

NLWJC- Kagan

Counsel - Box 011 - Folder 004

Timber - Other Litigation: Seattle  
Audubon v. Thomas [2]

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

FAX NUMBER 305-0506, -0267, -0429  
CONFIRMATION NUMBER (202) 305-0504

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Al Ferlo	514-4240
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Jim Sutherland(503)	465-6582
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 8

DATE: March 1, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: SAS v. Thomas (Judge Dwyer). Attached is SAS' Motion to Shorten Time on its renewed motion for summary judgment and permanent injunction re: First and Last. Plaintiffs request that the court hear the motion on March 6, 1996.

Today we are filing with Judge Hogan an emergency motion for a stay of that part of the injunction that orders the release of the First and Last sales.

THE HONORABLE WILLIAM L. DWYER

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  
SEATTLE AUDUBON SOCIETY'S  
MOTION TO SHORTEN TIME

Title of Underlying Motion:

Motions for Summary Judgment  
and Permanent Injunctions  
Against First and Last Timber  
Sales

Moving Parties:

Plaintiffs Seattle  
Audubon Society et al.

If motion to shorten time is not granted,  
underlying motion would be noted for the  
court's calendar on:  
1996

March 22,

Date and time when movant seeks to have  
court rule on motion to shorten time:

March 4, 1996

Date on which movant seeks to have court  
consider merits of underlying motion:

March 6, 1996

///

SEATTLE AUDUBON SOCIETY'S  
MOTION TO SHORTEN TIME - 1 -

Sierra Club Legal Defense Fund  
705 Second Avenue, Suite 203  
Seattle, Washington 98104  
Phone (206) 343-7340

1 Plaintiffs cite the following exigent and exceptional  
2 circumstances justifying the shortening of time on the underlying  
3 motion:

4 1. In the underlying motion, Seattle Audubon Society asks  
5 the Court to decide that two timber sales are illegal under the  
6 authority under which they were offered and to enjoin those sales  
7 from going forward today.

8 2. On February 28, 1996, attorneys for the federal  
9 defendants advised that they will send out award letters for the  
10 two sales on Friday, March 1, 1996.

11 3. On February 29, 1996, counsel for the federal  
12 defendants informed plaintiffs' counsel that the federal  
13 defendants would take no action to ensure that logging does not  
14 occur prior to this Court's ruling on the pending motions.

15 4. As this Court concluded with respect to four analogous  
16 timber sales, if these sales are logged, "the harm would be  
17 irreparable." Order on SAS's Motion to Clarify and Enforce and  
18 WCLA's Motion to Clarify or Vacate (February 26, 1996).

19 5. Because these sales were advertised under Section 318  
20 of Public Law 101-121, 103 Stat. 745, no temporary restraining  
21 order or preliminary injunctive relief is available to  
22 plaintiffs. Accordingly, the only way to prevent irreparable  
23 harm from logging these sales is for the Court to issue a  
24 permanent injunction barring such logging.

25 ///  
26 ///  
27 ///

1 Movant certifies that this motion to shorten time has been  
2 served on all other parties prior to filing with the court.

3 DATED this 29th day of February, 1996.

4 Respectfully submitted,

5  
6   
7 PATTI A. GOLDMAN (WSB #24426)  
8 TODD D. TRUE (WSB #12864)  
9 KRISTEN L. BOYLES (WSB #23806)  
10 Sierra Club Legal Defense Fund  
11 705 Second Ave., Suite 203  
12 Seattle, WA 98104  
13 (206) 343-7340

14 Attorneys for Plaintiffs

15 328SHORT.MOT

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

THE HONORABLE WILLIAM L. DWYER

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

SEATTLE AUDUBON SOCIETY, et al.,	)	
Plaintiffs,	)	Civil No. C89-160-WD
v.	)	DECLARATION OF
JACK WARD THOMAS, et al,	)	PATTI A. GOLDMAN
Defendants.	)	

I, Patti A. Goldman, hereby declare as follows:

1. I am an attorney representing the plaintiffs in this case.

2 On February 28, 1996, I received a letter by facsimile from attorneys for the federal defendants advising that they will send out award letters for the two sales on Friday, March 1, 1996. A true copy of that letter is attached as Exhibit 1.

3. On February 29, 1996, I spoke with counsel for the federal defendants who told me that the federal defendants would take no action to ensure that logging does not occur prior to this Court's ruling on the pending motions.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

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

Executed this 29th day of February, 1996, in Seattle, Washington.

  
PATTI A. GOLDMAN

328GOLDM.DEC

02/28/96 17:42

002/003



## U.S. Department of Justice

## Environment and Natural Resources Division

General Litigation Section

Washington, D.C. 20530

February 28, 1996

VIA TELEFAX

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

Patti A. Goldman  
Adam J. Berger  
Kristen L. Boyles  
Sierra Club Legal Defense Fund  
705 Second Avenue, Suite 203  
Seattle, WA 98104

Marianne Dugan  
Deborah N. Mailander  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401

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

Patricia Dost  
Schwabe, Williamson & Wyatt  
1211 SW 5th Avenue  
1600-1800 Pacwest Center  
Portland, OR 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.)

Seattle Audubon Society v. Thomas, CV-89-160-WD  
(W.D. Wash.)

Dear Counsel:

This letter concerns the First and Last timber sales which are subject to the injunction of the District Court of Oregon for immediate award and release.

SIERRA CLUB  
LEGAL DEFENSE FUND  
FEB 28 1996  
RECEIVED

02/28/96 17:42

003/003

The defendants have represented that these sales would not be released until Judge Dwyer ruled upon SAS's motion to clarify and enforce its prior judgment. On February 23, 1996 Judge Dwyer denied SAS's motion to clarify and enforce judgment as to the First and Last sales.

Pursuant to our representation, we are hereby advising that the Forest Service intends to send out the award letters for the First and Last timber sales at close of business Friday, March 1, 1996 absent a court order to the contrary.

