

NLWJC- Kagan

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Timber - Other Litigation: Seattle
Audubon v. Thomas [1]

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

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NUMBER OF PAGES: 4

DATE: April 2, 1996

FROM: Michelle Gilbert

MESSAGE: Please see attached.

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MAR 27 1996

MAR 27 1996

UNITED STATES ATTORNEY
Seattle, Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)

Plaintiffs,)

v.)

JACK WARD THOMAS, et al.,)

Defendants.)

and)

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,)

Defendants-
Intervenors.)

NO. C89-160WD

ORDER ON PLAINTIFFS'
RENOTED MOTIONS
RE FIRST AND LAST
TIMBER SALES

Cite and WCLD

The history of this matter is set out in the Order on Motions
Heard on November 1, 1995 (Dkt. # 1188), and the Order on SAS's
Motion to Clarify and Enforce and WCLA's Motion to Clarify or
Vacate (Dkt. # 1210). In the latter order, entered on Febru-
ary 23, 1996, the court ruled as follows:

The injunctions prohibiting the federal defendants
from going forward with the Cowboy, Nita, South Nita,
and Garden sales, entered herein, have never been vacat-
ed, and the only one appealed from was affirmed by the
Court of Appeals. The orderly administration of jus-
tice, and the avoidance of irreparable harm, require
that these injunctions not be vacated pending the Ninth
Circuit's decision in the appeals to be argued in the
week of May 6. If the Court of Appeals affirms the Dis-
trict of Oregon decision, this court will vacate the

1 injunctions; if it reverses, there will be no legal
2 authority for the agency to proceed with these four
3 sales.

4 The First and Last sales are in a different category.
5 They were never enjoined by this court but, instead,
6 were voluntarily cancelled by the Forest Service. As to
7 them the District of Oregon has issued not just a
8 declaratory judgment but an injunction requiring that
9 they go forward under Section 2001(k). The Court of
10 Appeals will decide whether they are within the scope of
11 Section 2001(k). These two sales are not the subject of
12 any injunction issued herein, and, as to them, WCLA's
13 motion must be granted and SAS's motion denied.

14 Plaintiffs Seattle Audubon Society, et al. (collectively
15 "SAS"), have now renoted two motions they originally filed in
16 1990. These motions sought summary judgment and a permanent
17 injunction against the First and Last timber sales in the Umpqua
18 National Forest in Oregon. Responsive briefs were never filed by
19 defendants. After other sales were enjoined as violative of
20 Section 318 of the Department of the Interior and Related Agencies
21 Appropriations Act, 1990, 103 Stat. 745 ("Section 318"), the
22 federal defendants withdrew the First and Last sales, recognizing
23 that they also would violate Section 318. The motions were
24 therefore stricken as moot. Dkt. # 675.

25 Under the short-term measure adopted in 1995, Section 2001(k)
26 of the Fiscal Year 1995 Emergency Supplemental Appropriations for
27 Disaster Relief and Rescissions Act ("Section 2001(k)"), the
28 federal defendants have been ordered by a judgment entered in the
29 District of Oregon to go forward with the First and Last sales.
30 The SAS parties in the present case are also intervenor-defendants
31 or amici curiae in the Oregon litigation. The judgment in the

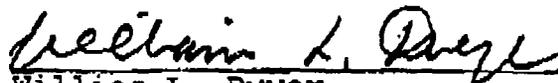
26

1 Oregon case is now on appeal, with argument in the Ninth Circuit
2 scheduled for the week of May 6, 1996.

3 The renoted SAS motions seek a ruling that the First and Last
4 sales are in violation of the substantive standards of Section
5 318. That proposition is not contested by the federal defendants.
6 Whether it follows that the sales are unauthorized under Section
7 2001(k) is a different question, however, and is now before the
8 Ninth Circuit. This 1989 case, in the course of which the First
9 and Last sales were withdrawn before final judgment was entered,
10 does not provide a vehicle for testing them under Section 2001(k),
11 particularly when the same issue has already been litigated
12 between substantially the same parties in an adjoining district.
13 For these reasons, the renoted motions are denied. SAS's motion,
14 raised in its reply brief, for relief from the judgment under Fed.
15 R. Civ. P. 60(b)(6) is also denied. The judgment contained no
16 provision adverse to SAS in the respect now argued.

17 The clerk is directed to send copies of this order to all
18 counsel of record.

19 Dated: March 27, 1996.

20
21 
22 William L. Dwyer
23 United States District Judge
24
25
26

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 PENNSYLVANIA AVENUE, N.W.
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NUMBER OF PAGES: 14

DATE: March 15, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: SAS v. Thomas. Attached is Federal Defendants' Response to Plaintiffs' Renoted Motion for Summary Judgment and Injunction as to the First and Last Timber Sales.

SAS' motion is noted for consideration today, but to the best of our knowledge, there is no hearing scheduled on this matter.

THE HONORABLE WILLIAM L. DWYER

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

7	SEATTLE AUDUBON SOCIETY, et al.,	)	Civil No. C89-160-WD
8	Plaintiffs,	)	FEDERAL DEFENDANTS'
9	v.	)	RESPONSE TO PLAINTIFFS'
10	JACK WARD THOMAS, et al.,	)	RENOTED MOTION FOR
11	Defendants.	)	SUMMARY JUDGMENT AND
12		)	INJUNCTION AS TO
		)	FIRST AND LAST TIMBER
		)	SALES

13 Plaintiffs have refiled two motions in this action:
 14 SAS' Motion for Summary Judgment and Permanent Injunction Against
 15 the Last Timber Sale, filed September 5, 1990, and SAS' Motion
 16 for Summary Judgment and Permanent Injunction Against the First
 17 Timber Sale, filed September 17, 1990. These motions contend
 18 that the First and Last Timber Sales violate the provisions of
 19 Section 318 of the Department of the Interior and Related
 20 Agencies Appropriations Act, 1990, 103 Stat. 745 ("Section
 21 318").¹

23 ¹ Pursuant to the outstanding injunction issued by the
 24 District Court of Oregon, contracts for the First and Last timber
 25 sales were awarded by the Forest Service on March 8, 1996.
 26 Operations have not commenced on the sales. The award of

(continued...)

1 1. The Government is sympathetic to the intent of plaintiffs'
2 motions. The First and Last timber sales are identical in form
3 to the four sales with respect to which the Court continued its
4 earlier injunctions pending decision by the Ninth Circuit (on
5 appeal from the decision of the District Court of Oregon)
6 regarding whether these sales are covered by Section 2001(k) of
7 the Rescissions Act of 1995. Order on SAS' Motion to Clarify and
8 Enforce and WCLA's Motion to Clarify or Vacate (Feb. 23, 1996)
9 ("Clarify Order "). The First and Last timber sales lie within a
10 Late Successional Reserve and a Key Watershed as those terms are
11 defined in the Northwest Forest Strategy. Attached declaration
12 of Claude C. McLean dated March 5, 1995, para. 7. At the time of
13 preparation of the Strategy, the Forest Service had no intention
14 of pursuing the award of these sales. Id.

15 2. This Court has reached its own conclusion that all six sales
16 involved in the prior proceedings in this Court would be
17 inconsistent with the Northwest Forest Strategy. See Order on
18 Motions Heard on November 1, 1995, p. 8 ("all six sales in
19 question would be illegal but for Section 2001(k)(1); they are
20 located in late-successional reserve areas, as defined by the
21 Northwest Forest Plan.") The Court has further concluded, as to
22 the four similarly situated enjoined sales, that if they are

23 _____
24 ¹(...continued)
25 contracts does not, of course, moot plaintiffs' motion for
26 summary judgment and injunction. See, generally, Headwaters, Inc.
v. Bureau of Land Management, 893 F.2d 1012 (9th Cir. 1990).

FEDERAL DEFENDANTS' RESPONSE TO
PLAINTIFFS' RENOTED MOTIONS - 2

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1 "irrevocably awarded for logging" prior to the Ninth Circuit's
2 ruling on the scope of Section 2001(k), "the harm would be
3 irreparable." Clarify Order p. 3.

4 3. The Forest Service cancelled the offers for the First and
5 Last sales in 1990 in light of the Court's rulings entering
6 summary judgment and granting an injunction in what the
7 Government termed "an identical matter" - section 318 challenges
8 to the enjoined Nita and South Nita Sales. See Defendants'
9 Memorandum in Response to SAS' Motion for Summary Judgment and
10 Permanent Injunction in Re First Timber Sale (10/3/90) (Dkt.
11 #670), p. 2. At that time, the Government advised the Court
12 that the First and Last sales would not be reoffered as part of
13 the Section 318 timber sale program, and the Court struck the
14 motions as moot. Minute Order (10/16/90) (Dkt# 675).

15 Thus, defendants agree that the sales could not have
16 proceeded under Section 318, and that the equities concerning
17 their sale and operation, in the context of the total history of
18 the Northwest old-growth controversy and its resolution in the
19 Northwest Forest Strategy upheld by this Court, strongly argue
20 that they not be released. Indeed, defendants would not have
21 awarded the contracts but for the enactment of Section 2001 and
22 the outstanding injunction issued by the District Court of Oregon
23 directing them to award the sales in the same form as originally
24 offered.

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FEDERAL DEFENDANTS' RESPONSE TO
PLAINTIFFS' RENOTED MOTIONS - 3

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1 4. The Government is also sympathetic to the posture in which
2 plaintiffs find themselves. Arguably, plaintiffs made a decision
3 not to pursue further proceedings against the First and Last
4 sales, following the Court's decision on mootness, on the basis
5 of a representation by the Forest Service that the sales would
6 not be reoffered. Under intervenors' interpretation of Section
7 2001(k), Congress has nullified that representation. The result
8 will doubtless discourage settlement of similar actions in the
9 future.

10 5. Defendants have repeatedly represented to the Courts that
11 they would not take a legal position on the First and Last sales.
12 In its role as an officer of this Court, the Department of
13 Justice is compelled to point out that plaintiffs' motion raises
14 two issues regarding the jurisdiction of this Court to act here.
15 These concern the expiration of Section 318, and the finality of
16 this Court's judgment.

17 a. Expiration of Section 318. Plaintiffs' motion appears
18 to assume that this Court presently has jurisdiction to entertain
19 an action under Section 318. Apparently, plaintiffs rely on the
20 proposition that because the sales will go forward in the form
21 originally offered, Section 318 still applies to them. See
22 plaintiffs' Renoting of Motions for Summary Judgment and
23 Permanent Injunction against the First and Last Timber
24 Sales, p. 3.

25 Section 318(k) provides:
26

1 Timber sales offered to meet the requirements
2 of subsection (a) of this section shall be
3 subject to the terms and conditions of this
4 section for the duration of those sale
contracts. All other provisions of this
section shall remain in effect until
September 30, 1990.

5 The Conference Report states as follows concerning the duration
6 of this statute:

7 In developing the amendment, the
8 managers have sought to balance the goals of
9 ensuring a predictable flow of public timber
for fiscal year 1990 and protecting the
10 northern spotted owl and significant old
growth forest stands. In reconciling these
11 often conflicting goals, the managers have
limited all provisions in this subsection to
12 fiscal year 1990, except that the timber
sales offered under this section in fiscal
13 year 1990 are covered by its terms and
conditions throughout the length of the
14 timber sale contracts. Sales offered under
this section but not awarded and withdrawn
15 after October 1, 1990 under normal Forest
Service and BLM procedures may not be
16 reoffered in subsequent fiscal years under
the terms of this section.

17 H. Conf. Rep. No. 101-264, 101st Cong., 1st Sess. 87 (1989)

18 A reasonable interpretation of Section 318(k) is that
19 Section 318 survives only with respect to those offers which
20 actually resulted in sales contracts prior to October 1, 1990.
21 Since the offers for the First and Last sales did not result in
22 award of a contract in fiscal year 1990, there is a question
23 whether Section 318 is available as a basis for a claim that this
24 Court presently has authority to enjoin these sales.

