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Timber - Legal Memos [2]

Draft Timeline for
Interagency Salvage Review Activities

May 28-31

Agreement on Review Goal and Objectives

Agreement on draft letter -

- o Separate letters from each agency OR a single letter signed by all 5 agency heads
- o Agreement on content of letter

5/30 -- working group meets to revise MOA compliance questions;

5/31-- team members brief their agency leaders and get review of questions

Forest Service believes field visits are essential to the credibility of this review and would like agreement now from the other agencies that there will be field visits. This will allow all involved agencies to begin making decisions about who will be involved in the trips and schedule their time for target dates in early or mid-July. Details about the specific sites to be visited can be made once we have field input from the Reply Due letter.

June 3-14

6/2 -- Final revision of draft MOA compliance questions.

6/2 or 6/3 -- Letter sent to Regional/State offices with 6/14 reply due.

OPTIONS:

1. Working group goes on a 3 or 4 day "trial run" field review trip to a national forest (and perhaps an adjacent BLM district) in the west; staff from agency regional/state offices of all 5 agencies join the team for an on-the-ground look at one or more salvage sales to discuss how best to conduct the interagency review.

OR

2. Working group stays in Washington and works on timelines and staffing decisions for the field reviews.

June 17-28

Working group consolidates input from field offices; revises MOA compliance questions; identifies potential sites for field reviews and presents recommendations/options for OK by agency leaders; get agreement on national level "questionnaire" on the MOA, and agreement on specific situations and locations that will be covered through field visits.

July 1-12

Set up field visits.

Send our national level "questionnaire" on MOA compliance by July 1 with reply due July 19.

July 15-26

Conduct field visits.

Begin compiling and analyzing responses to national level "questionnaire".

July 29-August 9

Prepare draft report.

August 16

Final report ready.

NOTE: This letter would go to Regional/State offices of each of the involved agencies from the appropriate Washington Office agency leader. The Enclosures are not being sent as part of this draft; Enclosure 1 will be the final goal and objectives statement and Enclosure 2 will be the draft MOA questions.

***** DRAFT 5/28/96 10:30 am *****

TO: .Agency field headquarters office
FROM: Agency head/MOA signatory
SUBJECT: Interagency Salvage Program Review

REPLY DUE June x, 1996

The interagency Memorandum of Agreement (MOA) on Timber Salvage Related Activities Under Public Law 104-19 commits us to a national salvage program review. The goal and objectives of this review (Enclosure 1) have been developed and agreed to by the five participating federal agencies.

Completing this review is a high priority and your participation and involvement is essential to its success. To facilitate the review process, we have developed draft questions specific to each MOA item. The intent of these questions is to help determine, on a national basis, compliance with the 11 items in the MOA. The draft questions are enclosed for your review and comment. (Enclosure 2)

Along with your comments on the draft questions, we request that you provide a list of additional specific topics, issues, concerns, locations/situations and processes which you believe should be addressed through the review, including any situations which need clarification or have been troublesome. We further request that you provide information on those processes being implemented under the MOA which have been particularly effective.

All five agencies involved in implementing the MOA are responding to this request. An interagency working group will develop a final set of questions on MOA compliance based on responses from all of the agencies. There also will be an interagency decision on whether field reviews are needed, and if so, where and how they will be conducted. If field reviews are needed, we will work with you to ensure that they are designed and implemented in a manner which minimizes disruption of field units while achieving the goal and objectives of the review.

Please provide your response by June X, 1996. Send your response to {insert name of agency contact}. If you have questions, you may contact {name} at {phone number and/or computer address}.

signature
title

cc: all other agency signatories

5/29/96

Draft Interagency Salvage Review letter for field input -- (attached)

The interagency working group proposes that the letter go from each agency head to that agency's Regional or State offices next week, with a reply due on June 14. The letter does several things:

1. Lets field offices know that planning has begun for a national, interagency review of the salvage sale program and transmits the goal and objectives for the review.
2. Requests comments and edits (not responses) on a set of draft questions concerning compliance with the MOA.
3. Requests a list of any additional specific topics, issues, concerns, locations/situations and processes which the Regional/State offices believe should be addressed through the review, including any situations which need clarification or have been troublesome. Also requests information on MOA processes that are particularly effective.
4. Lets the Regional/State offices know their input will be used to develop a final set of questions on MOA compliance and to determine whether field reviews are needed.
5. Provides assurance that if field reviews are needed, the WO will work with field units to set up the review so as to minimize disruption which achieving the review goal and objectives.

NEXT STEPS:

- The interagency team is proposing a separate letter (identical in content except for style protocols used by each agency) from each agency to its Regional/State offices in order to avoid the time delay which seems to be inherent when a document needs 5 signatures. If the agency heads prefer to do a single letter with 5 signatures, (which is how the August 18 letter on the MOA has handled) that decision needs to be made as soon as possible.
- The content of the letter needs an OK from the involved agencies.
- The working group needs to finish the next draft of the MOA compliance questions (target for this is Thursday, 5/30) so that agency leadership can review it and a final draft can be prepared by COB next Monday, June 3. The letter would go out to field offices on Monday or Tuesday of next week, depending on completion of the final draft of the MOA compliance questions.
- The Forest Service believes that the review will not have credibility unless it includes trips to selected field sites. We would like agreement now that there will be field reviews so that we can build them into a timeline and people's schedules, and indicate in the letter that there will be field reviews and ask for field input on specific sites to visit.

5/29/96

Interagency Salvage Review Goal and Objectives --

These are revised per input from CEQ last week.

NEXT STEP: Latest draft (5/28, 5 p.m.) needs review and final OK.

***** DRAFT 5/28/96 5:00 pm *****
INTERAGENCY SALVAGE REVIEW -- GOAL and OBJECTIVES

GOAL: Conduct an objective review of compliance with the interagency Memorandum of Agreement (MOA) on timber salvage activities under P.L. 104-19.

OBJECTIVES:

1. Determine how the involved agencies are complying with the eleven items in the Memorandum of Agreement on Salvage Timber Sales and related guidance, and identify actions to enhance compliance.
2. Determine whether the MOA has been effective in establishing processes necessary for achieving environmentally sound timber salvage sales.
3. Evaluate the effectiveness and time/cost savings associated with the streamlined consultation process, which was developed prior to P.L. 104-19 and incorporated in the MOA, and determine the potential applicability of the streamlined consultation process for future use.
4. Identify any additional actions to further enhance interagency collaboration.
5. Produce an interagency report which will provide information for agency decision-makers, the public, and the Congress regarding implementation of the MOA.

Ellen + Michelle - I have rewritten this introduction (through, as you will see, substantial portions of your language remain) in order to:

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1. assume a more confident, less defensive posture before the court as to our ability to do this.

DRAFT BRIEF -- WRITTEN OUTSIDE
THE CONTEXT OF SPECIFIC FACTS
Not Reviewed By Client Agencies

2. State our essential argument in as consolidated and sharp a way as possible.

3. Explain why we're doing this new INTRODUCTION (but only after explaining how we have the power to do it at all).
what do you think?

Is this the appropriate official?

A

~~The [Secretary of Agriculture] seeks a clarification of this Court's [date] 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[s]). The Court's Order interprets section 2001(k) (1) of the 1995 Rescissions Act, Pub. L. No. 104-19, to require the Secretary to award, release and permit to be completed [identify relevant sales and location]. By this motion, federal defendant seeks clarification of this Court's injunction[s] to assure that the Forest Service can properly rely on the original terms of the contracts to suspend, modify or cancel these particular timber sales released pursuant to this Court's order[s] interpreting section 2001(k). This Court has jurisdiction to entertain this motion under the Court's inherent authority to enforce and clarify its own injunctions.~~

Alternatively, if after being presented with this issue, the Court determines that its previous Orders require modification to permit the agency's reliance on these contract terms, defendants

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request that the Orders be so modified. In connection with this request, if the Court determines that it does not have jurisdiction to grant such a modification in connection with its enforcement authority, defendants respectfully move for a limited remand to allow such modification under Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

~~Recent events have prompted this motion~~ ^{See insert B} Section

2001(k)(1) directs the Secretary to release and permit to be completed certain timber contracts ^{"with no change in"} ~~under~~ originally advertised terms, [^] which ~~expressly incorporate contract terms~~. An essential component of the original contracts are those terms that authorize modification, suspension and termination of the contracts to protect national forest resources. ^{go to top three sentences on p. 3} While the Forest

~~Service successfully has negotiated mutual agreements to modify certain 2001(k)(1) sales to address significant environmental issues, it has been unable to do so to date with these sales. Accordingly, reliance on these provisions has now become critical. Moreover, the scope of remedies that the Forest Service now can provide when implementing certain of these original contract terms recently has been expanded. An interim final rule published on April 3, 1996 authorizes substitution of timber outside the sale area for timber within the 2001(k) sale area without engaging in competitive bidding if the parties mutually agree.~~

^e
und.
later-
see
insert C

no new ff

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Section 2001(k)(1)'s explicit incorporation of these contract terms provides the Secretary the necessary flexibility to utilize the terms as part of contract completion. While section 2001(k) served to resurrect these sales, their original terms now guide the contracts' completion. Indeed, the Secretary must be able to continue to rely on contracts terms as they ^{provide the sole} ~~in~~

legal guide to defining the sale contract. ^{see Unit B}
~~essence define the sale.~~

In light of this Court's outstanding injunction[s], before the Secretary takes any action to implement these terms, defendant seeks clarification from the Court that such actions are permitted. Alternatively, if after consideration of the issues presented, modification of the orders is deemed necessary, defendant requests that the Court exercise its inherent authority to enforce its orders to issue the appropriate modification. If necessary, defendants seek permission to proceed in accordance with Crateo.¹

redundant

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 [name] National Forest by the Forest Service. Of particular importance here are [number] sales, named [list

¹ 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).

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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 BLM to address the problems of the northern spotted owl and other elements of the old growth ecosystem affected by 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]

Dinah wants to talk w/ you about why this is.

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.

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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, as part of ecosystem management strategy. 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 these particular 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.]

Dinah says to add - if it is true - that this is because the Forest Service had never planned to release them.

The Rescissions Act resurrects these abandoned sales. In July 1995, Congress passed the Rescissions Act, P.L. 104-19. Litigation surrounding this statute began almost immediately after passage.

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Litigation Over Section 2001 In The United States District Court At Eugene, Oregon

On August 8, 1995, Northwest Forest Resources Council (NFRC) filed a complaint seeking mandamus and a permanent injunction to compel the Secretaries to award and release by September 10, 1995, "all timber sales offered prior to the date of enactment [of the Act] in all national forests in Oregon and Washington and Bureau of Land Management ("BLM") districts in western Oregon."