Sincerely,



Wells D. Burgess  
Michelle L. Gilbert  
United States Department of Justice  
Environment & Natural Resources  
Division  
P.O. Box 663  
Washington, D.C. 20044-0663  
(202) 305-0445

cc: Client

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

FAX NUMBER 305-0506, -0267, -0429  
CONFIRMATION NUMBER (202) 305-0504

PLEASE DELIVER TO:

To: Don Barry 208-4684  
Bob Baum 208-3877  
Dinah Bear 456-0753  
Ted Boling 514-4231  
Peter Coppelman, 514-0557  
Lois Schiffer,  
Jim Simon  
Al Ferlo 514-4240  
Mike Gippert, 690-2730  
Jay McWhirter  
Tim Obst  
Jeff Handy (503) 326-3807  
Nancy Hayes 208-5242  
Elena Kagan 456-1647  
Don Knowles (503) 326-6282  
Karen Mouritsen 219-1792  
Roger Nesbit (503) 231-2166  
Chris Nolin 395-4941  
Jim Sutherland(503) 465-6582  
Tom Tuchmann (503) 326-6254  
Sue Zike (503) 326-7742

NUMBER OF PAGES: 5

DATE: February 26, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: SAS v. Thomas (Judge Dwyer). Attached is Dwyer's Order on SAS's Motion to Clarify and Enforce and WCLA's Motion to Clarify or Vacate. Judge Dwyer will not vacate the injunctions as to the Nita, South Nita, Garden and Cowboy pending review by the Ninth Circuit in the May 6, 1996 hearing. The court found no relief could be ordered as to the First and Last timber sales.

FILED LODGED ENTERED RECEIVED

FEB 23 1996

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

COPY RECEIVED

FEB 23 1996

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES ATTORNEY Seattle, Washington

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

cfc, 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 CLARIFY AND ENFORCE, ETC. - 1

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

ORD ON SAS'S MTN TO  
CLARIFY AND ENFORCE, ETC. - 2

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

ORD ON SAS'S MTN TO  
 CLARIFY AND ENFORCE, ETC. - 3

AO 72

P.04

912023050429

TO

U.S. ATTORNEY - SEATTLE

FROM

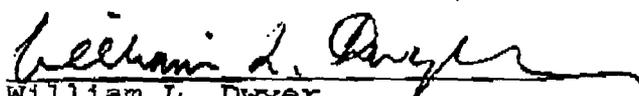
FEB-26-1996 09:53

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  
 21  
 22  
 23  
 24  
 25  
 26

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) 305-0429, -0506  
CONFIRMATION NUMBER (202) 305-0503

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	David Gayer	
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman	514-0557
	Lois Schiffer	
	Jim Simon	
	Al Ferlo	514-4240
	Greg Frazier	720-5437
	Mike Gippert,	690-2730
	Jay McWhirter	
	Jim Perry	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Jim Sutherland(503)	465-6582
	Karen Mouritsen	219-1792
	Kris Clark	
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Rick Prausa	205-1045
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 3

DATE: February 28, 1996

FROM: Paula Clinedinst, Paralegal, (202) 305-0431

MESSAGE: NFRC v. Glickman, SAS v. Thomas.

Attached is a letter sent to Opposing Counsel today regarding the First and Last Timber Sales subject to the injunction of the District Court of Oregon.



U.S. Department of Justice

Environment and Natural Resources Division

General Litigation Section

Washington, D.C. 20530

February 28, 1996

VIA TELEFAX

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

Patti A. Goldman  
Adam J. Berger  
Kristen L. Boyles  
Sierra Club Legal Defense Fund  
705 Second Avenue, Suite 203  
Seattle, WA 98104

Marianne Dugan  
Deborah N. Mailander  
Western Environmental Law Center  
1216 Lincoln Street  
Eugene, OR 97401

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

Patricia Dost  
Schwabe, Williamson & Wyatt  
1211 SW 5th Avenue  
1600-1800 Pacwest Center  
Portland, OR 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.)

Seattle Audubon Society v. Thomas, CV-89-160-WD  
(W.D. Wash.)

Dear Counsel:

This letter concerns the First and Last timber sales which are subject to the injunction of the District Court of Oregon for immediate award and release.

The defendants have represented that these sales would not be released until Judge Dwyer ruled upon SAS's motion to clarify and enforce its prior judgment. On February 23, 1996 Judge Dwyer denied SAS's motion to clarify and enforce judgment as to the First and Last sales.

Pursuant to our representation, we are hereby advising that the Forest Service intends to send out the award letters for the First and Last timber sales at close of business Friday, March 1, 1996 absent a Court order to the contrary.

Sincerely,



Wells D. Burgess  
Michelle L. Gilbert  
United States Department of Justice  
Environment & Natural Resources  
Division  
P.O. Box 663  
Washington, D.C. 20044-0663  
(202) 305-0445

cc: Client

THE HONORABLE WILLIAM L. DWYER

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

SEATTLE AUDUBON SOCIETY, et al., )	
) Plaintiffs,	Civ. No. C89-160WD
) v.	
JACK WARD THOMAS, et al. )	
) Defendants.	NOTICE OF FILING AND REQUEST FOR STATUS CONFERENCE

The United States Forest Service, through and by its counsel, hereby files the Order issued by Judge Hogan of the United States District Court of the District of Oregon on January 10, 1996 in Northwest Forest Resource Council v. Glickman, No. 95-6244 (consolidated with Case Nos. 95-6267, 95-6384). Pursuant to the January 10 Order, Judge Hogan declared that certain sales, including the First, Last, Cowboy, Nita and South Nita timber sales located on the Umpqua National Forest and the Garden sale located in the Siskiyou National Forest are subject to the requirement of Section 2001 of the Rescissions Act of 1995. Pub. L. 104-19 (July 27, 1995). Judge Hogan's January 10 Order enjoins the federal defendants to "immediately award, release

NOTICE OF FILING AND  
REQUEST FOR STATUS CONFERENCE - 1

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
P.O. BOX 663  
WASHINGTON, DC 20044-0663  
TELEPHONE: (202) 305-0504

1 and permit to be completed all sales subject to section  
2 2001(k)(1) as declared in this order. However, with respect to  
3 offered sales subject to a preceding injunction issued by another  
4 court, this order shall operate only as declaratory judgment  
5 under Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201.  
6 Plaintiffs may seek relief in the court that issued the preceding  
7 injunction or in this court subsequent to the issuing court's  
8 modification or vacation of the preceding injunction."