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FEDERAL DEFENDANTS' RESPONSE TO
PLAINTIFFS' RENOTED MOTIONS - 5

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1 This position would seem to be reinforced by the fact that the
2 offers for these sales were cancelled by the Forest Service. See
3 Plaintiffs' Memorandum in Support of Motion to Clarify and
4 Enforce Judgment (Oct. 3, 1995) pp. 17-18. As indicated by the
5 Conference Report quoted above, Congress did not intend to permit
6 withdrawn sales to be reoffered under Section 318 following the
7 expiration of the statute.

8 **b. Finality of Judgments.** Unlike the situation with the
9 four enjoined sales, there is no outstanding injunction or order
10 with prospective application as to the First and Last sales upon
11 which the Court can hinge its jurisdiction. Indeed the Court may
12 have determined this matter already in its February 23, 1996
13 Order. See Order on SAS Motion to Clarify and Enforce, etc., Feb.
14 23, 1996, pp. 3-4.

15 One basis upon which the Court might entertain these
16 renoted motions consistent with the rule regarding finality of
17 judgments is to consider them as motions under Rule 60(b)(6) to
18 vacate the Court's earlier judgment dismissing them as moot.²

19 _____
20 ² Under the pertinent provisions of 60(b)(6), for "any
21 other reason justifying relief from the operation of the
22 judgment," a court may relieve the party of a "final judgment,
23 order or proceedings." Fed. R. Civ. P. 60(b). Unlike
24 subsections (1)-(3) of Rule 60(b), there is no statutory time
25 limit on bringing a Rule 60(b)(6) motion. The rule merely
26 requires that it be brought "within a reasonable time," and the
Ninth Circuit has declared this to be a factual determination
committed to the sound discretion of the trial court judge.
Fed. R. Civ. P. 60(b)(6). See U.S. v. Alpine Land & Reservoir,
Co., 984 F.2d 1047, 1049 (9th Cir. 1993), cert. denied, 114 S.Ct.
(continued...)

1 The rule is available to provide relief to parties who are
 2 confronted with extraordinary circumstances that excuse their
 3 failure to follow ordinary paths of appeal. In re Pacific Far
 4 East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989). Applying
 5 the rule to this case would require the Court to find that the
 6 Forest Service's representation that the sales would not be
 7 reoffered, and the subsequent passage of 2001(k) (purportedly,
 8 under intervenors' construction of the statute, nullifying that
 9 representation) constitute "extraordinary circumstances" by
 10 reason of which plaintiffs were unfairly foreclosed from
 11 exercising their rights of appeal from the Court's judgment
 12 dismissing the actions as moot. The situation would be analogous
 13 to one where the parties entered into a settlement upon legal and
 14 factual bases that subsequent developments fundamentally altered,
 15 requiring equitable relief. See In re Pacific Far East Lines,

16
 17
 18 ²(...continued)

19 60 (1993). See also In re Pacific Far East Lines, Inc., 889 F.2d
 20 242, 249 (9th Cir. 1989). The Court clearly has the authority to
 21 treat plaintiffs' motion as a Rule 60(b)(6) motion. See Cisneros
 22 v. United States, 994 F.2d 1462, 1466 n.4 (9th Cir. 1993). The
 23 Supreme Court has set forth the general guidelines for
 24 application of Rule 60(b)(6):

25 The Rule does not particularize the factors that
 26 justify relief, but we have previously noted that it
 provides courts with "authority to enable them to
 vacate judgments whenever such action is appropriate to
 accomplish justice, while also cautioning that it
 should only be applied in "extraordinary
 circumstances."

Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847,
 863-64 (1988) (citations omitted).

FEDERAL DEFENDANTS' RESPONSE TO
 PLAINTIFFS' RENOTED MOTIONS - 7

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1 Inc., supra; see also 7 Moore, Federal Practice § 60.27[2] (1995)
2 (discussion, and cases cited n.53).

3 However, were the Court to reopen proceedings upon such a
4 basis, it would still have to determine that it had jurisdiction
5 to grant affirmative relief--in this case to grant summary
6 judgment and enter an injunction against the First and Last
7 timber sales pursuant to Section 318. Cf. Fairfax Countywide
8 Citizens Association v. County of Fairfax, Virginia, 571 F.2d
9 1299 (4th Cir. 1978), cert. denied, 439 U.S. 1047 (once
10 proceedings are reopened pursuant to a Rule 60(b)(6) motion,
11 district court not empowered to act without independent ground of
12 federal jurisdiction). Thus, the Court would still have to
13 consider whether it had jurisdiction to enjoin these sales.

14 CONCLUSION

15 The equities presented by plaintiffs' motion require this
16 Court, should it find jurisdiction to act, to accord to the First

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1 and Last timber sales the same treatment as that accorded to the
2 four enjoined sales pending decision by the Ninth Circuit on the
3 scope of Section 2001(k).

4 Dated this 11th day of March, 1996.

5 Respectfully submitted,

6
7 KATRINA C. PFLAUMER
8 United States Attorney

9 LOIS J. SCHIFFER
10 Assistant Attorney General

11 *Wells D. Burgess*
12 _____
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14 MICHELLE L. GILBERT
15 United States Department of Justice
16 Environment and Natural
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

SEATTLE AUDUBON SOCIETY, et al)	
)	
Plaintiffs,)	
	)	Civil No. 89-160-WD
v.)	
	)	DECLARATION OF
JACK WARD THOMAS, et al	)	CLAUDE C. MCLEAN
)	
Defendants.)	
)	

I, Claude C. McLean, hereby declare the following to be true and correct:

1. I am the Fire/Fuels/Air/Timber/Ecology Staff Officer for the Umpqua National Forest, headquartered in Roseburg, Oregon. I have been the Fire/Fuels/Air/Timber/Ecology Staff Officer for the Umpqua National Forest for 3 years. I have 34 years of experience with the Forest Service in timber sale preparation, contracting and administration.

DECLARATION OF CLAUDE C. MCLEAN
SEATTLE AUDUBON SOCIETY, et al v. THOMAS, et al
Civ. No. 89-160-WD

2. The First Timber Sale is located on the Tiller Ranger District of the Umpqua National Forest. It lies within Boulder Creek drainage of the South Umpqua Watershed. The sale is comprised of five cutting units, 1.9 miles of road construction, and 1.2 miles of road reconstruction, totaling 158 acres. None of the units exceed 42 acres. The timber to be harvested is predominately Douglas-fir, sugar pine, western hemlock, white fir, and incense cedar. Four of the units will be harvested by the clearcut method, leaving no residual standing trees, and one unit will be harvested by the shelterwood method, which will leave ten to fourteen trees per acre for seed source and shelter.

3. The Last Timber Sale is located on the Tiller Ranger District of the Umpqua National Forest. It lies within Boulder Creek drainage of the South Umpqua Watershed. The sale is comprised of seven cutting units, and 1.2 miles of road construction, totaling 141 acres. None of the units exceed 29 acres. The timber to be harvested is predominately Douglas-fir, sugar pine, western hemlock, white fir, and incense cedar. Six of the units will be harvested by the clearcut method, leaving no residual standing trees, and one unit will be harvested by the shelterwood method, which will leave ten to fourteen trees per acre for seed source and shelter.

4. The Umpqua National Forest Plan was amended by the Northwest Forest Plan in April 1994. The amendment made certain land allocations on the Umpqua National Forest that specify permitted management activities and establish standards and guidelines for the implementation of management activities. Two such land allocations are the Late-Successional Reserves (LSR) and Key Watersheds.

5. The LSRs are to be managed to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species, including the northern spotted owl. Limited timber stand management is permitted and subject to review by an interagency group, the Regional Ecosystem Office.

6. Key Watersheds are to be managed to maintain the existing watershed condition or lead to improved conditions. Key Watersheds overlay all other land allocations and place additional management requirements or emphasis on activities in those areas. Key Watersheds are 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 can be built in the unroaded portions of previously inventoried (RARE II) roadless areas; in other areas, there is to be no

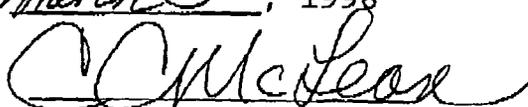
net increase in the amount of roads.

7. First and Last timber sales lie within an LSR and the South Umpqua Key Watershed. At the time of Northwest Forest Plan preparation in 1993 and 1994, the Forest Service had no intention of pursuing the award of these two sales. In fact, the Forest Service had rejected the bids for these sales in 1990. The Northwest Forest Plan Record of Decision, which amended the Umpqua Forest Plan, does not describe these two sales. It is not certain whether or not the Northwest Forest Plan considered the timber to be harvested from these sales, as it did with other described timber sales.

8. To date, the Forest Service has not undertaken any review of First and Last timber sales for their compliance or non-compliance with the Umpqua Forest Plan, as amended. These two sales were not a part of an aquatic strategy review made in 1993-94 of several other Umpqua National Forest timber sales.

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

Executed at Roseburg, Oregon, on March 5, 1996


CLAUDE C. MCLEAN

DECLARATION OF CLAUDE C. MCLEAN
SEATTLE AUDUBON SOCIETY, et al v. THOMAS, et al
Civ. No. 89-160-WD

Page 4



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NUMBER OF PAGES: 7

DATE: March 18, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: SAS v. Thomas. Attached is Plaintiffs' SAS Reply in Support of Renoted Motions (First and Last).

COPY

THE HONORABLE WILLIAM L. DWYER

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

SEATTLE AUDUBON SOCIETY, et al.,)	
)	
Plaintiffs,	)	Civil No. C89-160-WD
)	
v.)	
	)	PLAINTIFFS' REPLY IN SUPPORT
JACK WARD THOMAS, et al.,	)	OF RENOTED MOTIONS
)	
Defendants.)	

INTRODUCTION

Plaintiffs Seattle Audubon Society et al. (collectively "SAS") have renewed their motions for summary judgment and injunctive relief for the First and Last timber sales on the Umpqua National Forest. These sales were originally challenged in September 1990 for violating § 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121 (1989). Facing certain injunctions, the Forest Service withdrew the sales, and this Court struck the motions for summary judgment and permanent injunction as moot. Order at 1-2 (Oct. 16, 1990).

The First and Last timber sales "are identical in form to

1 the four sales with respect to which the Court continued its
2 earlier injunctions." Fed. Defs' Resp. to Renoted Motions at 2.
3 However, because the Court had no injunction in place to
4 continue, there was no relief available for First and Last,
5 despite the irrevocable harm that logging will cause. First and
6 Last not only violate § 318, but they "also contravene and
7 jeopardize the Northwest Forest Plan." Order on SAS's Motion to
8 Clarify at 2 (Feb. 22, 1996). The Forest Service has now awarded
9 the contracts for the First and Last timber sales. See Fed.
10 Defs' Resp. to Renoted Motions at 1 n.1.

11 ANALYSIS

12 I. FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6)

13 A district court may relieve a party from a final judgment,
14 order, or proceeding for "any other reason justifying relief from
15 the operation of the judgment." Fed. R. Civ. P. 60(b)(6). This
16 rule gives district courts the power to vacate final orders
17 "whenever such action is appropriate to accomplish justice."
18 United States v. Sparks, 685 F.2d 1128, 1130 (9th Cir. 1982).