See Northwest Forest Resource Council v. Glickman, Civil Action

No. 95-6244-HO. On August 22, 1995, the land management agencies issued their interpretation of the scope of subsection

2001(k)(1), explaining that the provision applies to the release of a set of sales that had been offered pursuant to section 318

of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act, but which had not proceeded.² Pursuant to

this interpretation, the federal defendants opposed NFRC's challenge to subsection 2001(k)(1) on the ground that plain

language of the statute, its legislative history, and the principle of deference to agency interpretation required that the

subsection only applied to a the discrete set of sales prepared and offered in the 13 northern spotted owl forests pursuant to

could we shorten this H. It doesn't really matter what we argued + why we argued it, given that our argument here is independent of whether we were right there. We wish conveying to the court that our argument here is linked to the one we made + it previously rejected.

² See August 22, 1995 Memorandum to Jack Ward Thomas, Chief of the Forest Service and Elaine Zielinski, Oregon State Director of BLM, from James R. Lyons, Under Secretary of Agriculture, Natural Resources and Environment and Mike Dombek, Director of the BLM.

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the ecological criteria and procedures specified in section 318 during the period it was in effect, fiscal year 1990.

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. NERC v. Glickman, No. 95-6244-HO (D. Or.). On October 17, 1995, the Court entered an order tracking the language of the statute that "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." [Identify which sales fall under which orders described herein.] The government has appealed the district court's ruling.

} bring up to date, including motion to stay.

[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

Also, can we make Rec - 7 - bracketed material from 7 to 9 shorter? It goes on a long time, without giving any real hint of why this factual material is relevant.

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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.³ 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. Federal defendants agreed that section 2001(k) did not cover sales that had been enjoined for violating Section 318⁴ or were cancelled at the request of

³ 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.

⁴ Section 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990.

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the high bidder or because the apparent high bidder was no longer willing or able to proceed. Giving effect to the "return of the bid bond" provision, defendants did not agree with Pilchuk plaintiffs' claims that sales for which the agencies had rejected bids were not covered by section 2001(k). Defendants also disagreed that section 2001(k) violated the separation of powers principle.]

In response, 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." [Explain which relevant sales this order covers.]

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.

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ARGUMENTS

I.

THE INJUNCTION[S] SHOULD BE
 CLARIFIED TO CONFIRM THAT
 THE SECRETARY CAN MODIFY, ~~AND SUSPEND~~ ^{OR TERMINATE}
 THE SUBJECT SALES PURSUANT TO THE
 ORIGINAL CONTRACT TERMS

A. This Court Has Authority to Clarify 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 ^{decision to} ~~seeking~~ of clarification 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 of order).

B. By Directing That Sales Proceed Under Originally Advertised Terms, Section 2001(k)(1) Expressly Authorizes The Secretary To Modify, Suspend Or Terminate The Subject Sales.

The first rule of statutory interpretation is that a statute is interpreted and applied according to its plain meaning.

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Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837, 843 (1984). Section 2001(k)(1) explicitly requires
the award, release and completion of "contracts" under "the
originally advertised terms" The advertised terms
expressly incorporate the terms of the contracts. [Confirm when
sales are identified/attach advertisements.] Remedial terms,
such as those authorizing modification, suspension and
termination, are critical, long-utilized and well-known
components of these contracts. ~~For example, if a contractor were~~ (kims
to begin harvesting outside the designated cutting area or ignore a bad
~~required operating conditions, the Forest Service must be able to~~ example
take the appropriate remedial actions, including, when necessary, ~~to~~ because so
termination. ~~easy to~~ distinguish-
able) If Congress had intended that these particular
remedial provisions were to be singled out as no longer applying,
or only applying under particular circumstances, as in the ~~scenario~~
~~described above,~~ ^{could and would} it ~~should~~ ^{said} have expressly stated so.
Absent such an express exemption, one should not be read into the
statute.

~~The contracts, and thus their terms, are creatures of the~~ See
~~National Forest Management Act (NFMA), 16 U.S.C. § 472a.~~ ^{Insert D} As

Section 2001(k)(1) provides "notwithstanding any other
provision of law" in the same sentence as the direction that
sales proceed under original terms. In the absence of an
explicit repeal, the contract terms, arising under NFMA, should
be given effect to avoid an inconsistency between laws. See In
re The Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (finding
(continued...)

I'm not sure I understand why you're making the argument
this way. The reference to NFMA seems to hurt us rather
than help us (because it's part of the "law" that the statute
doesn't apply. And we're saying a great deal more than
that. They don't conflict with...)

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~~this court has recognized, "[a]gency regulations which operate consistently with section 2001(k)(1) . . . remain in effect."~~
~~Jan. 10 Order at 21/ Utilization of the subject contract terms is consistent with Section 2001(k)(1)~~ [The statute requires the Secretaries to take actions that ultimately permit the contracts "to be completed." For these sales, suspending the contracts followed by either modification or termination allows completion of that process, either through provision of substitute timber pursuant to the interim final rule or payment of damages provided under the contract, as further explained below.] ~~At the same time, the statute protects the Secretaries' exercise of contract authority from challenge under other laws.~~

(1)

1. The Contract Terms Authorize Suspension of the Contracts.

Provision C6.01 of the subject contracts specifically permits the Forest Service to interrupt a purchaser's operations to prevent environmental damage that may require contract modification or termination. C6.01 -- INTERRUPTION OR DELAY OF OPERATIONS -- provides:

Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

⁵(...continued)
 phrase "notwithstanding any other provision of law" is not dispositive where other laws are included by reference).

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essential tool for effective timber sale contract management, and thus, a critical component of the subject contracts.)

Utilization of this suspension provision is particularly appropriate here. Allowing these particular sales to proceed before the Forest Service can determine what modification is necessary or whether cancellation is warranted, ^{might well} result in "serious environmental degradation or resource damage." [*Describe environmental problems of sales, once identified.*]

I am attaching comments by Q final here, which I am not sure I understand well enough to restate.

2. The Contract Terms Authorize Modification or Termination of these Sales

Suspension of a contract, as discussed above, is generally initially utilized to preserve the status quo before the next step is taken to prevent damage to resources. The contracts provide a number of different means for addressing the environmental concerns, with associated remedies for the purchaser. For example, as authorized by the suspension clause, the Contracting Officer can request the purchaser to delay operations, in whole or in part, while the Forest Service decides whether to modify the contract under CT8.3. 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 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

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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 [name] 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.]

Limit this inconsistent with statements on p. 5?

Modifications under CT8.3 can take different forms. For example, ~~the Contracting Officer could request the purchaser to delay operations for a set period of time (under CT6.01), while~~
^{could} the parties/attempt to work out mutually agreeable modifications. In ^{under}right ~~of~~ the new interim final rule, ^{which authorizes} ~~such modifications may be~~ ^{This rule authorizes}

necessary to substitute timber from outside the sale area for the unharvested portion of the suspended sale.
As explained, on April 3, 1996, the Forest Service published an interim final rule revising existing regulations regarding

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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, with the mutual agreement of the purchaser.

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. In these cases, such timber is unavailable. [Confirm.]

Thus, ^{The rule thus places} the Forest Service ~~is now~~ in a position to provide substitute timber, as agreed upon by the purchaser, through the contract modification process.

In the absence of any such mutually agreeable solution, ^{The Forest Service} under the contract terms specified, ~~the Contracting Officer may request delay in operations for an indefinite period of time~~

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.

no
reason
to keep
talking
about
suspense

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may make the
~~while the Forest Service determines what unilateral modifications~~
 are appropriate under the circumstances. For example, the Forest
 Service may ~~suspend~~ *modify* while the contract ~~is modified~~ to increase
 stream buffers to comply with standards and guidelines. Any such
 modifications that result in a reduction in available timber
 could lead to a rate redetermination to reflect resulting changes
 in the value of remaining included timber. See CT8.3, ¶ 1.

In addition, contract provision C6.25 provides other
 authority for modifying, or if necessary, cancelling, contracts:
 C6.25 -- PROTECTION OF HABITAT OF ENDANGERED, THREATENED, AND
 SENSITIVE SPECIES -- states 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. 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.

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

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'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").

→ Thus, if protection measures prove inadequate or areas needing protective measures are discovered, under the contract terms, the Forest Service can unilaterally modify the contract to provide the necessary additional protection or cancel the contract.

Here, [identify the sales] sales are in the [describe location], home to [identify threatened or endangered] species. [Include points which continue 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 [name] 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, applies to these sales. [Explain whether particular contract is being modified or cancelled.]

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As when modifications are made under contract clause CT8.2 discussed above, it is equally clear that prior to modifications under CG.25, suspension of the sale is appropriate. See Thomas Creek Lumber & Log Co. v. United States, 32 Fed. Cl. 787 (1995), appeal pending, 95-5080 (Fed. Cir. filed June 5, 1995). 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. In analyzing an analogous contract provision, 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.

Again, I don't understand why we're trying to justify suspensions here. To the extent necessary, shouldn't we do that in the section on suspensions?

32 Fed. Cl. at 790-91. This reasoning applies with equal force to the present facts. [Explain once sales are identified.]

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

In addition to the remedies discussed above, the Forest Service is expressly authorized under the contracts, under circumstances present here [confirm once sales are identified], to cancel the sale under contract provision CT8.2. Contract Clause C8.2, referred to in the previously discussed contracts clauses, specifically 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

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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, pursuant to C8.2(b), a sale can be terminated for a number of reasons, including environmental degradation, damage to cultural resources, jeopardizing threatened or endangered species or adversely impacting sensitive species, or significant inconsistency with land management plans. 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. [Describe other reasons for termination applicable to particular sale at issue.]

See attached comments from Dinah

In the event of contract termination, the contract describes the purchaser's remedies. See C9.5; C9.52. If the contract is terminated under C8.2, pursuant to C9.5 the purchaser may be entitled to certain out-of-pocket expenses, the difference between current contract rates and rates for comparable timber, plus other miscellaneous expenses. If the contract is terminated due to a determination that the contract may jeopardize the continued existence of a threatened or endangered species, the purchaser's remedies are more limited under C9.52.

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[Explain reasons for termination of particular sale and damages available to purchaser as part of the contract completion process.]