9 The above-mentioned sales were previously the subject of  
10 litigation in the above-captioned action. The First and Last  
11 sales were the subject of dismissals based on the Forest  
12 Service's decision to withdraw the sales.<sup>1</sup> The Cowboy, Nita,  
13 South Nita and Garden sales were enjoined for violations of  
14 Section 318 of the Department of the Interior and Related  
15 Agencies Appropriations Act for Fiscal Year 1990. Pub. L. No.  
16 101-121 (103 Stat. 701) (1989). These six sales were more  
17 recently the subject of plaintiffs' October 3, 1995 motion to  
18 clarify and enforce judgment filed with this Court.<sup>2</sup> On

19 \_\_\_\_\_  
20 <sup>1</sup> In 1990, plaintiffs Seattle Audubon Society et al.  
21 sought to halt the release of these two sales through separate  
22 motions for summary judgment and a permanent injunction. See  
23 Minute Order (October 16, 1990) (Dkt.# 675). In response to  
24 these motions, the Forest Service agreed to withdraw the First  
25 and Last Timber Sales. Upon notice of the Forest Service's  
26 action, this Court declared the motions for summary judgment and  
27 permanent injunction "stricken as moot." Id.

28 <sup>2</sup> On October 3, 1995, plaintiffs' Pilchuck Audubon  
Society et al. filed a Motion to Clarify and Enforce Judgment as  
(continued...)

1 November 3, 1995, this Court stayed plaintiff's motion to clarify  
2 and enforce judgment "pending further orders on the same or  
3 related matters concerning Section 2001(k)(1) in the District of  
4 Oregon. Any party may renote the motion on one week's notice,  
5 with responses to be due the day before the renoted hearing  
6 date."

7 The First and Last timber sales were not enjoined by this  
8 Court and are now subject to Judge Hogan's injunction ordering  
9 their immediate release. However, because these two sales were  
10 the subject of previous proceedings before this Court, including  
11 the recent motion to clarify and enforce judgment filed by the  
12 plaintiffs in this action, the Forest Service believes that  
13 clarification from this Court is necessary. Accordingly, the  
14 Forest Service seeks a status conference to clarify whether  
15 further action in this Court is appropriate with respect to these  
16 two sales.<sup>3</sup> Pursuant to Local Rule LR 7(f), federal defendants

17 \_\_\_\_\_  
18 <sup>2</sup>(...continued)  
19 to six sales, including the First and Last timber sales, that  
20 were enjoined or withdrawn from release as a result of earlier  
litigation in this court. See Motion to Clarify and Enforce  
Judgment (10/3/95).

21 <sup>3</sup> In previous filings before Judge Hogan, federal  
22 defendants explained that in light of this Court's stay of  
23 plaintiffs' motion to clarify and enforce this Court's prior  
24 orders, the First and Last sales should not be released unless  
25 Judge Hogan were to rule that the sales are covered by section  
2001(k) and that this Court were to confirm that the sales should  
be released upon consideration of Judge Hogan's ruling. See  
Defendants' Response to NFR's Two Motions Seeking Release of 11  
Sales Subject to Injunctions or Other Court Orders at page 9,  
note 7 (dated November 21, 1995).

26  
27 NOTICE OF FILING AND  
28 REQUEST FOR STATUS CONFERENCE - 3

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
P.O. BOX 663  
WASHINGTON, DC 20044-0663  
TELEPHONE: (202) 305-0504

1 respectfully request to participate in the status conference by  
 2 telephone. In light of Judge Hogan's order, federal defendants  
 3 further request that the status conference be held immediately.  
 4 The Forest Service notes that the four other sales, Cowboy, Nita,  
 5 South Nita, and Garden, are not subject to Judge Hogan's January  
 6 10 injunction.<sup>4</sup>

7 Respectfully submitted this 18th day of January 1996.

8  
 9 LOIS J. SCHIFFER  
 Assistant Attorney General

10 PETER D. COPPELMAN  
 Deputy Assistant Attorney General

11 KATRINA C. PFLAUMER  
 United States Attorney

12  
 13  
 14  
 15 \_\_\_\_\_  
 WELLS D. BURGESS  
 MICHELLE L. GILBERT  
 U.S. Department of Justice  
 Environment and Natural Resources  
 Division  
 General Litigation Section  
 P.O. Box 663  
 Washington, D.C. 20044-0663  
 (202) 272-6958

16  
 17  
 18  
 19  
 20 Attorneys for Federal Defendants

21  
 22 <sup>4</sup> Federal defendants had argued before Judge Hogan that  
 23 these four sales which had been enjoined for violations of  
 24 Section 318 and were never cured to comply with the statute were  
 25 void ab initio and accordingly not subject to Section 2001(k) (1).  
 Judge Hogan rejected that argument and declared that these sales  
 also were subject to Section 2001(k) (1). Judge Hogan did not  
 enjoin award of these four sales in light of this Court's  
 previous injunctions.

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) 305-0429, 0506, 0267  
CONFIRMATION NUMBER (202) 305-0431

DATE: February 5, 1996

PLEASE DELIVER TO:

Peter Coppelman	514-0557
Elena Kagan	456-1647
Dinah Bear	456-0753
Jay McWhirter	690-2730

FROM: Paula Clinedinst for Wells Burgess

NUMBER OF PAGES: ~~14~~ 10

MESSAGE: Please review attached. We would like to have this out to the US Attorney's Office by 5 PM today for filing with the court. Please call Wells at 305-0445, or fax your comments to 305-0429. Thank you.

*Amy Fabric*  
*371-7100*

---

*Ed Kuyler*  
*622-0287*

*371-7100*

1 DRAFT

THE HONORABLE WILLIAM L. DWYER

2

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

5

6 SEATTLE AUDUBON SOCIETY, et al., )

7 Plaintiffs, )

8 v. )

9 JACK WARD THOMAS, et al., )

10 Defendants. )

Civil No. C89-160-WD

FEDERAL DEFENDANTS'  
OPPOSITION TO WCLA'S  
MOTION TO CLARIFY  
JUDGMENT OR VACATE  
INJUNCTION AS TO  
FOUR SALES AND  
SUPPLEMENTAL FILING  
ON PLAINTIFFS' MOTION  
TO CLARIFY AND ENFORCE  
JUDGMENT

11

12

13

INTRODUCTION

14

15

16

17

18

19

20

21

22

23

24

25

26

On October 3, 1995, plaintiffs sought by motion to have this Court adjudicate the effect of Section 2001(k) of the Rescissions Act of 1995 on prior orders of this Court affecting six timber sales located in late-successional reserves as defined by the Northwest Forest Plan Amendments ( the "Plan" ) upheld by this Court on December 21, 1994. On November 3, 1995 this Court stayed plaintiffs' motion ( with leave to renew ) pending a ruling in pending litigation before the District Court in Oregon. On January 10, 1996 the District Court in Oregon decided that 2001(k) applied to these sales. That decision, as well as related issues concerning the application of the Rescissions Act to sales of old growth timber, is on appeal to the Ninth Circuit.

