an assured in filing his application for insurance." *Ibid.* The statute thereby not only focuses directly upon industry-specific selling practices, but also affects the relation of insured to insurer and the spreading of risk-matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act's concern. See *Union Labor Life Ins. Co. v. Pireno*, 458 U. S. 119, 129 (1982) (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U. S. 205 (1979); see also *Department of Treasury v. Fabe*, 508 U. S. 491, 502-504 (1993).

Consider, too, the McCarran-Ferguson Act's basic purposes. The Act sets forth two mutually reinforcing purposes in its first section, namely that "continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence

on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U. S. C. Section(s) 1011 (emphasis added). The latter phrase, particularly the word "silence," indicates that the Act does not seek to insulate state insurance regulation from the reach of all federal law. Rather, it seeks to protect state regulation primarily against inadvertent federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to comprise one part.

The circumstances surrounding enactment of the McCarran-Ferguson Act suggest the same. Just prior to the law's enactment, this Court, in *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), held that a federal antitrust law, the Sherman Act, applied to the business of insurance. The Sherman Act's highly general language said nothing specifically about insurance. See 15 U. S. C. Section(s) 1 (forbidding every "contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States"). The Sherman Act applied only to activities in or affecting interstate commerce. *Hopkins v. United States*, 171 U. S. 578, 586 (1898). Many lawyers and insurance professionals had previously thought, (relying, in part, on this Court's opinion in *Paul v. Virginia*, 8 Wall. 168, 183 (1869), and other cases), that the issuance of an insurance policy was not a "transaction of commerce," and therefore fell outside the Sherman Act's scope. *South-Eastern Underwriters* told those professionals that they were wrong about interstate commerce, and that the Sherman Act did apply. And *South-Eastern Underwriters'* principle meant, consequently, that other generally phrased congressional statutes might also apply to the issuance of insurance policies, thereby interfering with state regulation of insurance in similarly unanticipated ways.

In reaction to *South-Eastern Underwriters*, Congress "moved quickly," enacting McCarran-Ferguson "to restore the supremacy of the States in the realm of insurance regulation." Fabe, *supra*, at 500. But the circumstances we have just described mean that "restor[ation]" of "supremacy" basically required setting aside the unanticipated effects of *South-Eastern Underwriters*, and cautiously avoiding similar unanticipated interference with state regulation in the future. It did not require avoiding federal pre-emption by future federal statutes that indicate, through their "specific relat[ion]" to insurance, that Congress had focused upon the insurance industry, and therefore, in all likelihood, consciously intended to exert upon the insurance industry whatever pre-emptive force accompanied its law. See also, e.g., insofar as relevant, 91 Cong. Rec. 483 (1945) (statement of Sen. O'Mahoney, floor manager of the Act, that the Act was intended to be "a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but of which we did not have knowledge at the time"); *ibid.* (similar statement of Sen. Ferguson).

The language of the Federal Statute before us is not general. It refers specifically to insurance. Its state regulatory implications are not surprising, nor do we believe them inadvertent. See Part II, *supra*. Consequently, considerations of purpose, as well as of language, indicate that the Federal Statute falls within the scope of the McCarran-Ferguson's "specifically relates" exception to its anti-pre-emption rule. Cf. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U. S. ___ (1993) (slip op., at 9-11) (adopting the United States' view that language in the Employee Retirement Income Security Act of 1974 defining a "guaranteed benefit policy" as a certain

23-24
We are not seeking relief from under
We don't think we need such relief.
But if it disagrees, then
follow Chaco's proof?

Do not even mention this?
Think through.

Conclusion all way -
again refer to all these
other things which are
not part of the argument.
And not rep. timber.

kind of "insurance" policy, "obviously and specifically relates to the business of insurance") (internal quotation marks omitted).

We shall mention briefly why we are not convinced by several of the parties' remaining arguments. Florida says that the Federal Statute "specifically relates" to banking, not to insurance. But, a statute may specifically relate to more than one thing. Just as an ordinance forbidding dogs in city parks specifically relates to dogs and to parks, so a statute permitting banks to sell insurance can specifically relate to banks and to insurance. Neither the McCarran-Ferguson Act's language, nor its purpose, requires the Federal Statute to relate predominantly to insurance. To the contrary, specific detailed references to the insurance industry in proposed legislation normally will achieve the McCarran-Ferguson Act's objectives, for they will call the proposed legislation to the attention of interested parties, and thereby normally guarantee, should the proposal become law, that Congress will have focused upon its insurance-related effects.