All of the scenarios discussed above are expressly authorized by the ^{original terms of the} relevant ^{contracts} ~~contracts~~ ^{to} ~~allow the contracts to~~ ~~be finally resolved,~~ ^{which govern these sales under the plain meaning of} consistent with the plain language and intent of section 2001(k) (1). The contracts will either be modified to provide substitute timber, after a short suspension, unilaterally modified to prevent serious environmental harm with appropriate rate redeterminations applied to remaining uncut timber, or terminated with compensation to the purchaser as

~~provided under the contract. Section 2001(k) brought these sales back to life, and in accordance with their original terms, they will now be finally resolved, upon clarification by this Court~~ ^{At Each of these results actions} ~~because the contract terms authorize these actions, so too does S. 2001(k) specifically incorporate these terms. Likewise, so does this Ct's injunction, which tracks the statute's language, including that such actions are consistent with the statute and this its incorporation of the terms of the contract. The Secretary thus has Court's orders.~~

~~its reference to "originally advertised terms"~~ ^{II. applicable} The authority, ~~is~~ ^{is} under the contract, statute, and injunction to

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

If, upon examination of this issue now directly before the Court, the Court determines that jurisdiction over this matter is vested solely with the Ninth Circuit to modify or clarify the [date] injunction, the Secretary requests that this Court consider a motion pursuant to Crateo, Inc. v. Intermark, Inc.,

suspend, terminate or modify this timber sale.

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536 F.2d 862, 869 (9th Cir. 1976) (party seeking relief from district court's order, at same time order is on appeal, must follow procedure whereby first, matter is presented to district court for decision as to whether district court would entertain or grant motion seeking to alter or modify order; and second, if district court indicates that it would entertain or grant motion, moving party can move forward and request limited remand from appellate court).

Conclusion

For the reasons set forth above, the Secretary of Agriculture requests a clarification that 2001(k)(1), as interpreted by this Court, allows the agencies to rely on the subject contracts' original terms to modify, suspend or terminate the contracts as part of the contract completion process. Alternatively, the Secretary requests this Court to modify its [date] injunction, or if deemed necessary, direct the parties to proceed in accordance with the Crateo procedure for obtaining a modification.

Dated:

Items A-C

A.

The Secretary of Agriculture intends on _____ to ~~include~~ suspend, modify, or cancel certain timber sales in reliance on the original terms of the contracts governing such sales. The Secretary, for reasons described in This memorandum, believes This action to be fully consistent with Section 2001(k)(1), as well as with the Court's order interpreting This section and directing the award and release of certain timber sales.

Out of respect for the Court's role in ^{handling} litigation involving Section 2001(k) and ~~exercising~~ ^{overseeing} its own injunction, the Secretary files This motion and memorandum to notify the Court of his intent and obtain confirmation from the Court, through a clarification of its injunction, that he may proceed to suspend, modify, or cancel these sales under their original contract terms. This Ct has jurisdiction to entertain This motion under the Ct's inherent authority to enforce and clarify its own injunction. Alternatively ... [continue to end of paragraph]

B.

The Secretary's contention is, in brief, that Section 2001(k) ^{specifically} authorizes the Secretary to proceed under the original terms of the contract with respect to ^{suspension,} modification and termination of sales. [continue w/ 2 sentences in middle of p. 2; then top 3 sentences on p. 3] Hence, the Secretary may suspend, modify, or terminate sales when the original contract allows him to do so.

C.

The Secretary invokes this authority now as a last resort and only after expanding the remedies available to a purchaser affected by suspension, modification, or termination. While the Forest Service successfully has negotiated mutual agreements to modify certain 200kt sales to address significant environmental issues, it has been ^{un}able to do so to date with respect to these sales. Accordingly, reliance on these provisions has now become critical if ^{the Forest Service is to prevent} a grave environmental damage. ~~is to be avoided.~~ Moreover, the Forest Service, prior to taking this step, has mitigated the impact on purchasers through an interim rule authorizing, ^{without competitive bidding,} substitution of timber outside the sale area for timber within the sale area upon the parties' mutual agreement. By virtue of this rule, ^{affected} a purchaser can obtain either ~~his~~ usual contract damages or mutually agreed-upon alternative timber when the Secretary ~~implements~~ exercises his discretion, ~~to~~ under the contract, to suspend, modify, or terminate a sale.

Point D

Application of the subject contract terms, as expressly provided for in Section 2001(k)'s reference to "originally advertised terms," is also fully consistent with other language in the section. [See bracket 1.] In addition, the phrase "notwithstanding any other provision of law" protects the Secretaries' exercise of contract authority from challenge under other laws. That phrase obviously does not include as part of the "law" made inapplicable the ^{very} contract terms that are expressly stated as continuing to govern.

depending on
factual circumstances, aren't we
going straight for cancellation?

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This could
(depending on
facts) seem
unconsistent w/
arguments
one
Env-harm
of particular
sales. And
it seems
hard to
suggest
surprise
by now!

essential tool for effective timber sale contract management, and
thus, a critical component of the subject contracts.

Utilization of this suspension provision is particularly
appropriate here. Allowing these particular sales to proceed
before the Forest Service can determine what modification is
necessary or whether cancellation is warranted, would result in
"serious environmental degradation or resource damage."

[*Describe environmental problems of sales, once identified.*]

2. The Contract Terms Authorize Modification
or Termination of these Sales

Suspension of a contract, as discussed above, is generally
initially utilized to preserve the status quo before the next
step is taken to prevent damage to resources. The contracts
provide a number of different means for addressing the
environmental concerns, with associated remedies for the
purchaser. For example, as authorized by the suspension clause,
the Contracting Officer can request the purchaser to delay
operations, in whole or in part, while the Forest Service decides
whether to modify the contract under CT8.3. 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
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

This
presumably
would
recount
attempts
to
offer
alternative
volume

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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, pursuant to C8.2(b), a sale can be terminated for a number of reasons, including environmental degradation, damage to cultural resources, jeopardizing threatened or endangered species or adversely impacting sensitive species, or significant inconsistency with land management plans. 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.]

① reasons for termination

~~Therefore, pursuant to the standards and guidelines, therefore, direct that these sales should not go forward based on their contract terms alone. [Describe other reasons for termination applicable to particular sale at issue.]~~

§ 2001(k)(1), the Chief of the F.S. has chosen to terminate this contract.

In the event of contract termination, the contract describes the purchaser's remedies. See C9.5; C9.52. If the contract is terminated under C8.2, pursuant to C9.5 the purchaser may be entitled to certain out-of-pocket expenses, the difference between current contract rates and rates for comparable timber, plus other miscellaneous expenses. If the contract is terminated due to a determination that the contract may jeopardize the continued existence of a threatened or endangered species, the purchaser's remedies are more limited under C9.52.

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

FAX NUMBER (202) 305-0506
CONFIRMATION NUMBER (202) 305-0460

PLEASE DELIVER TO:

To: Dinah Bear 456-0753

DATE: April 26, 1996

FROM: Michelle L. Gilbert

- LUNCH

MESSAGE: Attached is the draft brief on contract cancellation. I apologize if you did not receive a copy last Friday.

TO: Elena
FROM: Dinah 
DATE: April 29, 1996
RE: Draft Cancellation Brief

Comments on the draft are enclosed. In the interests of saving trees, I'm not making an extra copy.

I looked at SCLDF's memo again, but don't see arguments that seem important and appropriate in their analysis that aren't presented here.

It dawns on me that - ironically enough - we are moving towards a factual posture that mirrors the legal argument that Tom and I lost last fall and that I mentioned to you in the context of cancellation a couple of weeks ago i.e., that prior to cancelling the contracts, we're offering alternative timber. You will recall that some of us in the western world believe (but were roundly overruled by DOJ) that 2001(k)(3) permits the gov. to cancel the contracts for reasons other than t & e nesting birds. If that analysis is correct, then, of course, we'd have to offer replacement timber under k(3). While DOJ has been adamant that they won't take that position, USDA - through the use of the interim final NFMA reg - is factually doing what it would take to invoke k(3) in this manner.

My only point is bringing this out [✓] know is that if/when DOJ is actually arguing this, should a judge bring this up in a way that indicates interest in the "if for any other reason" language in k(3), we don't shoot ourselves in the foot by arguing that k(3) is confined to bird cases. I don't expect DOJ to put this in the brief, but since there are two possible legitimate interpretations (i.e., either going to pure cancellation under the terms of the contract in k(1) cases or going to k(3), offering replacement timber first and then cancelling) and we're setting the factual stage for both, I just think we should be conscious of the possible attractiveness of that alternative argument.

I look forward to seeing the next iteration

Bear

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Query as to whether the appropriate official is the Sec. or the Chief (see termination provision)

DRAFT BRIEF -- WRITTEN OUTSIDE
THE CONTEXT OF SPECIFIC FACTS
Not Reviewed By Client Agencies

INTRODUCTION

The Secretary of Agriculture seeks a clarification of this Court's [date] 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[s]). The Court's Order interprets section 2001(k) (1) of the 1995 Rescissions Act, Pub. L. No. 104-19, to require the Secretary to award, release and permit to be completed the contract(s) awarded to — for the — sale(s). [identify relevant sales and location]. By this motion, federal defendant seeks clarification of this Court's injunction[s] to assure that the Forest Service can properly rely on the original terms of the contracts to suspend, modify or cancel these particular timber sales released pursuant to this Court's order[s] interpreting section 2001(k). This Court has jurisdiction to entertain this motion under the Court's inherent authority to enforce and clarify its own injunctions. Alternatively, if after being presented with this issue, the Court determines that its previous Orders require modification to permit the agency's reliance on these contract terms, defendants

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request that the Orders be so modified. In connection with this request, if the Court determines that it does not have jurisdiction to grant such a modification in connection with its enforcement authority, defendants respectfully move for a limited remand to allow such modification under Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

Recent events have prompted this motion. Section 2001(k) (1) directs the Secretary to release and permit to be completed certain timber contracts ^{"with no change in"} ~~under~~ "originally advertised terms," ~~which expressly incorporate contract terms.~~ An essential component of the original contracts are those terms that authorize modification, suspension and termination of the contracts to protect national forest resources. ~~While~~ ^{has} the Forest Service successfully has negotiated mutual agreements to modify certain 2001(k) (1) sales to address significant environmental issues. ^{However,} it has been unable to do so to date with these sales. Accordingly, reliance on these provisions has now become critical. Moreover, the scope of remedies that the Forest Service now can provide when implementing certain of these original contract terms recently has been expanded. An interim final rule published on April 3, 1996 authorizes substitution of timber outside the sale area for timber within the 2001(k) sale area without engaging in competitive bidding if the parties mutually agree.

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Section 2001(k)(1)'s explicit incorporation of these contract terms provides the Secretary the necessary flexibility to utilize the terms as part of contract completion. While section 2001(k) served to resurrect these sales, their original terms now guide the contracts' completion. Indeed, the Secretary must be able to continue to rely on contracts terms as they [in essence define the sale.] Contract In light of this Court's outstanding injunction[s], before the Secretary takes any action to implement these terms, defendant seeks clarification from the Court that such actions are permitted. Alternatively, if after consideration of the issues presented, modification of the orders is deemed necessary, defendant requests that the Court exercise its inherent authority to enforce its orders to issue the appropriate modification. If necessary, defendants seek permission to proceed in accordance with Crateo.¹

Are the legal
sale guide
defining
the sale
contract
under
§ 2001(k)?