FEDERAL DEFENDANTS' OPPOSITION  
TO WCLA'S MOTION TO CLARIFY . . . 1

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

1 Plaintiffs now renew their motion before this Court, and WCLA  
2 moves this Court to rule that it has no jurisdiction in this  
3 matter, or in the alternative to vacate its prior injunctions on  
4 the basis of the Oregon District Court decision.

5 Without deciding the issue of the application of Section  
6 2001(k) to the sales at issue, this Court should continue the  
7 injunctions in effect until the Ninth Circuit resolves the  
8 complicated issues regarding the application of 2001(k) to these  
9 ecologically sensitive sales of old growth timber.<sup>1</sup> It should do  
10 this because of the potential impact on the Plan from release of  
11 the enjoined sales, and because serious questions are presented  
12 going to the merits of an appeal on the enjoined sales.

13 BACKGROUND

14 In oral argument on plaintiffs' Motion to Clarify and  
15 Enforce Judgment heard November 1, 1995, the Government asked  
16 this Court to "stay the ruling on this motion and continue the  
17 injunction in effect until the Ninth Circuit rules on the  
18 government's appeal from Judge Hogan's order." Transcript, p.  
19 37. At that point in time the Court of Appeals had before it the  
20 issues of geographic and temporal scope raised by Judge Hogan's  
21 order of October 17, 1995. Now, in addition, the issue of  
22 whether 2001(k) comprehends the enjoined sales as well as related

23 \_\_\_\_\_  
24 <sup>1</sup> As indicated in its previous filing with this Court,  
25 because this Court did not reach the merits of whether the First  
26 and Last timber sales complied with Section 318, the Government  
cannot accede to plaintiffs' motion with respect to these sales.

1 | issues ruled upon in the Oregon District Court litigation are  
 2 | also on appeal. Some background on the events taking place  
 3 | subsequent to this Court's order of November 3, 1995 would assist  
 4 | this Court.

5 | Proceedings update:

6 | Since this Court's stay, the following has transpired in the  
 7 | Oregon litigation and before the Court of Appeals:

8 | Briefing has been completed on an expedited schedule on the  
 9 | Government's appeal from Judge Hogan's order of October 17, 1995.  
 10 | Oral argument before the Ninth Circuit panel was heard on January  
 11 | 8, 1996 and we are awaiting decision.<sup>2</sup>

12 | Acting on this Court's suggestion, environmental groups  
 13 | filed a separate action in the District of Oregon captioned  
 14 | Pilchuck Audubon Society v. Glickman, Civil No. 95-6384, raising  
 15 | the issues presented in their Motion to Clarify and Enforce  
 16 | Judgment in this Court, and other issues regarding the  
 17 | application of 2001(k)(1), and requesting an injunction against  
 18 | the release of timber sales. This action was consolidated with

19 | \_\_\_\_\_  
 20 | <sup>2</sup> The resolution of this issue is clearly intertwined with  
 21 | the issues presented concerning the application of 2001(k) to the  
 22 | enjoined sales. A finding that 2001(k) is limited to the sales  
 23 | originally offered in FY 1990 pursuant to section 318 (b)  
 24 | supports the Government's statutory construction argument that  
 25 | these sales cannot have been intended to be covered by the  
 26 | statute. We should note, however, that the converse is not true.  
 A finding that 2001(k) extends to the geographic scope of 318(a)  
 and, temporally, to sales offered after the expiry of Section  
 318 would not defeat the Government's argument that the offers  
 are void ab initio, and therefore outside the scope of the  
 statute. See discussion infra, pp. .

FEDERAL DEFENDANTS' OPPOSITION  
 TO WCLA'S MOTION TO CLARIFY . . . 3

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

1 NFRC v. Glickman, the pending 2001 litigation before Judge Hogan.

2

3 As this Court was informed at the time of the November 1  
4 hearing, NFRC had already filed a third motion for summary  
5 judgment seeking to compel the release of certain sales that had  
6 not been released under (k)(1), including the sales which were  
7 the subject of Plaintiffs' Motion to Clarify and Enforce  
8 Judgment. The Government opposed NFRC's motion.

9 On January 10, 1996 the Glickman Court issued an opinion as  
10 to the issues raised by NFRC in its third motion for summary  
11 judgment, and by Pilchuck Audubon in the consolidated action.  
12 See 1/10/96 Order attached to Notice of Filing and Request for  
13 Status Conference (1/18/96).<sup>3</sup> As to the sales at issue on  
14 plaintiffs' Motion to Enforce and Clarify Judgment, Judge Hogan  
15 decided that they were all subject to 2001(k)(1). The Court  
16 issued an injunction to the agency to release the First and Last  
17 sales, and a declaratory judgment as to the enjoined sales. NFRC  
18 v. Glickman (January 10, 1995 Order at 24-25). As to the  
19 enjoined sales, the Court declined to enter injunctive relief,  
20 and required NFRC to apply to this Court for relief from this  
21 Court's injunctions. Id. In accordance with its ruling, the  
22 court dismissed Pilchuck Audubon Society's complaint. Id.

23

24

25

26

---

<sup>3</sup> This Order was amended on January 17, 1996 to correct an error not relevant to these proceedings.

1 On January 12, 1996, Pilchuck Audubon filed a notice of  
 2 appeal from the final judgment dismissing their complaint,<sup>4</sup> and  
 3 a motion for a stay of Judge Hogan's mandatory injunction. On  
 4 January 23, 1995, federal defendants filed a notice of appeal and  
 5 motion for stay of certain provisions of Judge Hogan's Order not  
 6 relevant to these proceedings. The motion for a stay did not  
 7 oppose, nor did it support, Pilchuck's motion for a Stay. On  
 8 January 25, 1996, Judge Hogan denied both stay applications.  
 9 Pilchuck Audubon and the government have renewed their stay  
 10 applications before the Ninth Circuit.