19 The federal defendants agree with SAS that the requirement
20 of "extraordinary circumstances" for relief under Rule 60(b)(6)
21 is met here. See Fed. Defs' Resp. to Renoted Motions at 6-8.
22 Washington Contract Loggers Association ("WCLA") only obliquely
23 mentions Rule 60(b)(6), see WCLA Opp. to Renoted Motions at 2
24 n.1. and WCLA's reference to Maraziti v. Thorpe, 52 F.3d 252,
25 254-55 (9th Cir. 1995), is unhelpful. In Maraziti, the
26 extraordinary circumstances raised in the Rule 60(b) motion were
27 simply a reiteration of an earlier argument made before final

1 judgment. Here, the extraordinary circumstances arise from the
2 Forest Service reneging on representations that led to the
3 dismissal of these motions as moot. Clearly, SAS did not make
4 any arguments like this in 1990 or 1991.

5 Five years ago, this Court explicitly stated that SAS would
6 be permitted to renew its motions "should the Forest Service
7 advertise or otherwise proceed with any of these five sales."
8 Order (March 7, 1991). The five sales at issue included First
9 and Last. The enactment of § 2001(k) and the Oregon district
10 court's interpretation, which revives sales cancelled or enjoined
11 long ago, is an extraordinary circumstance that justifies
12 renewing these motions for summary judgment.

13 II. SECTION 318 GOVERNS THE ORIGINAL TERMS AND CONDITIONS OF
14 THESE SALES

15 Section 2001(k) of the 1995 Rescissions Act draws its
16 meaning from the past -- that is, it compels the government to
17 proceed with timber sale contracts offered or awarded between
18 Oct. 23, 1989 and July 27, 1995 "with no change in originally
19 advertised terms, volumes, and bid prices." See § 2001(k)(1).
20 It does not create new timber sale contracts. Section 318
21 defines the original terms and conditions for the First and Last
22 timber sales. In reviving these sales, the government has also
23 revived § 318.

24 Many of the plaintiffs in this case are also parties in
25 Northwest Forest Resource Council v. Glickman, No. 95-6244-HO (D.
26 Or.) (appeals pending). In NERC, environmental groups have
27 argued that § 2001(k) cannot resurrect timber sales which were
cancelled or enjoined prior to passage of the Rescissions Act.

1 The federal defendants' questions about jurisdiction and the
 2 expiration of § 318 highlight exactly the dilemma presented by
 3 the Oregon district court ruling. The original terms and
 4 conditions for First and Last come from § 318. If § 318 has
 5 expired, then either these sales cannot be resurrected through §
 6 2001(k) -- the argument rejected by the Oregon district court --
 7 or § 318, with its particular requirements, has been resurrected
 8 along with the sales.

9 Section 2001(k) does not allow timber sales to be reoffered;
 10 it only reactivates prior offers. As the Conference Report to §
 11 318 states, "timber sales offered under this section in fiscal
 12 year 1990 are covered by its terms and conditions throughout the
 13 length of the timber sale contracts. Sales offered under this
 14 section but not awarded and withdrawn after October 1, 1990 ...
 15 may not be reoffered in subsequent fiscal years under the terms
 16 of this section." H. Conf. Rep. No. 101-264, 101st Cong., 1st
 17 Sess. 87 (1989). First and Last must live and die by the
 18 requirements of § 318. If the First and Last timber sales were
 19 invalid when offered, as SAS contended in 1990 and contends now,
 20 the offers were null and void then, are null and void now, and
 21 are not resuscitated by § 2001(k).

22 III. NOTWITHSTANDING ANY OTHER PROVISION OF LAW

23 WCLA rests its argument on the "notwithstanding any other
 24 provision of law" language in § 2001(k)(1).^{1/} However, the

25
 26 ^{1/} WCLA misstates the recent procedural history of these two
 27 sales. SAS did not ask Judge Hogan to stay his January 10, 1996
 order in NFRC v. Glickman as to First and Last; the federal
 defendants' asked Judge Hogan for such a stay. See WCLA Opp. to
 Renoted Motions at 2-3.

1 motions on First and Last are not renoted under § 2001(k)(1);
2 they are renoted under § 318 for violations of § 318. This Court
3 has indicated that, but for the lack of a prior injunctive order,
4 First and Last's unlogged status would have been retained until
5 the Ninth Circuit Court of Appeals issues an opinion on these
6 issues. See Order at 3-4 (Feb. 22, 1996). These renoted motions
7 for summary judgment and permanent injunction provide the vehicle
8 for the Court to treat like issues and timber sales alike,
9 avoiding an inequitable result simply because the government
10 ceased illegal conduct five years ago to avoid judicial review.
11 If this Court issues an injunction against these sales under §
12 318, the issue of § 2001(k)'s mandates can then be addressed.

13 Moreover, in order for the dictates of § 2001(k) and its
14 "notwithstanding" language to apply, there must be an
15 outstanding, viable offer, and there is no such offer here. The
16 offers for First and Last were withdrawn by the Forest Service,
17 removing them from the pool of outstanding offers upon which §
18 2001(k) acts. Indeed, First and Last were withdrawn because they
19 were about to be pronounced illegal by this Court -- another
20 reason why the offers were then, and are now, null and void.

21 Additionally, the Ninth Circuit has refused to read
22 "notwithstanding any other provision of law" as a blanket
23 eradication of all other laws. In re Glacier Bay, 944 F.2d 577,
24 582 (9th Cir. 1991). Instead, it has applied ordinary standards
25 for determining whether a statute implicitly repeals a previous
26 law, such as whether there is a direct conflict between the new
27 law containing the phrase and other laws that otherwise would

1 apply. Id. Here, § 2001(k) expressly uses the phrase "subject
2 to Section 318," overriding any inference from the use of the
3 general phrase "notwithstanding any other provision of law" that
4 § 318 has been eradicated.

5 CONCLUSION

6 For the reasons stated above, in SAS' Renoting of Motions,
7 and in prior briefing concerning these issues, SAS respectfully
8 renews its motions for summary judgment and permanent injunction
9 with respect to the First and Last timber sales.

10 DATED this 14th day of March, 1996.

11 Respectfully submitted,

12
13 *Kristen L. Boyles*
14 PATTT A. GOLDMAN (WSB #24426)
15 TODD D. TRUE (WSB #12864)
16 KRISTEN L. BOYLES (WSB #23806)
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FAX NUMBER 305-0506, -0267, -0429
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NUMBER OF PAGES: 9

DATE: March 11, 1996

FROM: Wells Burgess, (202) 305-0445

MESSAGE: SAS v. Thomas. The attached draft reflects agency comments to date.

DRAFT - VERSION 4 (final edit)

THE HONORABLE WILLIAM L. DWYER

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

SEATTLE AUDUBON SOCIETY, et al.,	)	Civil No. C89-160-WD
)	
Plaintiffs,	)	FEDERAL DEFENDANTS'
	)	RESPONSE TO PLAINTIFFS'
v.	)	RENOTED MOTION FOR
	)	SUMMARY JUDGMENT AND
JACK WARD THOMAS, et al.,	)	INJUNCTION AS TO
	)	FIRST AND LAST TIMBER
Defendants.	)	SALES
)	
)	

Plaintiffs have refiled two motions in this action: SAS' Motion for Summary Judgment and Permanent Injunction Against the Last Timber Sale, filed September 5, 1990, and SAS' Motion for Summary Judgment and Permanent Injunction Against the First Timber Sale, filed September 17, 1990. These motions contend that the First and Last Timber Sales violate the provisions of Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745 ("Section 318").¹

1. The Government is sympathetic to the intent of plaintiffs' motions. The First and Last timber sales are identical in form

¹ Pursuant to the outstanding injunction issued by the District Court of Oregon, contracts for the First and Last timber sales were awarded by the Forest Service on March 8, 1996. Operations have not commenced on the sales. The award of contracts does not, of course, moot plaintiffs' motion for summary judgment and injunction. See, generally, Headwaters, Inc. v. Bureau of Land Management, 893 F.2d 1012 (9th Cir. 1990).

to the four sales with respect to which the Court continued its earlier injunctions pending decision by the Ninth Circuit (on appeal from the decision of the District Court of Oregon) regarding whether these sales are covered by Section 2001(k) of the Rescissions Act of 1995. Order on SAS' Motion to Clarify and Enforce and WCLA's Motion to Clarify or Vacate (Feb. 23, 1996) ("Clarify Order "). The First and Last timber sales lie within a Late Successional Reserve and a Key Watershed as those terms are defined in the Northwest Forest Strategy. Attached declaration of Claude C. McLean dated March 5, 1995, para. 7. At the time of preparation of the Strategy, the Forest Service had no intention of pursuing the award of these sales. Id.

2. This Court has reached its own conclusion that all six sales involved in the prior proceedings in this Court would be inconsistent with the Northwest Forest Strategy. See Order on Motions Heard on November 1, 1995, p. 8 ("all six sales in question would be illegal but for Section 2001(k) (1); they are located in late-successional reserve areas, as defined by the Northwest Forest Plan.") The Court has further concluded, as to the four similarly situated enjoined sales, that if they are "irrevocably awarded for logging" prior to the Ninth Circuit's ruling on the scope of Section 2001(k), "the harm would be irreparable." Clarify Order p. 3.

3. The Forest Service cancelled the offers for the First and Last sales in 1990 in light of the Court's rulings entering summary judgment and granting an injunction in what the Government termed

"an identical matter" - section 318 challenges to the enjoined Nita and South Nita Sales. See Defendants' Memorandum in Response to SAS' Motion for Summary Judgment and Permanent Injunction in Re First Timber Sale (10/3/90) (Dkt. #670), p. 2. At that time, the Government advised the Court that the First and Last sales would not be reoffered as part of the Section 318 timber sale program, and the Court struck the motions as moot. Minute Order (10/16/90) (Dkt# 675).

Thus, defendants agree that the sales could not have proceeded under Section 318, and that the equities concerning their sale and operation, in the context of the total history of the Northwest old-growth controversy and its resolution in the Northwest Forest Strategy upheld by this Court, strongly argue that they not be released. Indeed, defendants would not have awarded the contracts but for the outstanding injunction issued by the District Court of Oregon directing them to award the sales in the same form as originally offered.

4. The Government is also sympathetic to the posture in which plaintiffs find themselves. Arguably, plaintiffs made a decision not to pursue further proceedings against the First and Last sales, following the Court's decision on mootness, on the basis of a representation by the Forest Service that the sales would not be reoffered. Under intervenors' interpretation of Section 2001(k), Congress has nullified that representation. The result will doubtless discourage settlement of similar actions in the future.

5. Defendants have repeatedly represented to the Courts that they would not take a legal position on the First and Last sales. In its role as an officer of this Court, the Department of Justice is compelled to point out that plaintiffs' motion raises two issues regarding the jurisdiction of this Court to act here. These concern the expiration of Section 318, and the finality of this Court's judgment.

a. Expiration of Section 318. Plaintiffs' motion appears to assume that this Court presently has jurisdiction to entertain an action under Section 318. Apparently, plaintiffs rely on the proposition that because the sales will go forward in the form originally offered, Section 318 still applies to them. See plaintiffs' Renoting of Motions for Summary Judgment and Permanent Injunction against the First and Last Timber Sales, p. 3.

Section 318(k) provides:

Timber sales offered to meet the requirements of subsection (a) of this section shall be subject to the terms and conditions of this section for the duration of those sale contracts. All other provisions of this section shall remain in effect until September 30, 1990.

The Conference Report states as follows concerning the duration of this statute:

In developing the amendment, the managers have sought to balance the goals of ensuring a predictable flow of public timber for fiscal year 1990 and protecting the northern spotted owl and significant old growth forest stands. In reconciling these often conflicting goals, the managers have limited all provisions in this subsection to

fiscal year 1990, except that the timber sales offered under this section in fiscal year 1990 are covered by its terms and conditions throughout the length of the timber sale contracts. Sales offered under this section but not awarded and withdrawn after October 1, 1990 under normal Forest Service and BLM procedures may not be reoffered in subsequent fiscal years under the terms of this section.