An amicus argues that our interpretation would give the Act "little meaning," because "whenever a state statute 'regulates' the business of insurance, any conflicting federal statute necessarily will 'specifically relate' to the insurance business." Brief for American Council of Life Insurance as Amicus Curiae 4. We disagree. Many federal statutes with potentially pre-emptive effect, such as the bankruptcy statutes, use general language that does not appear to "specifically relate" to insurance; and where those statutes conflict with state law that was enacted "for the purpose of regulating the business of insurance," the McCarran-Ferguson Act's anti-pre-emption rule will apply. See generally *Fabe*, 508 U. S., at 501 (noting the parties' agreement that federal bankruptcy priority rules, although conflicting with state law, do not "specifically relate" to the business of insurance.)

The lower courts argued that the Federal Statute's 1916 date of enactment was significant, because Congress would have then believed that state insurance regulation was beyond its "Commerce Clause" power to affect. The lower courts apparently thought that Congress therefore could not have intended the Federal Statute to pre-empt contrary state law. The short answer to this claim is that there is no reason to think that Congress believed state insurance regulation beyond its constitutional powers to affect-insofar as Congress exercised those powers to create, to empower, or to regulate, national banks. See *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Farmers' and Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29, 33 (1875); see also, e.g., *Easton v. Iowa*, 188 U. S., at 238. We have explained, see Part II, *supra*, why we conclude that Congress indeed did intend the Federal Statute to pre-empt conflicting state law.

Finally, Florida points to language in *Fabe*, which states that the McCarran-Ferguson Act "imposes what is, in effect, a clear-statement rule" that forbids pre-emption "unless a federal statute specifically requires otherwise." 508 U. S., at 507. Florida believes that this statement in *Fabe* means that the Federal Statute would have to use the words "state law is pre-empted," or the like, in order to fall within the McCarran-Ferguson Act exception. We do not believe, however, that *Fabe* imposes any such requirement. Rather, the quoted language in *Fabe* was a general description of the Act's effect. It simply pointed to the existence of the clause at issue here-the exception for federal statutes that "specifically relat[e] to the business of insurance." But it did

12(1-3) - what is point here??

What is the remedy for 6.25??

14(14-22) - seems irrelevant - that's not the basis now, is it? Better approach is env degradation.

Ditto 17(1-13) given uncertain status of the injunctives.

Injunctives would never have been issued today - shouldn't depend on that.

19(6-7) - spell out: env harm

Need 8.2 because it gives terminability?

but even if that's only an incentive w/ land input plan?

How would such reliance contravene K1?

19-20 - Should go at beginning of argument.

And make stronger (+ larger)

2nd H should be 1st - This is not a 2. of

consistent law concerning

but of statute's own plain meaning.

don't need "context" quote

(14-20) - delete

1) K terms remain
+ 6.15

2) K terms

3) K terms met

here - env injury
(21 etc)

20 - 21

protesters etc. I think TAKE OUT

23 - replace?? Again - K damaged!

neg. impact - can
come in as
"modifying"?

not purport authoritatively to interpret the "specifically relates" clause. That matter was not at issue in Fabe. We therefore believe that Fabe does not require us to reach a different result here.

For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

... BANK OF MARIION COUNTY - NELSON Breyer U.S. 03/26/96

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~~the~~

Not modification

permit to be harvested? NO!!
confirming that the key energy,
under the inj or will get
under the relevant law,
cancel under original terms

"Since the inj - goes after
basic arg.

2006? / new rule - we know
but we're saying damages!

5 - (7-8)?

FN 2 - we are not changing
our position. And our pos
is not dependent on -
indeed less nothing to do
w/ - the availability of
rep. timber.

What have recent Dirs so highlighted?
My basic point - this less
nothing to do w/ core argument
we should be asking.

rule / Protectors?? NO!

Rule - irrel.

k 3 - irrel - undermines our
basic arg.

"In addition" is the arg we should
be making - this is biased!

at 171-701 - don't understand this
RESERVATION PHOTOCOPY

Name	Date
<i>Steven Reich</i>	<i>6/2/99 counsel</i>