11 On the issue of whether, in determining that a sale may be  
 12 excepted from release by reason of the "nesting" exception  
 13 contained in 2001(k)(2), the defendants could utilize the Pacific  
 14 Seabird Group (PSG) Protocol, Judge Hogan on January 19, 1996,  
 15 rejected the Government's argument, and issued an order holding  
 16 that (k)(2) requires other evidence of nesting within sale unit  
 17 boundaries. The Court enjoined the government to award and/or  
 18 release of any 2001 (k) sale which does not meet the Court's  
 19 standard.

20 Thereafter, the government and environmental groups,  
 21 intervenors in the action for the purposes of the (k)(2)  
 22 litigation, separately moved for an immediate stay pending appeal  
 23 on the basis of irreparable harm. On January 25, 1996, the court

---

24  
 25 <sup>4</sup> This appeal brings before the Ninth Circuit the issue of  
 26 the application of 2001(k) to the sales enjoined by this Court.

1 granted a 60-day stay of his order. By notices of appeal filed  
2 January 24, 1996 and January 30, 1996, both the environmental  
3 groups and the government are appealing from the January 19, 1996  
4 order.

5 Status of Enjoined Sales:

6 In its opinion of November 3, 1995, the Court carefully  
7 traced the history of the litigation affecting the old growth  
8 forests of the Pacific Northwest, the initial lawsuits; the  
9 short-term, and ultimately flawed, alteration of the  
10 environmental laws effected by Section 318; decisions by this  
11 Court and the District Court in Oregon finding violations of the  
12 environmental laws in the separate agency efforts to address the  
13 matter; and the affirmance of those decisions by the Ninth  
14 Circuit. Finally, the Court noted the prodigious undertaking to  
15 resolve the controversy and remedy the legal defects culminating  
16 in the Plan, which this Court found to be the first legally and  
17 scientifically sound approach to management of the old growth  
18 forests. Opinion, pp. 1 - 5.

19 At the hearing on November 1, 1995, this Court inquired of  
20 counsel regarding the impacts of release of sales under 2001 on  
21 the Plan. Counsel advised at that time that the agencies were  
22 studying the matter. That effort continues. At present the  
23 agencies are undertaking fact-gathering regarding the effects of  
24 the release of sales on the baselines for the Plan; no  
25 conclusions have been drawn.  
26

FEDERAL DEFENDANTS' OPPOSITION  
TO WCLA'S MOTION TO CLARIFY . . . 6

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

1 Notwithstanding that the agencies have not reached a  
 2 conclusion regarding the effects of release of the enjoined sales  
 3 ( or other sales ) on the Plan, the Court stated its views in its  
 4 November 3, 1995 opinion. Referring to its Opinion of December  
 5 21, 1994, the Court repeated its view that "any more logging  
 6 sales than the plan contemplates would probably violate the  
 7 laws." Opinion, p. 5, quoting SAS v. Lyons, and that "all six  
 8 sales in question would be illegal but for Section 2001(k)(1),  
 9 they are located in late-successional reserve areas, as defined  
 10 by the Northwest Forest Plan." Opinion, p. 8. Without endorsing  
 11 the Court's conclusions in any way, it is clear that serious  
 12 questions are presented regarding the impacts of the release of  
 13 the enjoined sales on the Plan.

14 ARGUMENT

15 The Government is mindful of this Court's concern about  
 16 avoiding duplication of proceedings between the two District  
 17 Courts, as expressed at the November 1, 1995 hearing and in its  
 18 Order on Motions Heard on November 1, 1995.

19 However, this Court clearly has discretion to continue the  
 20 injunctions in this case pending the resolution by the Court of  
 21 Appeals of the issues regarding the scope of this difficult  
 22 statute. By issuing a declaratory judgment and not an injunction  
 23 as to the sales enjoined by this Court, the Oregon Court has  
 24 presumably acknowledged that there may be equities pertaining to  
 25 the vacating of an injunction as to these sales which this Court  
 26

1 is in the best position to consider. In this context, it is  
 2 clearly appropriate for the Court to consider the likelihood of  
 3 success on the merits of an appeal concerning the enjoined sales.  
 4 The Government's position on the merits is by and large set forth  
 5 in its papers previously filed on Plaintiffs' Motion to Clarify  
 6 and Enforce Judgment, and in our remarks at the Court's hearing  
 7 on November 1, 1995. We urge those arguments, as supplemented by  
 8 additional arguments suggested by later events, here in  
 9 opposition to the Court vacating the injunctions against the  
 10 Cowboy, Nita, South Nita and Garden timber sales (the "enjoined  
 11 sales") pending resolution of these issues in the Court of  
 12 Appeals.<sup>5</sup> Prior to setting out these matters, there is the  
 13

---

14 <sup>5</sup> The Government continues in its opposition to plaintiffs'  
 15 argument that the separation of powers doctrine is applicable. It  
 16 has dealt with this in its prior papers submitted on this motion,  
 17 but wishes to make further comment on plaintiffs' reliance on the  
 18 Alaska Wilderness case. Plaintiffs suggest that the Ninth  
 19 Circuit's recent decision in Alaska Wilderness Recreation and  
 20 Tourism Assoc. v. Morrison, 67 F.3d 723 (9th Cir. 1995), can be  
 21 applied here to prevent the application of Section 2001(k)(1) to  
 22 pending litigation. In Alaska Wilderness, the Ninth Circuit  
 23 reaffirmed that "Congress unquestionably may amend substantive  
 24 law affecting a pending case." Alaska Wilderness, 67 F.3d at  
 25 733. However, the court held that the appropriations statute at  
 26 issue did not preclude application of NEPA to certain timber  
 sales, in part because the statute "offered no new statutory  
 basis on which to analyze the matter at issue." Id. Here,  
 Section 2001(k)(1) does provide such a basis: it requires the  
 Forest Service to award and release certain sales on their  
 original terms, "notwithstanding any other provision of law."  
 Plaintiffs simply ask the court to ignore this language.  
 However, the court cannot ignore language in the statute, and  
 whatever restrictions might apply to the phrase "notwithstanding  
 any other provision of law," it is fatal to plaintiffs' reliance  
 on the Alaska Wilderness decision.