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

A reasonable interpretation of Section 318(k) is that Section 318 survives only with respect to those offers which actually resulted in sales contracts prior to October 1, 1990. Since the offers for the First and Last sales did not result in award of a contract in fiscal year 1990, it would appear that Section 318 is not available as a basis for a claim that this Court presently has authority to enjoin these sales.

This position would seem to be reinforced by the fact that the offers for these sales were cancelled by the Forest Service. See Plaintiffs' Memorandum in Support of Motion to Clarify and Enforce Judgment (Oct. 3, 1995) pp. 17-18. As indicated by the Conference Report quoted above, Congress did not intend to permit withdrawn sales to be reoffered under Section 318 following the expiration of the statute.

b. Finality of Judgments. Unlike the situation with the four enjoined sales, there is no outstanding injunction or order with prospective application as to the First and Last sales upon which the Court can hinge its jurisdiction. Indeed the Court may have determined this matter already in its February 23, 1996

Order. See Order on SAS Motion to Clarify and Enforce, etc., Feb. 23, 1996, pp. 3-4.

One basis upon which the Court might entertain these renoted motions consistent with the rule regarding finality of judgments is to consider them as motions under Rule 60(b)(6) to vacate the Court's earlier judgment dismissing them as moot.² The rule is available to provide relief to parties who are confronted with extraordinary circumstances that excuse their failure to follow ordinary paths of appeal. In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989). Applying the rule to this case would require the Court to find that the Forest Service's representation that the sales would not be

² Under the pertinent provisions of 60(b)(6), for "any other reason justifying relief from the operation of the judgment," a court may relieve the party of a "final judgment, order or proceedings." Fed. R. Civ. P. 60(b). Unlike subsections (1)-(3) of Rule 60(b), there is no statutory time limit on bringing a Rule 60(b)(6) motion. The rule merely requires that it be brought "within a reasonable time," and the Ninth Circuit has declared this to be a factual determination committed to the sound discretion of the trial court judge. Fed. R. Civ. P. 60(b)(6). See U.S. v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993), cert. denied, 114 S.Ct. 60 (1993). See also In re Pacific Far East Lines, Inc., 889 F.2d 242, 249 (9th Cir. 1989). The Court clearly has the authority to treat plaintiffs' motion as a Rule 60(b)(6) motion. See Cisneros v. United States, 994 F.2d 1462, 1466 n.4 (9th Cir. 1993). The Supreme Court has set forth the general guidelines for application of Rule 60(b)(6):

The Rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with "authority to enable them to vacate judgments whenever such action is appropriate to accomplish justice, while also cautioning that it should only be applied in "extraordinary circumstances."

Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847, 863-64 (1988) (citations omitted).

reoffered, and the subsequent passage of 2001(k) (purportedly, under intervenors' construction of the statute, nullifying that representation) constitute "extraordinary circumstances" by reason of which plaintiffs were unfairly foreclosed from exercising their rights of appeal from the Court's judgment dismissing the actions as moot. The situation would be analogous to one where the parties entered into a settlement upon legal and factual bases that subsequent developments fundamentally altered, requiring equitable relief. See In re Pacific Far East Lines, Inc., supra; see also 7 Moore, Federal Practice § 60.27[2] (1995) (discussion, and cases cited n.53).

However, were the Court to reopen proceedings upon such a basis, it would still have to determine that it had jurisdiction to grant affirmative relief--in this case to grant summary judgment and enter an injunction against the First and Last timber sales pursuant to Section 318. Cf. Fairfax Countywide Citizens Association v. County of Fairfax, Virginia, 571 F.2d 1299 (4th Cir. 1978), cert. denied, 439 U.S. 1047 (once proceedings are reopened pursuant to a Rule 60(b)(6) motion, district court not empowered to act without independent ground of federal jurisdiction). Thus, the Court would still have to consider whether it had jurisdiction to enjoin sales for violation of a statute under which they can no longer be offered.

CONCLUSION

The equities presented by plaintiffs' motion require this Court, should it find jurisdiction to act, to accord to the First

and Last timber sales the same treatment as that accorded to the four enjoined sales pending decision by the Ninth Circuit on the scope of Section 2001(k).

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NUMBER OF PAGES: 8

DATE: March 8, 1996

FROM: Wells Burgess, (202) 305-0445

MESSAGE: SAS v. Thomas. Concerns were raised about the consistency of some of the statements made in version 3 of our draft response to the renoted motions for summary judgment, with our position on appeal. This occasioned a restructuring of our comments on jurisdiction and some further research. Enclosed is version 4, which represents our recommended response. We intend to file a response on Monday 3/11 in accordance with the Court's order. Comments by 10 AM Monday please.

*my recommendation on
last paragraph, p. 5 -
"Defendants recommend
that the Court consider
entertaining these renoted
motions"*

DRAFT - VERSION 4

THE HONORABLE WILLIAM L. DWYER

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

SEATTLE AUDUBON SOCIETY, et al.,	)	Civil No. C89-160-WD
)	
Plaintiffs.	)	FEDERAL DEFENDANTS'
	)	RESPONSE TO PLAINTIFFS'
v.	)	RENOTED MOTION FOR
)	SUMMARY JUDGMENT AND
JACK WARD THOMAS, et al.,)	INJUNCTION AS TO
)	FIRST AND LAST TIMBER
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The Government is sympathetic to the intent of plaintiffs' motion. These timber sales are identical in form to the four sales with respect to which the Court continued its earlier injunctions pending decision by the Ninth Circuit (on appeal from the decision of the District Court of Oregon) regarding whether these sales are covered by Section 2001(k) of the

Rescissions Act of 1995. Order on SAS' Motion to Clarify and Enforce and WCLA's Motion to Clarify or Vacate (Feb. 23, 1996). ("Clarify Order"). This Court has reached its own conclusion that all of the six sales involved in the prior proceedings in this Court would be inconsistent with the Northwest Forest Strategy. See Order on Motions Heard on November 1, 1995, p. 8 ("all six sales in question would be illegal but for Section 2001(k)(1); they are located in late-successional reserve areas, as defined by the Northwest Forest Plan.") The Court has further concluded, as to the similarly situated enjoined sales, that if they are "irrevocably awarded for logging" prior to the Ninth Circuit's ruling on the scope of Section 2001(k), that "the harm would be irreparable." Clarify Order p. 3.

These offers for these sales were cancelled by the Government in 1990 in light of the Court's rulings in what the Government termed "an identical matter" - section 318 challenges to the Nita and South Nita Sales - that entered summary judgment and granted injunctive relief to the plaintiffs. See Defendants' Memorandum in Response to SAS' Motion for Summary Judgment and Permanent Injunction in Re First Timber Sale (10/3/90) (Dkt. #670), p. 2. The Forest Service advised the Court that these two sales would not be reoffered as part of Section 318 timber sale program, and the Court struck the motions as moot. Minute Order (10/16/90) (Dkt# 675).

The First and Last Timber Sales lie within a Late Successional Reserve and a Key Watershed as those terms are

defined in the Northwest Forest Strategy. Attached declaration of Claude C. McLean dated March 5, 1995, para. 7. At the time of preparation of the Strategy, the Forest Service had no intention of pursuing the award of these sales. Id.

Thus, defendants agree that the sales could not have proceeded under Section 318, and that the equities concerning their sale and operation, in the context of the total history of the Northwest old-growth controversy and its resolution in the Northwest Forest Strategy upheld by this Court, strongly argue that they not be released.¹ Indeed, defendants would not award the contracts but for the outstanding injunction issued by the District Court of Oregon directing them to award the sales in the same form as originally constituted.

At the same time, defendants have repeatedly represented to the Courts that they would not take a legal position on these sales. In its role as an officer of this Court, the Department of Justice is compelled to point out that plaintiffs' motion raises ^{sublime} serious issues regarding the jurisdiction of this Court to act in this matter. These concern the expiration of Section 318, and the finality of this Court's judgment. We speak to these issues below.

¹ The Government is further sympathetic with the posture in which plaintiffs find themselves. Arguably, plaintiffs made a decision not to pursue further proceedings against the sales, following the Court's decision on mootness, on the basis of a representation by the Forest Service that the sales would not be reoffered. Under intervenors' interpretation of Section 2001(k), Congress has nullified that representation. The result will doubtless discourage settlement of similar actions in the future.

1. Expiration of Section 318. Plaintiffs' motion appears to assume that this Court presently has jurisdiction to entertain an action under Section 318. Apparently, plaintiffs rely on the proposition that because the sales will go forward in the form originally offered, Section 318 still applies to them. See plaintiffs' Renoting of Motions for Summary Judgment and Permanent Injunction against the First and Last Timber Sales, p. 3.

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Section 318(k).

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3. Finality of Judgments. Unlike the situation with the four enjoined sales, there is no outstanding injunction or order with prospective application as to the First and Last sales upon which the Court can hinge its jurisdiction. Indeed the Court may have determined this matter already in its February 23, 1996 Order. See Order on SAS Motion to Clarify and Enforce, etc., Feb. 23, 1996, pp. 3-4.

One basis upon which the Court might entertain these renoted motions consistent with the rule regarding finality of judgments is to treat them as a motion under Rule 60(b)(6) to vacate the Court's earlier judgment dismissing them as moot.²

² The pertinent provisions of 60(b)(6) state that for "any other reason justifying relief from the operation of the (continued...)"

The rule is available to provide relief to parties who were confronted with extraordinary circumstances that excused their failure to follow ordinary paths of appeal. In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989). Applying the rule to this case would require the Court to find that the Forest Service's representation that the sales would not be reoffered, and the subsequent passage of 2001(k) (purportedly, under intervenors' construction of the statute, nullifying that representation) constituted "extraordinary circumstances" by reason of which plaintiffs were unfairly foreclosed from exercising their rights of appeal (from the Court's judgment dismissing the actions as moot). The situation would be analogous to one where the parties entered into a settlement upon

²(...continued)

judgment," a court may relieve the party of a" final judgment, order or proceedings." Fed. R. Civ. P. 60(b). Unlike subsections (1)-(3) of Rule 60(b), there is no statutory time limit on bringing a (b)(6) motion. The rule merely requires that it be brought "within a reasonable time," and the Ninth Circuit has declared this to be a factual determination committed to the sound discretion of the trial court judge. Fed. R. Civ. P. 60(b)(6). See U.S. v. Alpine Land & Reservoir, Co., 984 F.2d 1047, 1049 (9th Cir. 1993), cert. denied, 114 S.Ct. 60 (1993). See also In re Pacific Far East Lines, Inc., 889 F.2d 242, 249 (9th Cir. 1989). The Court clearly has the authority to treat plaintiffs' motion as a Rule 60(b)(6) motion. See Cisneros v. United States, 994 F.2d 1462, 1466 n.4 (9th Cir. 1993). The Supreme Court has set forth the general guidelines for application of Rule 60(b)(6):

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legal and factual bases that subsequent developments fundamentally altered, requiring equitable relief. See In re Pacific Far East Lines, Inc., supra; see also 7 Moore, Federal Practice § 60.27[2] (1995) (discussion, and cases cited n.53).

However, were the Court to reopen proceedings upon such a basis, it would still have to determine whether it had jurisdiction to grant affirmative relief, in this case to grant summary judgment and enter an injunction against the First and Last timber sales pursuant to Section 318. Cf. Fairfax Countywide Citizens Association v. County of Fairfax, Virginia, 571 F.2d 1299 (4th Cir. 1978), cert. denied, 439 U.S. 1047 (once proceedings are reopened pursuant to a Rule 60(b)(6) motion, district court not empowered to act without independent ground of federal jurisdiction). Thus, the Court would still have to consider whether it had jurisdiction to enjoin ^{these} sales ~~for violation of a statute under which they can no longer be offered.~~

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NUMBER OF PAGES: 17

DATE: March 11, 1996

FROM: Wells Burgess, (202) 305-0445

MESSAGE: SAS v. Thomas. Attached is industry's opposition to plaintiffs' renoted motion for judgment and injunction against the First and Last timber sales. It relies entirely on 2001 and Judge Hogan's opinion, with a passing reference to the finality of judgment issue.