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 [name] National Forest by the Forest Service. Of particular importance here are [number] sales, named [list

¹ 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).

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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 BLM to address the problems of the northern spotted owl and other elements of the old growth ecosystem affected by 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]

(note - talk to Ellen about why this is)

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.

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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, as part of ecosystem management strategy. 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 these particular 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.]

-(because - ~~it~~ it had never planned on releasing them (if true))

The Rescissions Act resurrects these abandoned sales. In July 1995, Congress passed the Rescissions Act, P.L. 104-19. Litigation surrounding this statute began almost immediately after passage.

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Litigation Over Section 2001 In The United
States District Court At Eugene, Oregon

On August 8, 1995, Northwest Forest Resources Council (NFRC) filed a complaint seeking mandamus and a permanent injunction to compel the Secretaries to award and release by September 10, 1995, "all timber sales offered prior to the date of enactment [of the Act] in all national forests in Oregon and Washington and Bureau of Land Management ("BLM") districts in western Oregon." See Northwest Forest Resource Council v. Glickman, Civil Action No. 95-6244-HO. On August 22, 1995, the land management agencies issued their interpretation of the scope of subsection 2001(k)(1), explaining that the provision applies to the release of a set of sales that had been offered pursuant to section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act, but which had not proceeded.² Pursuant to this interpretation, the federal defendants opposed NFRC's challenge to subsection 2001(k)(1) on the ground that plain language of the statute, its legislative history, and the principle of deference to agency interpretation required that the subsection only applied to a the discrete set of sales prepared and offered in the 13 northern spotted owl forests pursuant to

² See August 22, 1995 Memorandum to Jack Ward Thomas, Chief of the Forest Service and Elaine Zielinski, Oregon State Director of BLM, from James R. Lyons, Under Secretary of Agriculture, Natural Resources and Environment and Mike Dombeck, Director of the BLM.

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the ecological criteria and procedures specified in section 318 during the period it was in effect, fiscal year 1990.

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 tracking the language of the statute that "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." [Identify which sales fall under which orders described herein.] 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

*High Circuit granted
 the gov's motion to stay*

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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.³ 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. Federal defendants agreed that section 2001(k) did not cover sales that had been enjoined for violating Section 318⁴ or were cancelled at the request of

³ 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.

⁴ Section 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990.

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the high bidder or because the apparent high bidder was no longer willing or able to proceed. Giving effect to the "return of the bid bond" provision, defendants did not agree with Pilchuk plaintiffs' claims that sales for which the agencies had rejected bids were not covered by section 2001(k). Defendants also disagreed that section 2001(k) violated the separation of powers principle.

In response, 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." [Explain which relevant sales this order covers.]

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.

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ARGUMENTS

I.

THE INJUNCTION[S] SHOULD BE
CLARIFIED TO CONFIRM THAT
THE SECRETARY CAN MODIFY AND SUSPEND
THE SUBJECT SALES PURSUANT TO THE
ORIGINAL CONTRACT TERMS

A. This Court Has Authority to Clarify 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 clarification 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 of order).

B. By Directing That Sales Proceed Under Originally Advertised Terms, Section 2001(k)(1) Expressly Authorizes The Secretary To Modify, Suspend Or Terminate The Subject Sales.

The first rule of statutory interpretation is that a statute is interpreted and applied according to its plain meaning.

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Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
 467 U.S. 837, 843 (1984). Section 2001(k)(1) explicitly requires
 the award, release and completion of "contracts" under "the
 originally advertised terms" The advertised terms
 expressly incorporate the terms of the contracts. [Confirm when
 sales are identified/attach advertisements.] Remedial terms,
 such as those authorizing modification, suspension and
 termination, are critical, long-utilized and well-known
 components of these contracts. ~~For example, if a contractor were~~
~~to begin harvesting outside the designated cutting area or ignore~~
~~required operating conditions, the Forest Service must be able to~~
~~take the appropriate remedial actions, including, when necessary,~~
~~termination.~~ If Congress had intended that these particular
 remedial provisions were to be singled out as no longer applying,
 or only applying under particular circumstances, as in the
 scenario described above, it ~~should~~ ^{could} have expressly stated so.
 Absent such an express exemption, one should not be read into the
 statute.

*I think this
 examples runs
 counter to our
 interest.
 We're
 NOT
 complaining
 about
 performance
 here.*

The contracts, and thus their terms, are creatures of the
 National Forest Management Act (NFMA), 16 U.S.C. § 472a.⁵ As

⁵ Section 2001(k)(1) provides "notwithstanding any other
 provision of law" in the same sentence as the direction that
 sales proceed under original terms. In the absence of an
 explicit repeal, the contract terms, arising under NFMA, should
 be given effect to avoid an inconsistency between laws. See In
 re The Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (finding

(continued...)

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this court has recognized, "[a]gency regulations which operate consistently with section 2001(k)(1) . . . remain in effect." Jan. 10 Order at 21. Utilization of the subject contract terms is ~~consistent with~~ ^{compelled by} Section 2001(k)(1). The statute requires the Secretaries to take actions that ultimately permit the contracts "to be completed." For these sales, suspending the contracts followed by either modification or termination allows completion of that process, either through provision of substitute timber pursuant to the interim final rule or payment of damages provided under the contract, as further explained below. At the same time, the statute protects the Secretaries' exercise of contract authority from challenge under other laws.

1. The Contract Terms Authorize
 Suspension of the Contracts.

Provision C6.01 of the subject contracts specifically permits the Forest Service to interrupt a purchaser's operations to prevent environmental damage that may require contract modification or termination. C6.01 -- INTERRUPTION OR DELAY OF OPERATIONS -- provides:

Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

⁵(...continued)
 phrase "notwithstanding any other provision of law" is not dispositive where other laws are included by reference).

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(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). . . .⁶

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. Under such circumstances, this clause authorizing suspension of operations to protect national forest resources became an

⁶ 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 the Contracting Officer which clearly identify and verify actual expenditures.

*Mike
Gippert
needs to
be consulted
about (among
other things)
issue related
to this
provision
& applicable
F.S. reg.)*

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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 [name] 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.]

Seems
w/ inconsistent
statements
on p. 5.

Modifications under CT8.3 can take different forms. For example, the Contracting Officer could request the purchaser to delay operations for a set period of time (under CT6.01), while the parties attempt to work out mutually agreeable modifications. In light of the new interim final rule, such modifications may be necessary to substitute timber from outside the sale area for the unharvested portion of the suspended sale.

As explained, on April 3, 1996, the Forest Service published an interim final rule revising existing regulations regarding

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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, with the mutual agreement of the purchaser. 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. In these cases, such timber is unavailable. [Confirm.] Thus, the Forest Service is now in a position to provide substitute timber, as agreed upon by the purchaser, through the contract modification process.⁷

In the absence of any such mutually agreeable solution, under the contract terms specified, the Contracting Officer may request delay in operations for an indefinite period of time

⁷ 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.

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while the Forest Service determines what unilateral modifications are appropriate under the circumstances. For example, the Forest Service may suspend while the contract is modified to increase stream buffers to comply with standards and guidelines. Any such modifications that result in a reduction in available timber could lead to a rate redetermination to reflect resulting changes in the value of remaining included timber. See CT8.3, ¶ 1.

In addition, contract provision C6.25 provides other authority for modifying, or if necessary, cancelling, contracts:
C6.25 -- PROTECTION OF HABITAT OF ENDANGERED, THREATENED, AND SENSITIVE SPECIES -- states 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

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'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").

Thus, if protection measures prove inadequate or areas needing protective measures are discovered, under the contract terms, the Forest Service can unilaterally modify the contract to provide the necessary additional protection or cancel the contract.

Here, [identify the sales] sales are in the [describe location], home to [identify threatened or endangered] species. [Include points which continue 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 [name] 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, applies to these sales. [Explain whether particular contract is being modified or cancelled.]

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As when modifications are made under contract clause CT8.2 discussed above, it is equally clear that prior to modifications under C6.25, suspension of the sale is appropriate. See Thomas Creek Lumber & Log Co. v. United States, 32 Fed. Cl. 787 (1995), appeal pending, 95-5080 (Fed. Cir. filed June 5, 1995). 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. In analyzing an analogous contract provision, 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. [Explain once sales are identified.]

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

In addition to the remedies discussed above, the Forest Service is expressly authorized under the contracts, under circumstances present here [confirm once sales are identified], to cancel the sale under contract provision CT8.2. Contract Clause C8.2, referred to in the previously discussed contracts clauses, specifically provides:

Someone Needs to talk to Jack.

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

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[Explain reasons for termination of particular sale and damages available to purchaser as part of the contract completion process.]

All of the scenarios discussed above are expressly authorized by the relevant contracts and allow the contracts to be finally resolved, consistent with the plain language and intent of section 2001(k)(1). The contracts will either be modified to provide substitute timber, after a short suspension, unilaterally modified to prevent serious environmental harm with appropriate rate redeterminations applied to remaining uncut timber, or terminated with compensation to the purchaser as provided under the contract. Section 2001(k) brought these sales back to life, and in accordance with their original terms, they will now be finally resolved, upon clarification by this Court that such actions are consistent with the statute and this Court's orders.

II.

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

If, upon examination of this issue now directly before the Court, the Court determines that jurisdiction over this matter is vested solely with the Ninth Circuit to modify or clarify the [date] injunction, the Secretary requests that this Court consider a motion pursuant to Crateo, Inc. v. Intermark, Inc.,

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536 F.2d 862, 869 (9th Cir. 1976) (party seeking relief from district court's order, at same time order is on appeal, must follow procedure whereby first, matter is presented to district court for decision as to whether district court would entertain or grant motion seeking to alter or modify order; and second, if district court indicates that it would entertain or grant motion, moving party can move forward and request limited remand from appellate court).

Conclusion

For the reasons set forth above, the Secretary of Agriculture requests a clarification that 2001(k)(1), as interpreted by this Court, allows the agencies to rely on the subject contracts' original terms to modify, suspend or terminate the contracts as part of the contract completion process. Alternatively, the Secretary requests this Court to modify its [date] injunction, or if deemed necessary, direct the parties to proceed in accordance with the Crateo procedure for obtaining a modification.