FEDERAL DEFENDANTS' OPPOSITION  
 TO WCLA'S MOTION TO CLARIFY . . . 8

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

1 | threshold matter of the Court's jurisdiction to act in this  
2 | matter.

3 | WCLA argues that because the final judgment in this action  
4 | did not carry forward the injunctions issued on the basis of the  
5 | enjoined sales' violations of section 318, there are no existing  
6 | injunctions and the Court is without jurisdiction to determine  
7 | the effect of Section 2001(k) of the Rescissions Act on its prior  
8 | orders. Its argument is flawed.

9 | The history of this matter makes clear that the only reason  
10 | the prior injunctions were not carried forward into the final  
11 | judgment was the historical accident that section 318 had lapsed,  
12 | and there was thus no legal basis for the Forest Service  
13 | reoffering the sales in their original form. As this Court has  
14 | stated, the judgment did not mention the Section 318 claims,  
15 | because these had been "resolved through injunctive relief."  
16 | Order on Motions Heard on November 1, 1995, p. 4. Indeed, the  
17 | 318 claims owed their existence in this action to the  
18 | Congressional substitution of those standards, on a temporally  
19 | limited basis, for the laws upon which the action was originally  
20 | based. Congress has now, according to WCLA, decreed that those  
21 | sales should go forward in the very form that this Court  
22 | determined they violated section 318. It is inconceivable that  
23 | under these circumstances this Court would not have jurisdiction  
24 | to determine the effect of Section 2001(k) upon its injunctions  
25 | and the orders upon which they are based.  
26 |

FEDERAL DEFENDANTS' OPPOSITION  
TO WCLA'S MOTION TO CLARIFY . . . 9

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

1 Turning to the matters to be resolved on appeal regarding  
 2 the enjoined sales, we indicated at the hearing that in our view  
 3 the Court's prior ruling that the sales did not meet the  
 4 requirements of section 318 - the statute authorizing their  
 5 offering - meant that the sales became null and void. Transcript  
 6 p. 16. We wish to elaborate on that argument, which was not  
 7 presented in our briefs.

8 Section 2001(k) does not resuscitate void sales.

9 Nothing in the language of the statute or the legislative  
 10 history suggests that in enacting subsection 2001(k), Congress  
 11 intended to validate otherwise invalid offers.<sup>6</sup> Subsection  
 12 2001(k) (1) requires the Secretary concerned to:

13 act to award, release, and permit to be completed in  
 14 fiscal years 1995 and 1996, with no change in  
 15 originally advertised terms, volumes, and bid prices,  
 16 all timber sale contracts offered or awarded before  
 17 that date [of enactment]

18 By directing the Secretary to "act to award, release and  
 19 permit to be completed . . . with no change in originally  
 20

---

21 <sup>6</sup> Some discussion of the timber sale process may be helpful  
 22 to the Court. All Forest Service timber sales with a value in  
 23 excess of \$10,000 must be advertised prior to sale, according to  
 24 specific requirements. See 36 CFR § 223.82. Although the  
 25 advertisement of timber is not equivalent to an offer of the  
 26 timber, it is an integral part of the process leading to award of  
 a sale. The Forest Service in its advertisement informs  
 interested parties that the government is seeking to sell timber,  
 but specifically reserves its right to enter into a contract that  
 will confer the greatest advantage to the government. See,  
Cutler-Hammer v. United States, 194 Ct. Cl. 758, 441 F. 2d 1179  
 (1971). Thus, the stage at which a timber sale is "offered" is  
 the point at which the Forest Service opens the bids of parties  
 responding to the advertisement.

1 advertised terms," the statute clearly contemplated that viable  
2 offers had been extended pursuant to which the award and  
3 completion could have been accomplished. This is confirmed by  
4 the legislative history which shows that Congress was targeting  
5 timber sales that, but for various delays or suspension, would  
6 otherwise have proceeded. See 141 Cong. Rec. H 3233 (statement  
7 by Representative Taylor that "in some cases the agencies  
8 rejected bids well after the auction due to administrative  
9 reviews and delays and changing standards . . . even though the  
10 preponderance of these sales were approved for harvest in the  
11 Record of Decision accompanying the President's Pacific Northwest  
12 Plan . . . ."); 141 Cong. Rec. H 5558.

13       These four sales enjoined by this Court do not fall into  
14 this category of sales. The sales were never offered in  
15 accordance with section 318, the statute from which the Forest  
16 Service derived its authority to offer and proceed with any such  
17 sales. This Court expressly found that the four enjoined sales  
18 violated section 318(b) requiring that sales "offered pursuant to  
19 this section shall minimize fragmentation of the most  
20 ecologically significant old growth forest stands." Accordingly,  
21 the court enjoined the sales until the defects were cured. The  
22 defects, however, were not cured during the life of section 318.  
23 Thus, these were not sales that were held up by "administrative  
24 reviews and delays and changing standards." Instead, the sales  
25 could not proceed because they never satisfied the initial  
26

FEDERAL DEFENDANTS' OPPOSITION  
TO WCLA'S MOTION TO CLARIFY . . . 11

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

1 requirement for forming a valid contract -- they were never  
2 offered in accordance with the authorizing statute. Cf. Croman  
3 Corp. v United States, 31 Fed. Cl. 741, 746 (Ct. Cl. 1994) ("re-  
4 offer" of substantially modified section 318 sale without  
5 compliance with competitive procurement regulations was  
6 unauthorized and invalid); United States v. Amdahl Corp., 786  
7 F.2d 387 (Fed. Cir. 1986) (recognizing general proposition that  
8 failure to comply with statutory requirements in making award may  
9 render contract nullity); Alabama Rural Fire Ins. Co. v. United  
10 states, 572 F.2d 727, 733 (Ct. Cl. 1978); see also Utah Power v.  
11 United States, 243 U.S. 389 (1917) (administrative actions taken  
12 in violation of statutory authorization or requirement are of no  
13 effect). Most significantly, when Section 318, the authorizing  
14 statute, expired, the sales became null and void, as if they had  
15 never been offered, because the authority to offer them had  
16 disappeared.