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Honorable William L. Dwyer

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

SEATTLE AUDUBON SOCIETY, et)	
al.,	)	Civil No. C89-160WD
)	
Plaintiffs,	)	WCLA'S MEMORANDUM IN
	)	OPPOSITION TO SAS' RENOTED
vs.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND PERMANENT INJUNCTION
JACK WARD THOMAS, et al.,	)	AGAINST FIRST AND LAST
	)	TIMBER SALES
Defendants,)	
)	
and)	
)	
WASHINGTON CONTRACT LOGGERS)	
ASSOCIATION, et al.,)	
)	
Defendants-Intervenors.)	

INTRODUCTION

SAS's renoted motion for summary judgment on the First and Last timber sales must be denied under section 2001 of the Rescissions Act. Judge Hogan has already ruled that section 2001(k) requires the First and Last sales to be awarded, released and completed "notwithstanding any other provision of law." This

WCLA'S MEMORANDUM IN OPPOSITION TO SAS' RENOTED
MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION
AGAINST FIRST AND LAST TIMBER SALES - 1

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
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N01-9508\1RB91029.1H7

1 section of the Rescissions Act forbids application of any
2 conflicting law that would prohibit the award, release and
3 completion of the sales, and therefore bars the relief requested
4 by SAS.¹

5 **ARGUMENT**

6 **SECTION 2001(k)(1) COMPELS THE AWARD, RELEASE AND**
7 **COMPLETION OF THE FIRST AND LAST TIMBER SALES, AND BARS**
8 **ANY INJUNCTION AGAINST THE TWO SALES.**

9 Judge Hogan has already determined that section 2001(k)(1)
10 of the Rescissions Act requires the Secretary of Agriculture to
11 award, release and permit completion in fiscal years 1995 and
12 1996 of the First and Last timber sales "notwithstanding any
13 other provision of law." *NFERC v. Glickman*, No. 95-6244-HO
(Order, January 10, 1996).

14 On February 8, 1996 the Ninth Circuit denied SAS' motion for
15 a stay of that injunctive order. On February 23, 1996 this court
16 granted WCLA's motion to clarify or vacate the judgment as to the
17 First and Last sales, ruling that "no relief can be ordered in
18 this case." Order on SAS's Motion To Clarify and Enforce And
19 WCLA's motion To Clarify or Vacate (February 23, 1996) at 4.

20 After SAS filed its renoted motion for summary judgment and
21 permanent injunction on the First and Last sales, it asked Judge

22
23 ¹ The final judgment entered in this case on April 10, 1992
24 contained no relief against the First and Last timber sales.
25 This final judgment bars further litigation against the First and
26 Last timber sales in this case unless SAS seeks and obtains
relief from the judgment under Rule 60(b). SAS has not requested
or obtained relief under Rule 60(b). It is not clear that relief
is available in this case under Rule 60(b). *Maraziti v. Thorpe*,
52 F.3d 252, 254-55 (9th Cir. 1995).

WCLA'S MEMORANDUM IN OPPOSITION TO SAS' RENOTED
MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION
AGAINST FIRST AND LAST TIMBER SALES - 2

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NO1-9508\1R891029.147

1 Hogan to stay his January 10 order in *NFRC v. Glickman* as to the
2 two sales pending this court's ruling on the renoted motion. On
3 March 1, 1996 Judge Hogan denied SAS' motion. Attachment 1.

4 SAS's latest effort to block the two sales is barred by the
5 Rescissions Act for the same reasons its previous efforts failed.
6 The "notwithstanding any other provision of law" clause in
7 section 2001(k)(1) means that no other law, including section
8 318, can stand in the way of award, release and completion of
9 these two sales during fiscal years 1995 and 1996. The Ninth
10 Circuit has explained that the phrase "notwithstanding any other
11 provision of law":

12 clearly forbids, on its face, applicability
13 of any other provision that may contradict
14 the terms of the provision in the absence of
15 any subsequent federal statute that might
16 modify or supersede the provision in some
17 way.

18 *California Nat'l Guard v. Federal Labor Relations Auth.*, 697 F.2d
19 874, 879 (9th Cir. 1983). A direction to act notwithstanding
20 another law exempts the required action from the other law. *Stop*
21 *H-3 Ass'n v. Dole*, 870 F.2d 1419, 1425 (9th Cir. 1989).

22 Other courts similarly give a "notwithstanding any other
23 provision of law" clause equally broad effect. The clause
24 "overrides any conflicting provision of law," *American Federation*
25 *of Gov. Employees v. FLRA*, 46 F.3d 73, 76 (D.C. Cir. 1995),
26 quoting *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283
(3d Cir. 1982), "takes precedence over any preexisting or subse-
quently enacted . . . legislation," *U.S. v. McLymont*, 45 F.3d

WCLA'S MEMORANDUM IN OPPOSITION TO SAS' RENOTED
MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION
AGAINST FIRST AND LAST TIMBER SALES - 3

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NO1-9608\1R891029.1H7

1 400, 401 (11th Cir. 1995), and "precludes application" of
2 conflicting laws. *Complaint of Hokkaido Fisheries Co., Ltd.*, 506
3 F. Supp. 631, 634 (D. Ak. 1981).

4 Since section 2001(k)(1) mandates the award, release and
5 completion of the First and Last sales, as Judge Hogan held, the
6 "notwithstanding any other provision of law" clause in the
7 statute "forbids applicability" of any law - including section
8 318 - that would prohibit the award, release and completion of
9 the two sales. *California Nat'l Guard v. Federal Labor Relations*
10 *Auth.*, 697 F.2d at 879.

11 Section 2001(k)(1) therefore bars this court from enjoining
12 the two sales based on a violation of section 318. *In Re Glacier*
13 *Bay*, 944 F.2d 577, 581-83 (9th Cir. 1991) ("notwithstanding any
14 other provision of law" clause implicitly repeals conflicting
15 statute).

16 Judge Hogan recently addressed a similar issue under section
17 2001(k) of the Rescissions Act in *Oregon Natural Resources*
18 *Council v. Thomas*, No. 95-6272-HO (D. Or.), where the plaintiffs
19 sought an injunction against two section 2001(k) timber sales
20 based on an alleged violation of the National Forest Management
21 Act. Judge Hogan ruled that section (k)'s "notwithstanding any
22 other provision of law" clause barred the requested relief, and
23 dismissed the action. *Id.* Order at 3-4, 8 (December 5, 1995)
24 (Attachment 2), appeal pending, 9th Cir. No. 95-35256 (argued
25 March 4, 1996).

26 The same result applies here. Section 2001(k)(1) requires

WCLA'S MEMORANDUM IN OPPOSITION TO SAS' RENOTED
MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION
AGAINST FIRST AND LAST TIMBER SALES - 4

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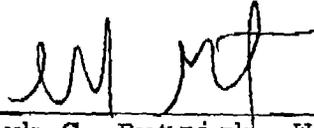
the First and Last sales to be released and completed
"notwithstanding any other provision of law." This court cannot
grant the relief requested by SAS.

CONCLUSION

The court should deny SAS's renoted motion for summary
judgment and permanent injunction against the First and Last
timber sales.

Dated this 8th day of March, 1996.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: 
Mark C. Rutzick, WSB #17291
Of Attorneys for Defendants-
Intervenors Washington
Contract Loggers
Association, et al.

Lin.

JUDGE DWYER

PATTI A. GOLDMAN (WSB #24426)
TODD D. TRUE (WSB #12864)
KRISTEN L. BOYLES (WSB # 23806)
Sierra Club Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Attorneys for Plaintiffs

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

SEATTLE AUDUBON SOCIETY, et al.,)
Plaintiffs,)
v.)
JACK WARD THOMAS, et al.,)
Defendants.)

Civil No. C89-160-WD
RENOTING OF MOTIONS FOR
SUMMARY JUDGMENT AND
PERMANENT INJUNCTION AGAINST
FIRST AND LAST TIMBER SALES
Renoted on Motion Calendar
March 22, 1996

In September 1990, plaintiffs Seattle Audubon Society et al. filed two motions for summary judgment and permanent injunctions challenging the First and Last timber sales on the Umpqua National Forest. SAS' Motion for Summary Judgment and Permanent Injunction Against the Last Timber Sale (Sept. 5, 1990); SAS' Motion for Summary Judgment and Permanent Injunction Against First Timber Sale (Sept. 17, 1990). These sales had been advertised under Section 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, Tit. III, 103, Stat. 745-750 (1989) ("Section 318"). However, in these and other sales, the Forest Service had

1 violated its obligations under Section 318 to "minimize such
2 fragmentation [of old growth forests] . . . on a national forest-
3 by-national forest basis." Section 318(b)(2). Indeed, this
4 Court held in this case that four other timber sales were illegal
5 under Section 318 for this very reason. Order (May 11, 1990),
6 aff'd, Seattle Audubon Society v. Robertson, No. 90-35519 (9th
7 Cir. Aug. 27, 1990); Order (Sept. 29, 1990); Order (Oct. 19,
8 1990).

9 Rather than face a similar court ruling and injunction with
10 respect to the First and Last sales, the Forest Service withdrew
11 these sales. Accordingly, this Court struck plaintiffs' motions
12 for summary judgment and permanent injunction as to these sales
13 as moot. Order at 1-2 (Oct. 16, 1990).

14 When Seattle Audubon asked this Court to rule on further
15 motions for summary judgment as to these two sales (along with
16 three others), this Court declined because the controversy had
17 become moot. More specifically, this Court held that because the
18 Forest Service had withdrawn the First and Last sales, and
19 "[n]othing in the record suggests that the Forest Service plans
20 to go forward with these sales[, t]here is accordingly no case or
21 controversy as to them." SAS, No. C89-160WD & C89-99(T)(WD (W.D.
22 Wash. Mar. 7, 1991). The Court, however, specifically permitted
23 SAS to renew its motion "should the Forest Service advertise or
24 otherwise proceed with any of these five sales." Id.

25 The Forest Service is now otherwise proceeding with the
26 First and Last timber sales under Section 2001(k) of the
27 Rescissions Act. Accordingly, Seattle Audubon now renews its

1 motions for summary judgment and permanent injunction with
2 respect to these two sales.

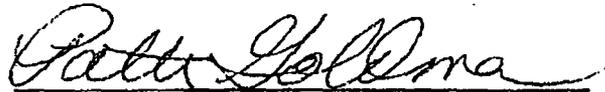
3 Because these two sales violated Section 318, the authority
4 under which they were proceeding in 1990, they were illegal ab
5 initio, and are still illegal since timber sales offered under
6 Section 318 continue to be "subject to the terms and conditions
7 of this section for the duration of those sales contracts."
8 Section 318(k). Moreover, because Section 2001(k) expressly
9 includes the phrase "subject to Section 318," it carries forward
10 Section 318's legal requirements with respect to those sales,
11 like First and Last, that proceeded under that law.

12 On February 26, 1996, this Court refused to prohibit logging
13 of the First and Last sales because no injunction had previously
14 been issued by this Court. No such order issued previously
15 because the Forest Service withdrew the sales. The government
16 should not be permitted to cease illegal conduct to avoid
17 judicial review and then reinstate that very conduct after a
18 challenge has been held to be moot.