Dated:

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DRAFT BRIEF -- WRITTEN OUTSIDE
THE CONTEXT OF SPECIFIC FACTS
Not Reviewed By Client Agencies

INTRODUCTION

The Secretary of Agriculture seeks a clarification of this Court's [date] 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[s]). The Court's Order interprets section 2001(k) (1) of the 1995 Rescissions Act, Pub. L. No. 104-19, to require the Secretary to award, release and permit to be completed [identify relevant sales and location]. By this motion, federal defendant seeks clarification of this Court's injunction[s] to assure that the Forest Service can properly rely on the original terms of the contracts to suspend, modify or cancel these particular timber sales released pursuant to this Court's order[s] interpreting section 2001(k). This Court has jurisdiction to entertain this motion under the Court's inherent authority to enforce and clarify its own injunctions. Alternatively, if after being presented with this issue, the Court determines that its previous Orders require modification to permit the agency's reliance on these contract terms, defendants

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request that the Orders be so modified. In connection with this request, if the Court determines that it does not have jurisdiction to grant such a modification in connection with its enforcement authority, defendants respectfully move for a limited remand to allow such modification under Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

Recent events have prompted this motion. Section 2001(k)(1) directs the Secretary to release and permit to be completed certain timber contracts under "originally advertised terms," which expressly incorporate contract terms. An essential component of the original contracts are those terms that authorize modification, suspension and termination of the contracts to protect national forest resources. While the Forest Service successfully has negotiated mutual agreements to modify certain 2001(k)(1) sales to address significant environmental issues, it has been unable to do so to date with these sales. Accordingly, reliance on these provisions has now become critical. Moreover, the scope of remedies that the Forest Service now can provide when implementing certain of these original contract terms recently has been expanded. An interim final rule published on April 3, 1996 authorizes substitution of timber outside the sale area for timber within the 2001(k) sale area without engaging in competitive bidding if the parties mutually agree.

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Section 2001(k) (1)'s explicit incorporation of these contract terms provides the Secretary the necessary flexibility to utilize the terms as part of contract completion. While section 2001(k) served to resurrect these sales, their original terms now guide the contracts' completion. Indeed, the Secretary must be able to continue to rely on contracts terms as they in essence define the sale. In light of this Court's outstanding injunction[s], before the Secretary takes any action to implement these terms, defendant seeks clarification from the Court that such actions are permitted. Alternatively, if after consideration of the issues presented, modification of the orders is deemed necessary, defendant requests that the Court exercise its inherent authority to enforce its orders to issue the appropriate modification. If necessary, defendants seek permission to proceed in accordance with Crateo.¹

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 [name] National Forest by the Forest Service. Of particular importance here are [number] sales, named [list

¹ 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).

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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 BLM to address the problems of the northern spotted owl and other elements of the old growth ecosystem affected by 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.

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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, as part of ecosystem management strategy. 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 these particular 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, Congress passed the Rescissions Act, P.L. 104-19. Litigation surrounding this statute began almost immediately after passage.

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Litigation Over Section 2001 In The United
States District Court At Eugene, Oregon

On August 8, 1995, Northwest Forest Resources Council (NFRC) filed a complaint seeking mandamus and a permanent injunction to compel the Secretaries to award and release by September 10, 1995, "all timber sales offered prior to the date of enactment [of the Act] in all national forests in Oregon and Washington and Bureau of Land Management ("BLM") districts in western Oregon." See Northwest Forest Resource Council v. Glickman, Civil Action No. 95-6244-HO. On August 22, 1995, the land management agencies issued their interpretation of the scope of subsection 2001(k)(1), explaining that the provision applies to the release of a set of sales that had been offered pursuant to section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act, but which had not proceeded.² Pursuant to this interpretation, the federal defendants opposed NFRC's challenge to subsection 2001(k)(1) on the ground that plain language of the statute, its legislative history, and the principle of deference to agency interpretation required that the subsection only applied to a the discrete set of sales prepared and offered in the 13 northern spotted owl forests pursuant to

² See August 22, 1995 Memorandum to Jack Ward Thomas, Chief of the Forest Service and Elaine Zielinski, Oregon State Director of BLM, from James R. Lyons, Under Secretary of Agriculture, Natural Resources and Environment and Mike Dombeck, Director of the BLM.

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the ecological criteria and procedures specified in section 318 during the period it was in effect, fiscal year 1990.

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. NERC v. Glickman, No. 95-6244-HO (D. Or.). On October 17, 1995, the Court entered an order tracking the language of the statute that "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." [Identify which sales fall under which orders described herein.] 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

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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.³ 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. Federal defendants agreed that section 2001(k) did not cover sales that had been enjoined for violating Section 318⁴ or were cancelled at the request of

³ 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 Crab 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.

⁴ Section 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990.

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the high bidder or because the apparent high bidder was no longer willing or able to proceed. Giving effect to the "return of the bid bond" provision, defendants did not agree with Pilchuk plaintiffs' claims that sales for which the agencies had rejected bids were not covered by section 2001(k). Defendants also disagreed that section 2001(k) violated the separation of powers principle.

In response, 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." [Explain which relevant sales this order covers.]

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.

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ARGUMENTS

I.

THE INJUNCTION[S] SHOULD BE
CLARIFIED TO CONFIRM THAT
THE SECRETARY CAN MODIFY AND SUSPEND
THE SUBJECT SALES PURSUANT TO THE
ORIGINAL CONTRACT TERMS

A. This Court Has Authority to Clarify 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 clarification 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 of order).

B. By Directing That Sales Proceed Under Originally Advertised Terms, Section 2001(k)(1) Expressly Authorizes The Secretary To Modify, Suspend Or Terminate The Subject Sales.

The first rule of statutory interpretation is that a statute is interpreted and applied according to its plain meaning.

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Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837, 843 (1984). Section 2001(k)(1) explicitly requires
the award, release and completion of "contracts" under "the
originally advertised terms" The advertised terms
expressly incorporate the terms of the contracts. [Confirm when
sales are identified/attach advertisements.] Remedial terms,
such as those authorizing modification, suspension and
termination, are critical, long-utilized and well-known
components of these contracts. For example, if a contractor were
to begin harvesting outside the designated cutting area or ignore
required operating conditions, the Forest Service must be able to
take the appropriate remedial actions, including, when necessary,
termination. If Congress had intended that these particular
remedial provisions were to be singled out as no longer applying,
or only applying under particular circumstances, as in the
scenario described above, it should have expressly stated so.
Absent such an express exemption, one should not be read into the
statute.

The contracts, and thus their terms, are creatures of the
National Forest Management Act (NFMA), 16 U.S.C. § 472a.⁵ As

⁵ Section 2001(k)(1) provides "notwithstanding any other
provision of law" in the same sentence as the direction that
sales proceed under original terms. In the absence of an
explicit repeal, the contract terms, arising under NFMA, should
be given effect to avoid an inconsistency between laws. See In
re The Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (finding
(continued...)

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this court has recognized, "[a]gency regulations which operate consistently with section 2001(k)(1) . . . remain in effect." Jan. 10 Order at 21. Utilization of the subject contract terms is consistent with Section 2001(k)(1). The statute requires the Secretaries to take actions that ultimately permit the contracts "to be completed." For these sales, suspending the contracts followed by either modification or termination allows completion of that process, either through provision of substitute timber pursuant to the interim final rule or payment of damages provided under the contract, as further explained below. At the same time, the statute protects the Secretaries' exercise of contract authority from challenge under other laws.

1. The Contract Terms Authorize
Suspension of the Contracts.

Provision C6.01 of the subject contracts specifically permits the Forest Service to interrupt a purchaser's operations to prevent environmental damage that may require contract modification or termination. C6.01 -- INTERRUPTION OR DELAY OF OPERATIONS -- provides:

Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

⁵(...continued)
phrase "notwithstanding any other provision of law" is not dispositive where other laws are included by reference).

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(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). . . .⁶

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. Under such circumstances, this clause authorizing suspension of operations to protect national forest resources became an

⁶ 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 the Contracting Officer which clearly identify and verify actual expenditures.

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essential tool for effective timber sale contract management, and thus, a critical component of the subject contracts.

Utilization of this suspension provision is particularly appropriate here. Allowing these particular sales to proceed before the Forest Service can determine what modification is necessary or whether cancellation is warranted, would result in "serious environmental degradation or resource damage."

[*Describe environmental problems of sales, once identified.*]

2. The Contract Terms Authorize Modification or Termination of these Sales

Suspension of a contract, as discussed above, is generally initially utilized to preserve the status quo before the next step is taken to prevent damage to resources. The contracts provide a number of different means for addressing the environmental concerns, with associated remedies for the purchaser. For example, as authorized by the suspension clause, the Contracting Officer can request the purchaser to delay operations, in whole or in part, while the Forest Service decides whether to modify the contract under CT8.3. 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 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

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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 [name] 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.]

Modifications under CT8.3 can take different forms. For example, the Contracting Officer could request the purchaser to delay operations for a set period of time (under CT6.01), while the parties attempt to work out mutually agreeable modifications. In light of the new interim final rule, such modifications may be necessary to substitute timber from outside the sale area for the unharvested portion of the suspended sale.

As explained, on April 3, 1996, the Forest Service published an interim final rule revising existing regulations regarding

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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, with the mutual agreement of the purchaser. 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. In these cases, such timber is unavailable. [Confirm.] Thus, the Forest Service is now in a position to provide substitute timber, as agreed upon by the purchaser, through the contract modification process.⁷

In the absence of any such mutually agreeable solution, under the contract terms specified, the Contracting Officer may request delay in operations for an indefinite period of time

⁷ 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.

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while the Forest Service determines what unilateral modifications are appropriate under the circumstances. For example, the Forest Service may suspend while the contract is modified to increase stream buffers to comply with standards and guidelines. Any such modifications that result in a reduction in available timber could lead to a rate redetermination to reflect resulting changes in the value of remaining included timber. See CT8.3, ¶ 1.

In addition, contract provision C6.25 provides other authority for modifying, or if necessary, cancelling, contracts: C6.25 -- PROTECTION OF HABITAT OF ENDANGERED, THREATENED, AND SENSITIVE SPECIES -- states 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

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'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").

Thus, if protection measures prove inadequate or areas needing protective measures are discovered, under the contract terms, the Forest Service can unilaterally modify the contract to provide the necessary additional protection or cancel the contract.

Here, [identify the sales] sales are in the [describe location], home to [identify threatened or endangered] species. [Include points which continue 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 [name] 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, applies to these sales. [Explain whether particular contract is being modified or cancelled.]

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As when modifications are made under contract clause CT8.2 discussed above, it is equally clear that prior to modifications under C6.25, suspension of the sale is appropriate. See Thomas Creek Lumber & Log Co. v. United States, 32 Fed. Cl. 787 (1995), appeal pending, 95-5080 (Fed. Cir. filed June 5, 1995). 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. In analyzing an analogous contract provision, 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. [Explain once sales are identified.]

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

In addition to the remedies discussed above, the Forest Service is expressly authorized under the contracts, under circumstances present here [confirm once sales are identified], to cancel the sale under contract provision CT8.2. Contract Clause C8.2, referred to in the previously discussed contracts clauses, specifically 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

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[Explain reasons for termination of particular sale and damages available to purchaser as part of the contract completion process.]