17 The government makes a crucial distinction between sales  
18 that were enjoined for having violated Section 318 and sales that  
19 were enjoined for violations of other statutes, such as NEPA.  
20 Contra, NFRC v. Glickman (January 10, 1995 Order at 18). Unlike  
21 NEPA, Section 318 provides the very authority to offer and award  
22 the four enjoined Umpqua sales. Statutes such as NEPA apply to a  
23 timber sale only where the Forest Service or BLM have already  
24 decided to take action under whatever statute authorizes the sale  
25 in the first place. Thus, the effect of a violation of Section  
26

FEDERAL DEFENDANTS' OPPOSITION  
TO WCLA'S MOTION TO CLARIFY . . . 12

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

1 318 is fundamentally different from the effect of a violation of  
2 a statute such as NEPA in determining under Section 2001(k) (1)  
3 whether a timber sale was ever "offered" in the eyes of the law.

4 The distinction is analogous to the distinction between  
5 a "void contract" and a "voidable contract." A void contract is  
6 "[o]ne which never had any legal existence or effect . . .  
7 because of lack of some essential element of a contract."  
8 Black's Law Dictionary, at 1412 (5th ed. 1979). A "voidable  
9 contract" is one that is valid when entered but "which is void as  
10 to wrongdoer but not void to wronged party, unless he elects to  
11 so treat it." Id. at 1411-12. Thus, a void marriage can be  
12 annulled, while a voidable marriage terminates in divorce. "An  
13 'annulment' differs conceptually from a divorce in that a divorce  
14 terminates a legal status, whereas an annulment establishes that  
15 a marital status never existed." Id. at 83. In other words, the  
16 eyes of the law are sometimes blind, pretending that actual  
17 contracts or events never existed. Thus, the timber sales at  
18 issue, which violated their authorizing statute, are void --  
19 legally, as good as if never offered.

20 Finally, we wish to note that the very rulings of the  
21 District Court in Oregon suggest an inconsistency which might  
22 lead the Court of Appeals to a different conclusion on the  
23 application of 2001(k) as a general matter. NFRS has continually  
24 argued that the plain language of the statute contains no  
25 ambiguity which would permit administrative interpretation under  
26

1 the principles of Chevron U.S.A., Inc. v. Natural Resources  
2 Defence Council, 467 U.S. 837 (1984), and the Oregon Court has  
3 generally accepted that argument in its rulings. However, in  
4 ruling on the issue of whether 2001(k) comprehended sales which  
5 predated section 318, the Court acknowledged a potential  
6 ambiguity. See NFERC v. Glickman, January 10, 1995 Order at 11 (  
7 " The phrase 'subject to section 318 ' is not clear regarding the  
8 presence of absence of a temporal limit."). We believe that this  
9 acknowledged ambiguity in the temporal scope of 2001(k) supports  
10 the Government's position that Chevron requires that the  
11 administrative interpretation be deferred to regarding  
12 ambiguities which pervade the entire statute. Were the Court of  
13 Appeals to reach the same conclusion, it is but a short step to a  
14 finding that 2001(k) does not comprehend the sales enjoined by  
15 this Court for violation of Section 318. See Federal Defendants'  
16 Response to Motion to Clarify and Enforce Judgment dated October  
17 25, 1995 pp. 17 - 21.

18 CONCLUSION

19 For the reasons above stated, this Court should continue the  
20 injunction expressed in its prior orders affecting the Cowboy,  
21 Nita, South Nita and Garden sales, pending resolution of by the  
22 Court of Appeals of the application of 2001(k) to these sales.  
23 Dated this 5th day of February, 1996.

24 Respectfully submitted,

25  
26  
FEDERAL DEFENDANTS' OPPOSITION  
TO WCLA'S MOTION TO CLARIFY . . . 14

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

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

FAX NUMBER 305-0506, -0267, -0429  
 CONFIRMATION NUMBER (202) 305-0504

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman,	514-0557
	Lois Schiffer,	
	Jim Simon	
	Al Ferlo	514-4240
	Greg Frazier	720-5437
	Mike Gippert,	690-2730
	Jay McWhirter	
	Tim Obst	
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Karen Mouritsen	219-1792
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Jim Sutherland(503)	465-6582
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES:

DATE: January 24, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: SAS v. Thomas (Judge Dwyer)  
 Attached is WCLA's Motion and Supporting  
 Memorandum to Clarify Judgment or Vacate  
 Injunction as to Four Timber Sales.

Per a status conference with the Judge today,  
 this motion, as well as plaintiffs' motion to  
 clarify and enforce judgment as to all six  
 timber sales, is noted for 2/9/96.

N01-9508\1RP90944.JEP

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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 MOTION TO CLARIFY
	)	JUDGMENT OR VACATE
vs.	)	INJUNCTION AS TO FOUR
	)	TIMBER SALES
JACK WARD THOMAS, et al.,	)	
	)	NOTE ON MOTION CALENDAR:
Defendants,	)	February 9, 1996
	)	
and	)	
	)	
WASHINGTON CONTRACT LOGGERS	)	
ASSOCIATION, et al.,	)	
	)	
Defendants-Intervenors.	)	

Defendants-Intervenors Washington Contract Loggers Association and Northwest Forest Resource Council (jointly "WCLA") move to clarify that the judgment in this case does not enjoin the award or release of the Cowboy, Nita, South Nita and Garden timber sales, or in the alternative move to vacate any existing injunction against the award and release of these four timber

WCLA'S MOTION TO CLARIFY JUDGMENT OR VACATE  
INJUNCTION AS TO FOUR 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  
(503) 498-4573 • Fax (503) 295-0815

N01-9508\1RP90944.1EP

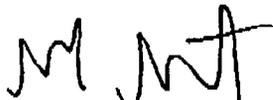
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

sales in light of Congress' enactment of section 2001(k) of the 1995 Rescissions Act, Pub. L. 104-19.

In support of this motion the court is referred to the Memorandum In Support Of WCLA's Motion To Clarify Judgment Or Vacate Injunction As To Four Timber Sales filed herewith.

Dated this 23rd day of January, 1996.

MARK C. RUTZICK LAW FIRM,  
A Professional Corporation

By:   
Mark C. Rutzick, WSB #17291  
Alison Kean Campbell,  
WSB #19363  
Of Attorneys for Defendants-  
Intervenors Washington  
Contract Loggers  
Association, et al.