19 Seattle Audubon recognizes that Chief Judge Hogan has issued
20 an injunction directing the Forest Service to award and release
21 certain timber sales under Section 2001(k), and the First and
22 Last sales fall within the broad reach of that ruling. Northwest
23 Forest Resource Council v. Glickman, No. C95-6244 (D. Ore. Jan.
24 10, 1996). However, at a hearing held on January 25, 1996, Judge
25 Hogan made it clear that Seattle Audubon could ask him to modify
26 that order with respect to particular sales based on the nature
27 of proceedings in other courts concerning those sales. If this

1 Court enjoins the First and Last sales because they violate
 2 Section 318, Seattle Audubon would ask Judge Hogan to modify his
 3 January 10, 1996 injunction to exclude the First and Last Sales
 4 as he previously had excluded four other sales enjoined by this
 5 Court.

6 Respectfully submitted,

7 

8 PATTI A. GOLDMAN (WSB #24426)
 9 TODD D. TRUE (WSB #12864)
 10 KRISTEN L. BOYLES (WSB #23806)
 11 Sierra Club Legal Defense Fund
 12 705 Second Ave., Suite 203
 13 Seattle, WA 98104
 14 (206) 343-7340

15 Attorneys for Plaintiffs

16 328RENOT.MOT

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FEB 23 1996

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AT SEATTLE CLERK U S DISTRICT COURT WESTERN DISTRICT OF WASHINGTON DEPUTY

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,) Plaintiffs,) v.) JACK WARD THOMAS, et al.,) Defendants.) and) WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al.,) Defendants-Intervenors.)

NO. C89-160WD ORDER ON SAS'S MOTION TO CLARIFY AND ENFORCE AND WCLA'S MOTION TO CLARIFY OR VACATE

ctc, wld

The history of this matter is set out in the Order on Motions Heard on November 1, 1995 (Dkt. # 1188). Plaintiffs Seattle Audubon Society, et al. (collectively "SAS"), seek an order determining that injunctions issued herein in 1990 preclude the award of six timber sales in Oregon pursuant to Section 2001(k) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act ("Rescissions Act"), Pub. L. No. 104-19. Defendants-intervenors Washington Contract Loggers Association and Northwest Forest Council (collectively "WCLA") seek an order determining that the injunctions as to four of the

ORD ON SAS'S MTN TO

1210

1 sales are no longer in effect, or in the alternative vacating
2 them; as to the other two sales, WCLA contends that there is
3 nothing to decide, as they were withdrawn by the Forest Service
4 and motions to enjoin them were stricken as moot. The federal
5 defendants, agreeing with WCLA as to the two withdrawn sales and
6 with SAS as to the four others, ask that the injunctions as to the
7 latter be left in place pending the Ninth Circuit's expedited
8 ruling on the District of Oregon's recent decisions on the scope
9 and meaning of Section 2001(k). The matter has been thoroughly
10 briefed, and oral argument was heard by telephone conference call
11 on February 15, 1996.

12 Chief Judge Hogan, in the District of Oregon, has held that
13 "[t]he plain language of section 2001(k) requires the agency to
14 award certain previously offered sales, even those canceled or
15 enjoined prior to section 2001(k) (1)'s enactment, so long as there
16 are no threatened or endangered birds known to be nesting in the
17 sale unit." Northwest Forest Resource Council, et al. v.
18 Glickman, et al., No. C95-6244 (D. Ore. filed January 10, 1996, at
19 16-17). This ruling was entered only as a declaratory judgment in
20 regard to the four sales enjoined by this court before Section
21 2001(k) was enacted; the other two sales, which had never been
22 enjoined, were ordered released. SAS argues that Section 2001(k)
23 was not meant to resurrect sales found to be in violation of
24 Section 318 and then cancelled. It contends that Section
25 2001(k) (1)'s requirement that a sale be awarded "with no change in
26 its originally advertised terms," in view of Section 318(k)'s

1 incorporation of substantive terms into the contracts "for the
2 duration of those sale contracts," means that those substantive
3 terms still apply, and that, accordingly, no sale can go forward
4 where they are violated. That issue will be argued in the Ninth
5 Circuit, on appeal from the District of Oregon, in the week of May
6 6, 1996.

7 If the sales in question were logged -- or irrevocably
8 awarded for logging -- in the meantime, the harm would be irrepa-
9 rable. These sales were not only violative of Section 318, they
10 would also contravene and jeopardize the Northwest Forest Plan.

11 The injunctions prohibiting the federal defendants from going
12 forward with the Cowboy, Nita, South Nita, and Garden sales,
13 entered herein, have never been vacated, and the only one appealed
14 from was affirmed by the Court of Appeals. The orderly adminis-
15 tration of justice, and the avoidance of irreparable harm, require
16 that these injunctions not be vacated pending the Ninth Circuit's
17 decision in the appeals to be argued in the week of May 6. If the
18 Court of Appeals affirms the District of Oregon decision, this
19 court will vacate the injunctions; if it reverses, there will be
20 no legal authority for the agency to proceed with these four
21 sales.

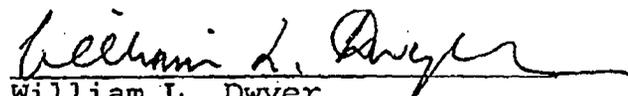
22 The First and Last sales are in a different category. They
23 were never enjoined by this court but, instead, were voluntarily
24 cancelled by the Forest Service. As to them the District of
25 Oregon has issued not just a declaratory judgment but an injunc-
26 tion requiring that they go forward under Section 2001(k). The

1 Court of Appeals will decide whether they are within the scope of
2 Section 2001(k). These two sales are not the subject of any
3 injunction issued herein, and, as to them, WCLA's motion must be
4 granted and SAS's motion denied.

5 For the reasons stated, the court will not vacate the injunc-
6 tions as to the Cowboy, Nita, South Nita, and Garden sales pending
7 the Court of Appeals' review, set for hearing in the week of
8 May 6, 1996, of the District of Oregon's rulings concerning
9 Section 2001(k). As to the First and Last sales, which were never
10 enjoined herein, no relief can be ordered in this case. The
11 motions are granted in part and denied in part accordingly.

12 The clerk is directed to send copies of this order to all
13 counsel of record.

14 Dated: February 22, 1996.

15
16 
17 William L. Dwyer
18 United States District Judge
19
20
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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
	Peter Coppelman	514-0557
	Elena Kagan	456-1647
	Mark Gaede	720-4732
	Mike Gippert	690-2730
	Jay McWhirter	

NUMBER OF PAGES:

DATE: March 8, 1996

FROM: Michelle Gilbert

MESSAGE: Attached is correspondence relating to
release of award letters for First and Last sales.

MAR 08 '96 16:05 TO-12023050275

FROM-HAGLUND & KIRTLEY

T-082 P.02 F-179

HAGLUND & KIRTLEY

ATTORNEYS AT LAW

ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204

TELEPHONE (503) 225-0777
FACSIMILE (503) 225-1257

March 6, 1996

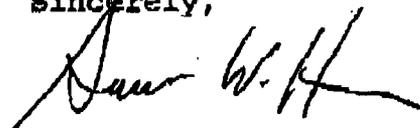
VIA FAX AND REGULAR MAIL

Ms. Michelle L. Gilbert
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
P. O. Box 663
Washington, D.C. 20044

Dear Michelle:

This is a follow up to our telephone conference today with Allyn Ford and Jim Lyons regarding the award of the First and Last Timber Sales. This is to confirm that Mr. Ford and Mr. Lyons agreed late last week that the award of these two sales would occur this Friday, March 8. Scott Timber Co. intends to hold the government to this agreement. However, Allyn Ford and Scott Timber Co. are willing to work with the government on an operation schedule that would delay harvest of the awarded sales to provide the opportunity for a good faith exploration of alternatives to the harvest of these sales, including replacement volume. We agreed to convene at 9:00 A.M. (PST), Friday, March 8, via conference call to discuss the options following award. Please contact me if this letter mischaracterizes the current status.

Sincerely,



Scott W. Horngren

cc: Mr. Allyn Ford

HAGLUND & KIRTLEY

ATTORNEYS AT LAW

ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204

TELEPHONE (503) 225-0777
FACSIMILE (503) 225-1257

March 8, 1996

VIA FAX AND REGULAR MAIL

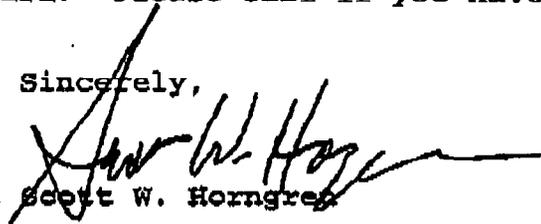
Ms. Michelle L. Gilbert
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
P. O. Box 663
Washington, D.C. 20044

Dear Michelle:

This is a follow up to our telephone conference this morning regarding the award of the First and Last Timber Sales. I have discussed the matter with Allyn Ford. In response to your request for additional time to consider various options to harvest of the First and Last Tiber sale, Mr. Ford talked to his operational people and Scott Timber is willing to wait until March 20, 1996 to begin falling. Scott Timber is also willing to work with the Forest Service in identifying the particular areas of the sales in prioritizing the progression of harvest. Mr. Ford discussed this with Forest Supervisor Don Osby. Scott Timber will work in good faith with the government to explore various options to defer harvest of the sales following award.

We would like to know by 11:00 am today whether Scott Timber can go to the Supervisors Office and obtain award of the sale. Apparently Mr. Osby is in Portland today, so could you please inform Brenda Woodard locally so there is no delay in conveying the direction to award. Please call if you have any questions.

Sincerely,



Scott W. Hornsgr

cc: Mr. Allyn Ford



U.S. Department of Justice

Environment and Natural Resources Division

General Litigation Section

Washington, D.C. 20530

March 8, 1996

VIA TELEFAX

Scott Horngren
Haglund & Kirtley
One Main Place
101 S.W. Main, Suite 700
Portland, Oregon 97204

Re: Northwest Forest Resource Council v. Glickman,
Civil No. 95-6244-HO (lead case), No. 95-6267-HO
(consolidated case), No. 95-6384-HO (consolidated
case) (D. Or.)

Dear Scott:

This letter confirms our conversation today, March 8, 1996, regarding issuance of the award letters for the First and Last timber sales. It is the parties' understanding, as set forth in your letters dated March 6 and March 8, 1996, that Scott Timber will not begin falling trees before March 20 and that the parties will work to explore various options to further defer harvest of the sales, including identification of potential alternative timber. As per the parties' understanding as more fully set forth in your letters, the Forest Service has directed that the award letters be made immediately available today to Scott Timber. Please call if you have any further questions.

Sincerely,

A handwritten signature in cursive script that reads "Michelle L. Gilbert".

Michelle L. Gilbert

Michelle Gilbert - Telecon 3/7/96

Have until Friday - drop dead date.

How long to postpone harvesting?

Auth to negotiate a deal?

↳ doesn't impinge on King's ^{Officers'} auth

Lycus/Ford - to talk today.

getting in writing - w/ to postpone harvesting

wanted to have reports as a K holder.

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
	Peter Coppelman	514-0557
	Elena Kagan	456-1647
	Jay McWhirter	690-2730
	Karen Mouritsan	219-1792

NUMBER OF PAGES:

DATE: January 22, 1996

FROM: Michelle Gilbert

MESSAGE: Attached is a letter from Scott Horngren setting forth his agreement as of last night relating to First and Last.