All of the scenarios discussed above are expressly authorized by the relevant contracts and allow the contracts to be finally resolved, consistent with the plain language and intent of section 2001(k)(1). The contracts will either be modified to provide substitute timber, after a short suspension, unilaterally modified to prevent serious environmental harm with appropriate rate redeterminations applied to remaining uncut timber, or terminated with compensation to the purchaser as provided under the contract. Section 2001(k) brought these sales back to life, and in accordance with their original terms, they will now be finally resolved, upon clarification by this Court that such actions are consistent with the statute and this Court's orders.

II.

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

If, upon examination of this issue now directly before the Court, the Court determines that jurisdiction over this matter is vested solely with the Ninth Circuit to modify or clarify the [date] injunction, the Secretary requests that this Court consider a motion pursuant to Crateo, Inc. v. Intermark, Inc.,

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536 F.2d 862, 869 (9th Cir. 1976) (party seeking relief from district court's order, at same time order is on appeal, must follow procedure whereby first, matter is presented to district court for decision as to whether district court would entertain or grant motion seeking to alter or modify order; and second, if district court indicates that it would entertain or grant motion, moving party can move forward and request limited remand from appellate court).

Conclusion

For the reasons set forth above, the Secretary of Agriculture requests a clarification that 2001(k)(1), as interpreted by this Court, allows the agencies to rely on the subject contracts' original terms to modify, suspend or terminate the contracts as part of the contract completion process. Alternatively, the Secretary requests this Court to modify its [date] injunction, or if deemed necessary, direct the parties to proceed in accordance with the Crateo procedure for obtaining a modification.

Dated:

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LITIGATION UPDATE (5/21/96): RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan) (industry challenge to Administration's interpretation of scope and know to be nesting provisions) CONSOLIDATED with Scott Timber v. Glickman and Pilchuck Audubon Soc'y v. Glickman (challenge to temporal scope of Section 2001(k) and to intention to go forward with withdrawn and cancelled sales).

(1) Geographic Scope. On April 24, the Ninth Circuit issued an opinion affirming Judge Hogan's interpretation of the geographic scope of Section 2001(k). The Court focused on the plain language of the statute, as well as the legislative history. As a result of conflicting language in the opinion regarding 2001(k)'s application to Eastside vs. Westside sales, on May 3, we filed a motion for a rehearing. **No decision has been made yet on filing a petition for a rehearing en banc.**

(2) "Known to be Nesting" and Appeal. On 1\19\96, Judge Hogan issued an opinion on the "known to be nesting" standard holding that (k)(2) requires evidence of nesting within sale unit boundaries. On 1/25/96 the District Court granted a 60-day stay of this order. On April 5, 1996, the Ninth Circuit continued the stay of all provisions of this order. Appellate arguments were held on May 7th.

(3) "High Bidder" and Appeal. The Ninth Circuit heard arguments on May 7, 1996.

(4) Reporting Requirements. A thirteenth compliance report was filed last week.

(5) Replacement Volume, Termination of (k)(1) and Modification or Termination of Existing Sale Contracts. **Scott Timber and NFRC filed motions to compel release of (k)(3) replacement volume. Scott Timber's motion to identify and release (k)(3) replacement timber volume was argued on May 14. Today, we intend to file a response to NFRC's motion seeking to compel release of replacement volume by June 1, 1996 on the basis that the "notwithstanding" language applies to (k)(3).**

Klamath Tribes v. United States, (D. Or.) The Klamath Tribe, represented by SCLDF, has filed an action seeking to enjoin the harvesting of eight timber sales on the Winema and Fremont National Forests in Oregon. The Tribe claims the U.S. and Forest

Service are violating a trust responsibility to protect the Klamath Tribes' treaty rights to hunt and fish on these forests. The Forest Service is currently under an injunction from Judge Hogan to release all eight sales. On May 6, the court denied the government's motion to transfer the action to Judge Hogan, and granted Boise Cascade's motion to intervene. We anticipate a ruling shortly on plaintiffs' motion for a PI. **We are still waiting.**

Seattle Audubon Society v. Thomas (W.D. Wash., Dwyer, J.). In October 1995, SAS filed a motion to clarify and enforce injunctions issued in 1990 on the Cowboy, Nita, South Nita and Garden timber sales, and to clarify the ruling as to the First and Last sales. Industry filed a subsequent motion to vacate the injunctions on the basis of the Glickman Court's orders. On 2/22/96, Judge Dwyer issued an order staying a decision on the four enjoined sales pending a ruling by the Ninth Circuit.

The court on March 27, 1996 issued a ruling declaring that no further relief could be afforded as to the First and Last timber sales. Subsequently, the Forest Service entered into an agreement with the purchaser whereby these environmentally damaging sales will be substituted for less damaging sales.

Native Americans for Enola v. USFS (Ninth Circuit) The Enola Hill Sale located on Mount Hood NF was released pursuant to Section 2001(k)(1). The release was challenged on the basis of an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. The district court granted our motion to dismiss ruling that the Rescissions Act precludes plaintiffs substantive and procedural challenges (2/28/96). An appeal followed. On Thursday April 25, Judge Marsh, finding plaintiffs have no likelihood of success on appeal, vacated his April 17 TRO and denied the plaintiffs' motion for stay and injunction pending appeal.

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) In November, the purchaser of a timber sale that the Forest Service had suspended for NEPA issues, filed an order requesting that the sale be released under 2001(k). A hearing was held on January 23, 1996. The matter is under advisement. A decision on this matter will likely be forthcoming as a result of the Ninth Circuit's recent opinion affirming geographic scope. In order to apprise the court of the current status, on May 3, we filed a copy of the Ninth Circuit's opinion with the court and informed the court of our action in seeking a rehearing.

****SEE BELOW FOR FURTHER INFORMATION ON ACTIONS AFFECTING THE NORTHWEST FOREST PLAN.**

Northwest Forest Plan.

Northwest Forest Resource Council v. Dombeck, O&C Counties v. Babbitt, Northwest Forest Resource Council v. Espy (D.D.C. - Judge Jackson) (Burgess) These actions are challenges by the timber industry to the Northwest Forest Plan. In June of 1994, the district court stayed these actions in order to allow the Ninth Circuit to decide similar issues. In early April, the Ninth Circuit affirmed the legality of the Northwest Forest Plan. The D.C. court has now scheduled a status conference for May 22, 1996. Today, we intend to file a status report to update the court on the status of NFRC's claims.

Section 2001(d) Sales (Option 9 Sales)

ONRC v. Thomas (Ninth Circuit) (challenge to four timber sales -- two under 2001(d) and two not under the Rescissions Act). On 12/5/95, U.S. District Court Judge Hogan issued a ruling, determining that all sales, including those that were not delayed, fall within the scope of 2001(k). The effects of this decision remain unsettled. On March 4, 1996, a Ninth Circuit panel heard arguments on the government's appeal of this decision.

DECISIONS/CLOSED ACTIONS FOR 2001(k):

Pacific Crest Biodiversity v. Glickman, (W.D. Wash.) On March 18, 1996, environmental plaintiffs filed a motion for TRO and PI as to the controversial Rocky timber sale located in the Olympic National Forest. The Rocky sale was originally offered under Section 318, and released pursuant to (k)(1). Plaintiffs contended the sale area contains northern spotted owls. On March 19, 1996 the court denied plaintiffs' motion.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). On February 1, 1996 federal defendants and SCLDF entered into a joint stipulation to dismiss the complaint without prejudice.

Oakhurst v. USFS (D. Or.). In January of 1996, the court dismissed this action by a pro se plaintiff that challenged the Sugarloaf Timber Sale. Plaintiff raised constitutional issues, the Civil Rights Act, the religious Freedom Restoration Act and the APA.

Section 2001(b) Sales (Salvage Sales)

PENDING DISTRICT COURT ACTIONS:

Idaho Sporting Congress v. USFS, (D. Idaho). The same plaintiffs now bring a fourth action against two additional salvage timber sales that are offered as part of the Thunderbolt Recovery Fire Recovery Project. Plaintiffs allege the same violations as in "Thunderbolt III", (See "Decisions in District Court," below).

PENDING CIRCUIT COURT ACTIONS:

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona), on appeal. On March 14, the district court granted our motion for summary judgment and dismissed this challenge to the Rustler Fire Salvage Sale located on the Coronado National Forest, Arizona. Significantly, the court found that the Forest Service properly invoked a categorical exclusion (CE) for this sale, and the environmental documentation used by the Secretary was sufficient. The court indicated that this ruling will be submitted for publication. On April 3, 1996, plaintiffs filed a notice of appeal.

Sierra Club v. U.S. Forest Service (Ninth Circuit) ("Warner Creek" Timber Sale). The Forest Service originally offered this salvage sale prior to the enactment of the Rescissions Act after an unknown arsonist burned the area. In May of 1995, a magistrate judge issued an opinion finding that the Forest Service should have considered this factor in the EIS. After passage of the Rescissions Act, the district court judge ordered briefing on the effect of Section 2001 on the Warner Creek Sale, and after finding that Section 2001 was applicable, dismissed plaintiffs NEPA and NFMA claims. Plaintiffs appealed, claiming the district court improperly applied Section 2001 to a sale that was already "prepared" and requesting that the district court be required to review the NEPA claims. Our response brief was filed on March 20, 1996.

Idaho Sporting Congress v. USFS (Ninth Circuit) (Thunderbolt I) Plaintiffs challenged the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. On January 8, 1996 the court granted our motion for summary judgment and to dismiss finding that the Forest Service did not act in an arbitrary or capricious manner. The court rejected plaintiffs' public trust doctrine and APA arguments, and limited review to those sales that were advertised, thus holding that an unadvertised sale does not present a case or controversy under the Rescissions Act. Argument was given on May 10, 1996.

Idaho Conservation League v. USFS (Ninth Circuit) (Thunderbolt II) On December 11, the court granted our motion for summary judgment, finding that the Forest Service did not proceed in an arbitrary or capricious manner in making the determination to offer the sale, despite some contradictory positions by other agencies. Further, the court found that the Secretary could, in fact, delegate his responsibilities under the Rescissions Act, contrary to plaintiffs' arguments. A hearing is scheduled for May 10, 1996.

DECISIONS IN DISTRICT AND CIRCUIT COURTS:

Inland Empire Public Lands Council v. Glickman (9th Cir.) (Fire Salvage Sales) On May 8, 1996, the Ninth Circuit affirmed the district court's order that allowed fire salvage sales to go forward in the Kootenai National Forest. The court noted that the Rescissions Act provides for "extremely limited judicial review," and the Act does not require the Secretary to personally authorize each salvage sale. Further, the Ninth Circuit affirmed the district court's actions in dismissing the action against the FWS and striking extra-record materials.

Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). On May 3, 1996, Judge Limbaugh granted federal defendants motion for summary judgment in this challenge to a salvage timber sale located on the Mark Twain National Forest. The Forest Service had proceeded with this sale under the categorical exclusion provision of NEPA. Plaintiffs challenged that a categorical exclusion did not comply with the Rescissions Act. The court rejected this argument. Notably, in this action, the court had contrary to express provisions of 2001, issued a TRO.

Idaho Sporting Congress v. USFS (D. Idaho) ("Thunderbolt III"). This represents the third challenge to a salvage sale offered as part of the Thunderbolt Fire Recovery Project. Plaintiffs allege violations of the public trust doctrine, the President's Directive for implementation of salvage sales and the APA. By order issued 4/19/96, the court granted summary judgment in favor of defendants on all counts.

The Armuchee Alliance v. King, District Ranger, (D. Georgia). Plaintiffs challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to release Southern Pine Beetle (SPB) Salvage Sales in the Chattahoochee National Forest. By order dated April 18, 1996, the court granted our motion for summary judgment on all counts. Specifically, the court concluded that the Timber Salvage Rider was not unconstitutionally vague, did not violate the separate of powers doctrine or equal protection clause, and did not unconstitutionally infringe upon plaintiffs' substantive and procedural due rights. Further, the court affirmed the Forest

Service's decision to invoke a categorical exclusion. We received notice from the court that this opinion was submitted for publication.

Alabama Wilderness v. Carter, (M.D. Ala. - Judge Thompson) Negotiations resulted in an agreement to dismiss this action, and on April 10, 1996 the court dismissed the action with prejudice. At issue in this second challenge to salvage timber sales in the Alabama National Forests, was the constitutionality of the Timber Salvage Rider, the Forest Service's decision to proceed with the sale and the use of a categorical exclusion.

Alabama Wilderness v. Yancy, (M.D. Ala.). This action was dismissed by agreement of the parties in February, 1996. Prior to our filing of a brief on the merits, plaintiffs and the Forest Service negotiated a settlement that released the 15 sales at issue. In this action, environmental groups challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to proceed with 15 salvage sales in the Conecuh National Forest.

Kentucky Heartwood v. USFS, 906 F. Supp. 410 (E.D. Ky. 1995). The court granted federal defendants' motion for summary judgment. Plaintiffs had challenged five salvage sales in the Daniel Boone National Forest and their impacts on the endangered Indiana bat. The court's decision was the first to address the applicable standard of review for salvage timber sales under the Rescissions Act. The court held an arbitrary and capricious review is the appropriate standard, yet the review is to be "extremely deferential."

***** DRAFT 5/17/96 2:30 PM *****

INTERAGENCY SALVAGE REVIEW FRAMEWORK

GOAL: Conduct an objective review of compliance with and effectiveness of the interagency Memorandum of Agreement (MOA) on timber salvage activities under P.L. 104-19, and the effectiveness of streamlined procedures identified in the MOA and their potential applicability in the future.

OBJECTIVES:

1. Determine how the involved agencies are complying with the eleven items in the Memorandum of Agreement on Salvage Timber Sales and related guidance, and identify actions to enhance compliance.
2. Evaluate the effectiveness of the MOA in achieving environmentally sound salvage timber sales.
3. Evaluate the effectiveness and time/cost savings associated with the streamlined consultation process and the combined NEPA document and Biological Evaluation, and determine the potential applicability of these approaches for future use.
4. Identify any additional actions to further enhance interagency collaboration.
5. Produce an interagency report which will provide information for agency decision-makers, the public, and the Congress regarding implementation and effectiveness of the MOA.

CATEGORIES OF INFORMATION

The review will gather three general classes of information:

1. Factual accounts of performance under the MOA (e.g. volume offered to date).
2. Assessments of the status of interagency collaboration (e.g. interagency issues and priority identification on a Regional/State scale).
3. Information on Forest Service and BLM definitions, interpretations, and criteria (e.g. criteria for what is a salvage sale vs a green sale).

The review will include specific information regarding compliance and effectiveness of all eleven items of the MOA.

REVIEW PROCESS SEQUENCE

STEP 1. Each agency contacts its field offices to help identify:

- Specific issues, topics, and locations the agency wants to have addressed in the review.

Specific "good" processes and/or examples to evaluate in the review.

STEP 2. Feedback from Step 1 is pooled and evaluated to develop a list of review items, sorted according to:

- A. Those which are good examples that can be promptly shared and adopted on a more widespread basis, where applicable.
- B. Those for which a solution can be offered promptly.
- C. Those needing field review or other further evaluation to identify solutions.

STEP 3. Using the list developed in Step 2, action items will be identified and implemented. These action items could include:

- A. Distributing information on "good examples" so that they can be adopted on a more widespread basis, where applicable.
- B. Developing and distributing solutions/clarifications to address problems or concerns.
- C. Developing and implementing an action plan to address any problems or concerns which require additional information or evaluation. This could involve questionnaires to field offices and/or field review trips.

STEP 4. Based on the information developed through Step 3, a report on the review findings and actions will be prepared and communicated to agency leaders, the public, and the Congress.

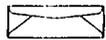
Forest Service Project-Level Decision Steps



1. Schedule of Proposed Projects is sent to mailing list quarterly listing upcoming NEPA projects.



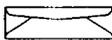
2. Scoping notice and comment on proposal.



3. Environmental Assessment (EA) is sent to mailing list and noticed in designated newspapers.*



4. Comment Period begins after notice published: 30 days for CE and EA, 60 days for EIS.*



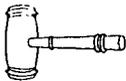
5. Decision Notice sent to commentors and notice published in designated newspapers. ESA, CWA, NHPA and other compliance completed.*



6. 45-Day Appeal Period with automatic stay begins upon notice of decision publication. Wait 5 business days after appeal period.*



7. 45-Day Appeal Resolution Period if any appeals are filed with continuation of automatic stay. May not implement for 15 days.*



8. Judicial Review of Final Agency Action can occur after an appeal decision is rendered or the 45-day appeal resolution period elapses.*

*Required by 16 U.S.C. 1612 note, 36 CFR 215

9. Measure performance of all parties' and individuals' efforts involved in the development and implementation of timber sales prepared pursuant to this MOA based upon the combined achievement of the goals set forth in this MOA.
10. Monitor and evaluate timber sale objectives and mitigation requirements as an integral part of salvage sales and the salvage program as prescribed in Forest Plans, Land Use Plans and agency direction. Public and stakeholder involvement in monitoring and evaluation will be encouraged. There will be a national salvage program review involving regions and States with significant activity under this Act.
11. Recognize and use the definition of salvage timber sale as contained in Public Law 104-19, which is a timber sale "for which an important reason for entry includes the removal of disease or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack." This definition allows for treating associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation as long as a viable salvage component exists. While this definition provides necessary flexibility to meet salvage objectives, care must be taken to avoid abuse by including trees or areas not consistent with current environmental laws and existing standards and guidelines as set forth in this MOA.

This Memorandum of Agreement is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

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LITIGATION UPDATE (5/14/96): RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan) (industry challenge to Administration's interpretation of scope and know to be nesting provisions) CONSOLIDATED with Scott Timber v. Glickman and Pilchuck Audubon Soc'y v. Glickman (challenge to temporal scope of Section 2001(k) and to intention to go forward with withdrawn and cancelled sales).

(1) Geographic Scope. On April 24, the Ninth Circuit issued an opinion affirming Judge Hogan's interpretation of the geographic scope of Section 2001(k). The Court focused on the plain language of the statute, as well as the legislative history. As a result of conflicting language in the opinion regarding 2001(k)'s application to Eastside vs. Westside sales, on May 3, we filed a motion for a rehearing.

(2) "Known to be Nesting" and Appeal. On 1\19\96, Judge Hogan issued an opinion on the "known to be nesting" standard holding that (k)(2) requires evidence of nesting within sale unit boundaries. On 1/25/96 the District Court granted a 60-day stay of this order. On April 5, 1996, the Ninth Circuit continued the stay of all provisions of this order. Appellate arguments were held on May 7th.

(3) "High Bidder" and Appeal. The Ninth Circuit heard arguments on May 7, 1996.

(4) Reporting Requirements. A thirteenth compliance report was filed last week.

(5) Replacement Volume, Termination of (k)(1) and Modification or Termination of Existing Sale Contracts. On May 1, Scott Timber filed a motion for identification and release of replacement timber. The government filed an opposition on May 10, 1996. NFRC filed a reply to our opposition claiming the "notwithstanding" language applies to (k)(3). This motion is scheduled for oral argument on Tuesday May 14. Further, On May 9, NFRC filed a motion seeking to compel the Forest Service to provide replacement timber for identified sales no later than June 1, 1996.

Klamath Tribes v. United States, (D. Or.) The Klamath Tribe, represented by SCLDF, has filed an action seeking to enjoin the harvesting of eight timber sales on the Winema and Fremont National Forests in Oregon. The Tribe claims the U.S. and Forest Service are violating a trust responsibility to protect the

Klamath Tribes' treaty rights to hunt and fish on these forests. The Forest Service is currently under an injunction from Judge Hogan to release all eight sales. On May 6, the court denied the government's motion to transfer the action to Judge Hogan, and granted Boise Cascade's motion to intervene. We anticipate a ruling shortly on plaintiffs' motion for a PI.

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Section 2001(d) Sales (Option 9 Sales)

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Section 2001(b) Sales (Salvage Sales)

PENDING DISTRICT COURT ACTIONS:

Idaho Sporting Congress v. USFS, (D. Idaho). The same plaintiffs now bring a fourth action against two additional salvage timber sales that are offered as part of the Thunderbolt Recovery Fire Recovery Project. Plaintiffs allege the same violations as in "Thunderbolt III", (See "Decisions in District Court," below).

PENDING CIRCUIT COURT ACTIONS:

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona), on appeal. On March 14, the district court granted our motion for summary judgment and dismissed this challenge to the Rustler Fire Salvage Sale located on the Coronado National Forest, Arizona. Significantly, the court found that the Forest Service properly invoked a categorical exclusion (CE) for this sale, and the environmental documentation used by the Secretary was sufficient. The court indicated that this ruling will be submitted for publication. On April 3, 1996, plaintiffs filed a notice of appeal.

Sierra Club v. U.S. Forest Service (Ninth Circuit) ("Warner Creek" Timber Sale). The Forest Service originally offered this salvage sale prior to the enactment of the Rescissions Act after an unknown arsonist burned the area. In May of 1995, a magistrate judge issued an opinion finding that the Forest Service should have considered this factor in the EIS. After passage of the Rescissions Act, the district court judge ordered briefing on the effect of Section 2001 on the Warner Creek Sale, and after finding that Section 2001 was applicable, dismissed plaintiffs NEPA and NFMA claims. Plaintiffs appealed, claiming the district court improperly applied Section 2001 to a sale that was already "prepared" and requesting that the district court be required to review the NEPA claims. Our response brief was filed on March 20, 1996.