MAR 06 '96 10:05 TO-12023050275

FROM-HAGLUND & KIRTLEY

T-082 P.02 F-179

HAGLUND & KIRTLEY

ATTORNEYS AT LAW

ONE MAIN PLACE
101 SW MAIN, SUITE 1800
PORTLAND, OR 97204TELEPHONE (503) 225-0777
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March 6, 1996

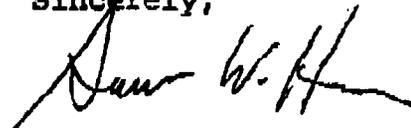
VIA FAX AND REGULAR MAIL

Ms. Michelle L. Gilbert
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
P. O. Box 663
Washington, D.C. 20044

Dear Michelle:

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Sincerely,



Scott W. Horngren

cc: Mr. Allyn Ford



DEPARTMENT OF AGRICULTURE
 OFFICE OF THE GENERAL COUNSEL
 NATURAL RESOURCES DIVISION
 12TH & INDEPENDENCE AVE, SW
 ROOM 4621
 WASHINGTON, D.C. 20250-1400
 PHONE: 202-720-9190 FAX: 202-690-2730

FACSIMILE TRANSMISSION COVER

DATE: MARCH 1, 1996

FROM: TIM OBST
ATTORNEY

To:		<u>Fax</u>	<u>Speed Dial</u>
Lois Schiffer, Peter Coppelman	DOJ	514-0557	[043]
Wells Burgess, Michelle Gilbert	DOJ	305-0429	[038]
Ted Boling	DOJ	616-8543	
Elena Kagan		456-1647	
Dinah Bcar	CEQ	456-0753	[047]

MESSAGE:

Attached is information about the First and Last Timber Sales, including maps of the sale areas.

The second page of this fax is information regarding the possible argument that environmental conditions have changed since enactment of the Rescissions Act. I followed up with Claude McLean of the Umpqua NF and his staff do not know of any or events since July which would significantly alter the environmental effects or downstream effect of the First and Last sales. The third page of this fax describes the two fish species proposed for listing in the drainage. The rest of the pages describe the sales, including acres of each unit, types of harvesting, and maps.

This document may be privileged and confidential. Unauthorized use of this document is prohibited. Call immediately if this document was received in error.

MESSAGE DISPLAY FOR TIM ORST

To T.ORST:W01D
CC J.HOFER
CC R.DEVLIN

From: Robert J. Devlin:R6/PNW Host: R06C
Postmark: Mar 01,96 10:54 AM Delivered: Mar 01,96 2:01 PM

Subject: Forwarded: Condition of First and Last Timber Sales

Comments:

From: Robert J. Devlin:R6/PNW
Date: Mar 01,96 10:54 AM
TIM--HERE IS INFO FROM UMPQUA TIMBER STAFF ON FIRST AND LAST TIMBER
SALES

Message:

From: Claude McLean:R06F15A
Date: Mar 01,96 9:35 AM
Bob, In response to your telephone request, I have the following
Information:
-The recent NW flooding did not impact the area where these sales are
located. Most of intense rainfall occurred north of the Umpqua
drainage in the Willamette and coastal river drainages. Although no
one has walked through the sale areas, no unusual damage to the sale
area is expected.
-No fires have occurred near these sales for many years. Since they
are presently covered with snow, I would not expect any fires any
time soon.
If you need more info, give me a call.
Claude

-----X-----

MESSAGE DISPLAY FOR TIM OBST

To T.Obst:w01d

From: Jerry L. Hofer:R6/PNW Host: R06C
Postmark: Mar 01,96 11:46 AM Delivered: Mar 01,96 2:52 PM
Status: Certified
Subject: Forwarded: proposed fish species for listing in the S. Umpqua Basin

Comments:

From: Jerry L. Hofer:R6/PNW
Date: Mar 01,96 11:46 AM

Message:

From: Jerry L. Hofer
Date: Mar 01,96 11:02 AM
First and Last Timber Sales are in the S. Umpqua River Sub-Basin. Two species are proposed for listing:

1. Oregon Coast Coho Salmon: NMFS proposal to list as threatened published 7/25/95
2. Coastal cutthroat trout (resident and sea-run): NMFS proposal to list as endangered published 7/8/94

In April 14, 1995, RF sent letter to Forcst that henceforth, any proposal to list a fish species automatically entitles it to RF sensitive species listing. Therefore 06.25# (contract clause), Protection of habitat of endangered, threatened and sensitive species would apply. Its the best we could do! Sue and Jerry

-----X-----

MESSAGE DISPLAY FOR TIM OBST

To I.Ristino:w01d
CC T.Obst:w01d
CC J.McWhirter:w01d
CC S.Zike

From: Jerry L. Hofer:R6/PNW Host: R06C
Postmark: Mar 01,96 10:34 AM Delivered: Mar 01,96 1:41 PM
Status: Certified
Subject: Forwarded: First & Last Info

Comments:

From: Jerry L. Hofer:R6/PNW
Date: Mar 01,96 10:34 AM
Info on sales. I am faxing a summary sheet and map of each sale

Message:

From: Brenda Woodard:R06F15A
Date: Mar 01,96 9:37 AM

	First TS	Last TS
# of harvest acres	158*	141
C6.01 in contract?	yes 6/90	yes 6/90
C9.5 in contract?	yes 10/77	yes 10/77
C9.52 in contract?	yes 12/89	yes 12/89

* the acres of Right-of-Way were estimated for First TS...not included on the summary sheet that we have in the original file. This is a HIGH estimate to make sure that it covers all of the R/W acres.

-----X-----

03/01/86 FRI 08:38 FAX 541 957 3495

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MATERIAL OFFERED AT PER-M RATES

First

Volume	MBF by Species or Groups				Sale Name
Species:	<u>D&D</u>	<u>PINES</u>	<u>HEM+WF</u>	<u>CEDARS</u>	<u>Total</u>
Gross Cut Vol. :	<u>5869</u>	<u>257</u>	<u>249</u>	<u>396</u>	<u>6771</u>
Hidden Def. and Breakage % :	<u>VARIES 20-25%</u>				
					Special Cull PAM: <u>600</u> MBF
					Utility Cull PAM (Chip) <u>500</u> MBF

Unit No.	Harvest Method	Acres					Total	% Vol. By Unit	Ave. Vol/Ac	Rounded Net
1	HCC	18	567	16	14	2	599	15.0	33.3	601
2	HCC	17	452	14	-	7	473	11.9	27.8	475
3	HCC	29	777	82	-	78	957	24.0	33.0	960
4	HSM	42	494	35	94	47	670	16.8	15.9	672
5	HCC	36	939	15	57	74	1035	35.9	28.8	1038

Clearcut

Shelterwood (Partial Cut)

(142) ac

	R/HCC	235	12	1	1.6	254	6.4	254
Subtotal by Harvest Method	HCC	100	2735	127	71	131		
	HSM	42	494	35	94	47		

Unrounded Net 142 3454 174 166 194 3988 100.0

Rounded Net 2500 300 100 200 4000

4000
Total Rounded

% Vol. By Species Group 73% 4% 2% 4% 17% 100.00

Scaling Defect 22 3 O&C: Yes No
Sale Defect 41 2

(PAM) 4000

FIRST

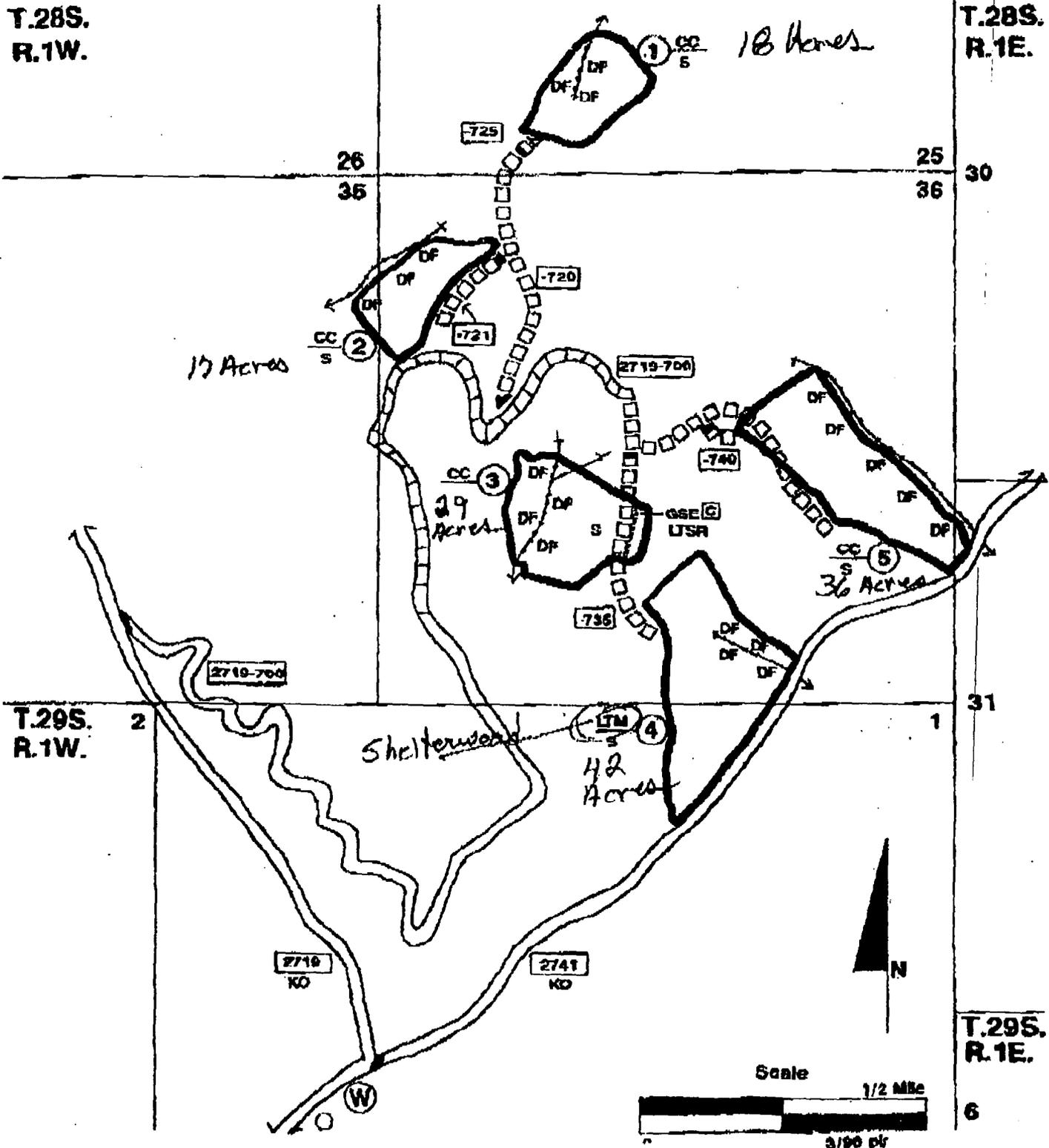
SALE AREA MAP & SLASH DISPOSAL MAP

Umpqua National Forest Tiller Ranger District

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T.28S.
R.1W.

T.28S.
R.1E.



T.29S.
R.1W.

T.29S.
R.1E.

T.29S.
R.1E.

6

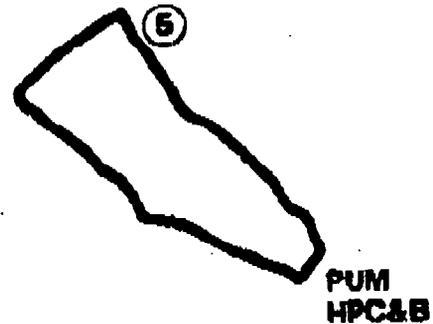
FIRST

SALE AREA MAP & SLASH DISPOSAL MAP

Umpqua National Forest

Tiller Ranger District

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FIRSTSALE AREA MAP AND SLASH DISPOSAL MAP

Umpqua National Forest
Tiller Ranger District
Page 3 of 4

LAND LINES ARE APPROXIMATE

Sale Area Boundary is 200 feet slope distance outside Clearcutting Unit boundaries except where Clearcutting Units are adjacent to private land or other existing timber sales. B1.1

All specified road construction listed in A9 shall be Subdivision 6. When Forest Service performs construction, delete the word "Specified" from the transportation facilities items listed herein.

Purchaser shall post warning signs prior to beginning operations on or adjacent to National Forest system roads. C6.331#

Landings, skid trails, skidroads, and temporary roads shall be scarified to a 12" depth by Purchaser following use. C6.4 (Option 1)

All designated survey monument bearing trees shall have a minimum stump height not less than 6 inches above the official survey inscription. B6.23

Log Removal Required (LRR). When removal of Pulp (Utility) logs and Special Cull Logs has been waived, Purchaser shall yard and pile logs according to specifications attached to C6.402.

Dead trees outside Clearcut Subdivision boundaries shall be left standing, except for safety reasons. B2.31

Cutting of trees less than minimum DBH in A2 is not required within 50 feet of designated stream courses in clearcutting units. B6.4, B6.5, C6.4 Opt.1

-  Subdivision Boundary, B1.1
- CC Clearcutting Unit, B2.3, B2.31
- LTM Leave Tree Marking, B2.35.
-  Existing Transportation System Road, C5.12, C5.42, C5.43
-  Specified Road Construction, A9, B5.2
-  Specified Road Reconstruction, A9, B5.2
-  Water Source, C5.42, C5.43
- KO Keep Road (or Trail) Open, B6.22
- DF Areas Requiring Directional Felling, C6.41#
-  Specified Skidding or Yarding Boundary, B6.42

FIRST**SALE AREA MAP AND SLASH DISPOSAL MAP**

Tiller Ranger District
Umpqua National Forest

Page 4 of 4

- LTSR Tractor Skid Road to be Approved in Advance of Felling Operations, C6.4 (Option 1)
- QSE Ground Skidding Equipment Specified, B6.42, C6.42#, C6.425#
- S Skyline Yarding Specified, B6.42, C6.42#
- Ⓞ Soil Productivity Protection, C6.425#
- Protect Streamcourse, Block Marks Upper Limit, B6.5

SLASH TREATMENT SPECIFICATIONS, C6.74 (Option 1)

- PUM Piling (Skyline) of Unutilized Material
- HPC Handpile and Cover
- B Burning

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MATERIAL OFFERED AT PER-M RATES

Least

Sale Name 5/31/90 Rc

Volume MFB by Species or Groups

Species	<u>D&O</u>	<u>Pine</u>	<u>Hemlock</u>	<u>Ced</u>	Total
Gross Cut Vol. :	<u>7244</u>	<u>528</u>	<u>236</u>	<u>138</u>	<u>8146</u>

Special Cull
PAM: 500 MFB

Hidden Def. and Breakage % :	<u>Various</u>
------------------------------	----------------

Utility Cull
PAM (Chip) 400 MFB

Unit No.	Harvest Method	Acres					Total	% Vol. By Unit	Ave. Vol/Ac	Rounded Net
1	HCC	26	847	38	47	—	932	16.1	36.1	939
2	HCC	29	818	104	131	37	1090	18.9	37.9	1098
3	HCC	19	710	43	2	20	775	13.4	41.1	780
4	HCC	14	822	59	—	46	927	16.1	66.4	933
7	HCC	22	787	33	—	—	820	14.2	37.5	825
9	HCC	12	444	—	8	—	452	7.9	37.9	455
10	HCC	14	458	7	—	—	465	8.1	33.4	468
Clear cut										
Shelterwood - Partial Cut										
R/W		5	267	12	12	9	300	5.2		302
Subtotal	HCC	124	4442	284	180	103				
by Harvest Method	MH	12	444	—	8	—				

Unrounded Net 136 5153 296 200 112 5761

Rounded Net 141 5200 300 200 100

5800
Total Rounded

Sale Vol. By Species Group 90 5 3 2 100.00

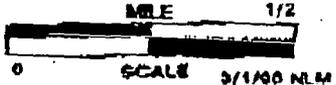
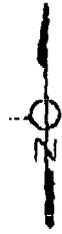
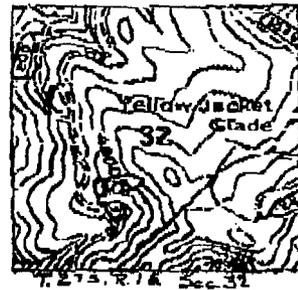
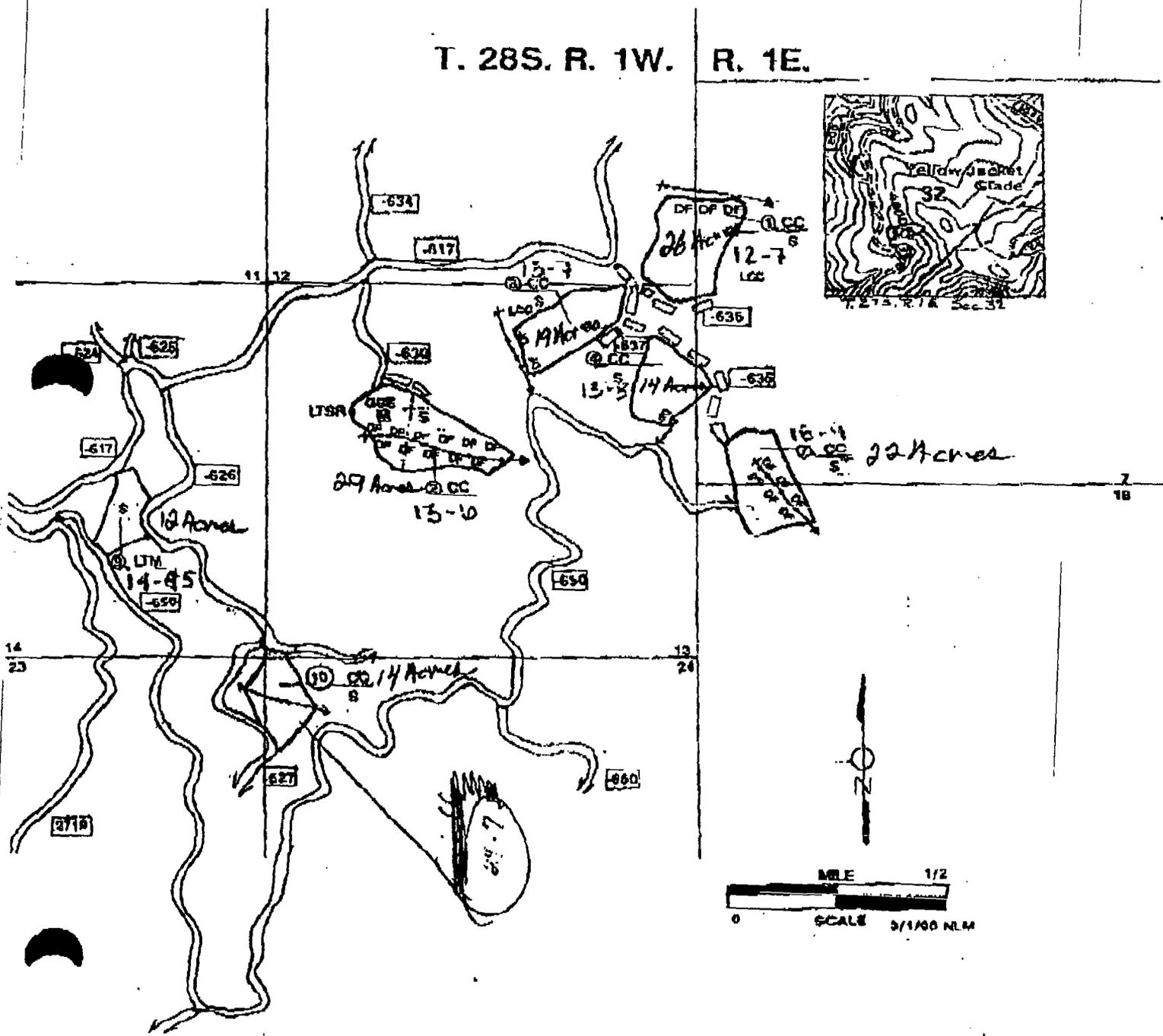
Scaling Defect 16 %
Sale Defect 28.8 %
O&C: Yes — No —

LAST SALE AREA MAP AND SLASH DISPOSAL MAP

TILLER RANGER DISTRICT
UMPQUA NATIONAL FOREST

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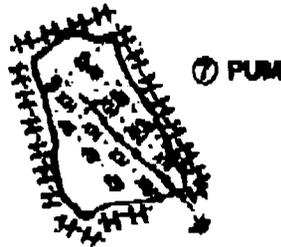
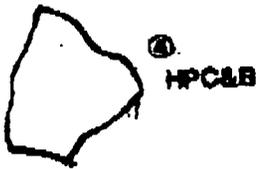
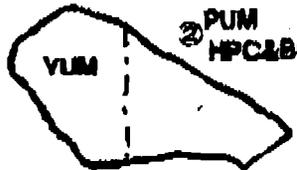
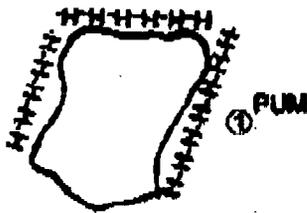
T. 28S. R. 1W. R. 1E.



LAST SALE AREA MAP AND SLASH DISPOSAL MAP

TILLER RANGER DISTRICT
UMPOUA NATIONAL FOREST

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LAST SALE AREA MAP AND SLASH DISPOSAL MAP

Tiller Ranger District
 Umpqua National Forest
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LAND LINES ARE APPROXIMATE

Sale Area Boundary is 200 feet slope distance outside Clearcutting Unit boundaries except where Clearcutting Units are adjacent to private land or other existing timber sales. B1.1

There are no units 5, 6 and 8.

All specified road construction listed in A9 shall be Subdivision 11. When Forest Service performs construction, delete the word "Specified" from the transportation facilities items listed herein.

Purchaser shall post warning signs prior to beginning operations on or adjacent to National Forest system roads. C6.331#

Landings, skid trails, skidroads, and temporary roads shall be scarified to a 12" depth by Purchaser following use.

All designated survey monument bearing trees shall have a minimum stump height not less than 6 inches above the official survey inscription. B6.23

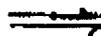
Log Removal Required (LRR). When removal of Pulp (Utility) logs and Special Cull Logs has been waived, Purchaser shall yard and pile logs according to specifications attached to C6.402.

Dead trees outside Clearcut Subdivision boundaries shall be left standing, except for safety reasons. B2.31

Cutting of trees less than minimum DBH in A2 is not required within 50 feet of designated stream courses in clearcutting units. B6.4, B6.5, C6.4 Opt.1

CC) Clearcutting Unit, B2.3, B2.31

LTM Leave Tree Marking, B2.35.

 Existing Transportation System Road, C5.12, C5.42, C5.43

 Specified Road Construction, A9, B5.2

 Water Source, C5.42, C5.43

DF Areas Requiring Directional Felling, C6.41#

..... Specified Skidding or Yarding Boundary, B6.42

LTSR Tractor Skid Road to be Approved in Advance of Felling Operations, C6.4 (Option 1)

GSE Ground Skidding Equipment Specified, B6.42, C6.42#, C6.425#

LCC Landing Construction Critical. (C6.422)

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SALS AREA MAP AND SLASH DISPOSAL MAPTiller Ranger District
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LEGEND

- S Skyline Yarding Specified. B6.42, C6.42#
- Soil Productivity Protection, C6.423#
-  Protect Streamcourse, Block Marks Upper Limit. B6.5

SLASH TREATMENT SPECIFICATIONS, C6.74 (Option 1)

- H-H-H Hand Fireline
- PUM Piling (Skyline) of Unutilized Material
- HPC Handpile and Cover
- B Burning
- HX-HX Extra Wide Hand Line
- SP Slash Pullback
- YUM Yarding (GSE) of Unutilized Material