Idaho Sporting Congress v. USFS (Ninth Circuit) (Thunderbolt I) Plaintiffs challenged the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. On January 8, 1996 the court granted our motion for summary judgment and to dismiss finding that the Forest Service did not act in an arbitrary or capricious manner. The court rejected plaintiffs' public trust doctrine and APA arguments, and limited review to those sales that were advertised, thus holding that an unadvertised sale does not present a case or controversy under the Rescissions Act. Argument was given on May 10, 1996.

Idaho Conservation League v. USFS (Ninth Circuit) (Thunderbolt II) On December 11, the court granted our motion for summary judgement, finding that the Forest Service did not proceed in an arbitrary or capricious manner in making the determination to offer the sale, despite some contradictory positions by other agencies. Further, the court found that the Secretary could, in fact, delegate his responsibilities under the Rescissions Act, contrary to plaintiffs' arguments. A hearing is scheduled for May 10, 1996.

DECISIONS IN DISTRICT AND CIRCUIT COURTS:

Inland Empire Public Lands Council v. Glickman (9th Cir.) (Fire Salvage Sales) On May 8, 1996, the Ninth Circuit affirmed the district court's order that allowed fire salvage sales to go forward in the Kootenai National Forest. The court noted that the Rescissions Act provides for "extremely limited judicial review," and the Act does not require the Secretary to personally authorize each salvage sale. Further, the Ninth Circuit affirmed the district court's actions in dismissing the action against the FWS and striking extra-record materials.

Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). On May 3, 1996, Judge Limbaugh granted federal defendants motion for summary judgment in this challenge to a salvage timber sale located on the Mark Twain National Forest. The Forest Service had proceeded with this sale under the categorical exclusion provision of NEPA. Plaintiffs challenged that a categorical exclusion did not comply with the Rescissions Act. The court rejected this argument. Notably, in this action, the court had contrary to express provisions of 2001, issued a TRO.

Idaho Sporting Congress v. USFS (D. Idaho) ("Thunderbolt III"). This represents the third challenge to a salvage sale offered as part of the Thunderbolt Fire Recovery Project. Plaintiffs allege violations of the public trust doctrine, the President's Directive for implementation of salvage sales and the APA. By order issued 4/19/96, the court granted summary judgment in favor of defendants on all counts.

The Armuchee Alliance v. King, District Ranger, (D. Georgia). Plaintiffs challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to release Southern Pine Beetle (SPB) Salvage Sales in the Chattahoochee National Forest. By order dated April 18, 1996, the court granted our motion for summary judgment on all counts. Specifically, the court concluded that the Timber Salvage Rider was not unconstitutionally vague, did not violate the separate of powers doctrine or equal protection clause, and did not unconstitutionally infringe upon plaintiffs' substantive and procedural due rights. Further, the court affirmed the Forest

Service's decision to invoke a categorical exclusion. We received notice from the court that this opinion was submitted for publication.

Alabama Wilderness v. Carter, (M.D. Ala. - Judge Thompson) Negotiations resulted in an agreement to dismiss this action, and on April 10, 1996 the court dismissed the action with prejudice. At issue in this second challenge to salvage timber sales in the Alabama National Forests, was the constitutionality of the Timber Salvage Rider, the Forest Service's decision to proceed with the sale and the use of a categorical exclusion.

Alabama Wilderness v. Yancy, (M.D. Ala.). This action was dismissed by agreement of the parties in February, 1996. Prior to our filing of a brief on the merits, plaintiffs and the Forest Service negotiated a settlement that released the 15 sales at issue. In this action, environmental groups challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to proceed with 15 salvage sales in the Conecuh National Forest.

Kentucky Heartwood v. USFS, 906 F. Supp. 410 (E.D. Ky. 1995). The court granted federal defendants' motion for summary judgment. Plaintiffs had challenged five salvage sales in the Daniel Boone National Forest and their impacts on the endangered Indiana bat. The court's decision was the first to address the applicable standard of review for salvage timber sales under the Rescissions Act. The court held an arbitrary and capricious review is the appropriate standard, yet the review is to be "extremely deferential."

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ATTORNEY/CLIENT DOCUMENT

LITIGATION UPDATE (4/30/96): RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan) (industry challenge to Administration's interpretation of scope and know to be nesting provisions) CONSOLIDATED with Scott Timber v. Glickman and Pilchuck Audubon Soc'y v. Glickman (challenge to temporal scope of Section 2001(k) and to intention to go forward with withdrawn and cancelled sales).

(1) Geographic Scope. On April 24, the Ninth Circuit issued an opinion affirming Judge Hogan's interpretation of the geographic scope of Section 2001(k). The Court focused on the plain language of the statute, as well as the legislative history.

(2) "Known to be Nesting" and Appeal. Appeal consolidated with appeal of 1/10/96 High Bidder Order. On January 19, 1996 Judge Hogan issued an opinion on the "known to be nesting" standard holding that (k)(2) requires evidence of nesting within sale unit boundaries. On 1/25/96 the District Court granted a 60-day stay of this order. By order issued April 5, 1996, the Ninth Circuit continued the stay of all provisions of the 1/19/96 Order.

(3) "High Bidder" and Appeal. The Ninth Circuit hearing is scheduled for May 7, 1996.

(4) Reporting Requirements. We filed a twelfth compliance report on April 26, 1996.

(5) Replacement Volume, Termination of (k)(1) and Modification or Termination of Existing Sale Contracts. The agencies continue to discuss possible interpretations and solutions to these issues.

Klamath Tribes v. United States, (D. Or.) The Klamath Tribe, represented by SCLDF, has filed an action seeking to enjoin the harvesting of eight timber sales on the Winema and Fremont National Forests in Oregon. The Tribe claims the U.S. and Forest Service are violating a trust responsibility to protect the Klamath Tribes' treaty rights to hunt and fish on these forests. The Forest Service is currently under an injunction from Judge Hogan to release all eight sales. Judge Haggerty will hold a consolidated hearing on the U.S. motion to transfer, Boise Cascade's motion to intervene, and the Tribes' motion for PI in Portland on May 6 at 2 pm.

Seattle Audubon Society v. Thomas (W.D. Wash., Dwyer, J.). In October 1995, SAS filed a motion to clarify and enforce injunctions issued in 1990 on the Cowboy, Nita, South Nita and Garden timber sales, and to clarify the ruling as to the First and Last sales. Industry filed a subsequent motion to vacate the injunctions on the basis of the Glickman Court's orders. On 2/22/96, Judge Dwyer issued an order staying a decision on the four enjoined sales pending a ruling by the Ninth Circuit.

The court on March 27, 1996 issued a ruling declaring that no further relief could be afforded as to the First and Last timber sales. Subsequently, the Forest Service entered into an agreement with the purchaser whereby these environmentally damaging sales will be substituted for less damaging sales.

Native Americans for Enola v. USFS (Ninth Circuit) The Enola Hill Sale located on Mount Hood NF was released pursuant to Section 2001(k)(1). The release was challenged on the basis of an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. The district court granted our motion to dismiss ruling that the Rescissions Act precludes plaintiffs substantive and procedural challenges (2/28/96). An appeal followed. **On Thursday April 25, Judge Marsh, finding plaintiffs have no likelihood of success on appeal, vacated his April 17 TRO and denied the plaintiffs' motion for stay and injunction pending appeal.**

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) In November, the purchaser of a timber sale that the Forest Service had suspended for NEPA issues, filed an order requesting that the sale be released under 2001(k). A hearing was held on January 23, 1996. The matter is under advisement. **A decision on this matter will likely be forthcoming as a result of the Ninth Circuit's recent opinion affirming geographic scope.**

DECISIONS/CLOSED ACTIONS FOR 2001(k):

Pacific Crest Biodiversity v. Glickman, (W.D. Wash.) On March 18, 1996, environmental plaintiffs filed a motion for TRO and PI as to the controversial Rocky timber sale located in the Olympic National Forest. The Rocky sale was originally offered under Section 318, and released pursuant to (k)(1). Plaintiffs contended the sale area contains northern spotted owls. On March 19, 1996 the court denied plaintiffs' motion.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). On February 1, 1996 federal defendants and SCLDF entered into a joint stipulation to dismiss the complaint without prejudice.

Oakhurst v. USFS (D. Or.). In January of 1996, the court dismissed this action by a pro se plaintiff that challenged the Sugarloaf Timber Sale. Plaintiff raised constitutional issues, the Civil Rights Act, the religious Freedom Restoration Act and the APA.

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Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). The Ozark Chapter filed a complaint in February challenging the actions of the Forest Service in awarding fire/drought salvage sales on the Mark Twain National Forest. In their motion for summary judgment, plaintiffs allege that the Forest Service's use of a categorical exclusion is arbitrary and capricious, the environmental documentation is insufficient, and the sales do not fall within the scope of the Rescissions Act. On 3/12/96, the court extended the briefing schedule beyond the 45-days and ordered the Forest Service not to sell or log the sales pending a final decision on this motion. The order directly contravenes § 2001(f)(3), which disallows PI/TROs in salvage timber sale cases. The motion is fully briefed and we await a ruling.

PENDING CIRCUIT COURT ACTIONS:

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona), on appeal. On March 14, the district court granted our motion for summary judgment and dismissed this challenge to the Rustler Fire Salvage Sale located on the Coronado National Forest, Arizona. Significantly, the court found that the Forest Service properly invoked a categorical exclusion (CE) for this sale, and the environmental documentation used by the Secretary was sufficient. The court indicated that this ruling will be submitted for publication. On April 3, 1996, plaintiffs filed a notice of appeal.

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Inland Empire Public Lands Council v. Glickman (Ninth Circuit) (Fire Salvage Sales) On March 13, 1996, a Ninth Circuit panel heard arguments on this environmental group's appeal of the district court's decision. In December, a district court in Montana granted summary judgment in favor of the Forest Service's actions to release fire salvage sales in the Kootenai National Forest. The panel focused on several areas including Congress' ability to pass the Emergency Timber Salvage Rider, the type of relief a court could grant under the Rider and the scope of challenges allowed by the Rider. We await a decision.

DECISIONS IN THE DISTRICT COURT:

Idaho Sporting Congress v. USFS (D. Idaho) ("Thunderbolt III"). This represents the third challenge to a salvage sale offered as part of the Thunderbolt Fire Recovery Project. Plaintiffs allege violations of the public trust doctrine, the President's Directive for implementation of salvage sales and the APA. **By order issued 4/19/96, the court granted summary judgment in favor of defendants on all counts.**

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