N01-9508\IRP90945.1EQ

Honorable William L. Dwyer

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

SEATTLE AUDUBON SOCIETY, et	)	
al.,	)	Civil No. C89-160WD
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT OF
	)	WCLA'S MOTION TO CLARIFY
vs.	)	JUDGMENT OR VACATE
	)	INJUNCTION AS TO FOUR
JACK WARD THOMAS, et al.,	)	TIMBER SALES
	)	
Defendants,	)	
	)	
and	)	
	)	
WASHINGTON CONTRACT LOGGERS	)	
ASSOCIATION, et al.,	)	
	)	
Defendants-Intervenors.	)	

The district court for the district of Oregon has issued a declaratory judgment in Northwest Forest Resource Council v. Glickman, Civil No. 95-6244-HO (Order, January 10, 1996, amended January 17, 1996), that section 2001(k) of the 1995 Rescissions Act, Pub. L. 104-19, requires the award and release of timber sales offered between October 23, 1989 and July 27, 1995 includ-

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
600 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2088  
(503) 499-4673 • Fax (503) 295-0815

NO1-9508\IRP90945.1EQ

1 ing, specifically, the Cowboy, Nita, South Nita and Garden timber  
2 sales that were the subject of prior injunctions from this court,  
3 as well as the First and Last sales that were the subject of  
4 litigation in this court in 1990.

5 While NFRC sought (and obtained) an injunction requiring the  
6 award and release of other sales involved in that case (including  
7 the First and Last sales that all parties agreed were not subject  
8 to an injunction in this court), NFRC did not request an injunc-  
9 tion requiring the award and release of the Cowboy, Nita, South  
10 Nita and Garden timber sales because of the prior injunctions  
11 issued by this court, and because of Seattle Audubon's contention  
12 that the injunctions remain in effect. NFRC sought and obtained  
13 a declaratory judgment that the statute requires the award and  
14 release of these four sales.

15 Based on the Oregon court's declaratory judgment, defendant-  
16 intervenors Washington Contract Loggers Association and NFRC  
17 (jointly referred to as "WCLA") now seek to remove any remaining  
18 judicial impediment in this case to the award and release of  
19 these four timber sales.

20 WCLA has filed two alternative motions. As WCLA discussed  
21 in its brief last fall in this case, it does not appear that the  
22 final judgment in this case entered in 1992 carried forward the  
23 injunctions issued by the court in 1990 concerning Cowboy, Nita,  
24 South Nita and Garden. Accordingly, the court can and should  
25 clarify that there is no existing injunction against the award  
26 and release of these sales. In that event, Judge Hogan's January

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO CLARIFY  
JUDGMENT OR VACATE INJUNCTION AS TO FOUR TIMBER SALES

- 2

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 295-0914

N01-9508\IRP90945.1EO

1 10 order would require the immediate award and release of the  
2 four sales.

3 Alternatively, the court can and should vacate any prior  
4 injunction against the four timber sales in light of Congress'  
5 enactment of section 2001(k) of the 1995 Rescissions Act.

6 The Ninth Circuit has stated the rule that controls this  
7 motion:

8 When a change in the law authorizes what had  
9 previously been forbidden, it is an abuse of  
discretion for a court to refuse to modify an  
injunction founded on superseded law.

10 *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986), cert.  
11 denied, 481 U.S. 1069 (1987), quoting *American Horse Protection*  
12 *Association v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982). Other  
13 courts follow the same rule. *Protectoseal Co. v. Barancik*, 23  
14 F.3d 1184, 1187 (7th Cir. 1994); *Railway Labor Executives v.*  
15 *Metro-North Commuter*, 759 F. Supp. 1019, 1021-22 (S.D.N.Y. 1990).

16 WCLA's motion should be granted under this rule. This court  
17 previously enjoined the four sales in 1990 based on section 318.  
18 Judge Hogan determined that in 1995 Congress superseded prior law  
19 by enacting section 2001(k), which requires the award and release  
20 of the sales described in the statute "notwithstanding any other  
21 provision of law." See Order, January 10, 1996 at 13-19. Judge  
22 Hogan specifically applied his ruling to the four sales at issue  
23 here. *Id.* at 3-4. Thus, the effect of section 2001(k) on these  
24 four sales is that Congress "authorize[d] what had previously  
25 been forbidden." It would be an abuse of the discretion for the  
26

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO CLARIFY  
JUDGMENT OR VACATE INJUNCTION AS TO FOUR TIMBER SALES

- 3

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 489-4673 • Fax (503) 718-0911

N01-9508\IRP90945.1EQ

1 court not to vacate any existing injunction that bars the award  
2 and release of these sales. *Toussaint v. McCarthy*, 801 F.2d at  
3 1090.

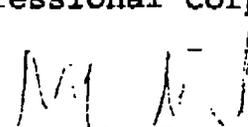
4 The high bidders on these sales in 1990 continue to seek the  
5 prompt award and release of these sales. Scott Timber Co., high  
6 bidder on the Cowboy, Nita and South Nita sales, actively  
7 participated in the *NFRC v. Glickman* case, filing a companion  
8 action that was consolidated with the main case. Medite Corpora-  
9 tion, high bidder on the Garden sale, seeks the immediate award  
10 and release of the sale. See declaration of Tom Coiner (January  
11 22, 1996) (filed herewith).

12 **CONCLUSION**

13 The court should clarify that there is no existing injunc-  
14 tion against award and release of the Cowboy, Nita, South Nita  
15 and Garden timber sales, or in the alternative, should vacate any  
16 existing injunction in light of section 2001(k) of the 1995  
17 Rescissions Act.

18 Dated this 23rd day of January, 1996.

19 MARK C. RUTZICK LAW FIRM,  
20 A Professional Corporation

21 By:   
22

23 Mark C. Rutzick, WSB #17291  
24 Alison Kean Campbell,  
25 WSB #19363

26 Of Attorneys for Defendants-  
Intervenors Washington  
Contract Loggers  
Association, et al.

N01-9508\RP01149.05A

Honorable William L. Dwyer

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

SEATTLE AUDUBON SOCIETY, et	)	
al.,	)	Civil No. C89-160WD
	)	
Plaintiffs,	)	DECLARATION OF MARK C.
	)	RUTZICK REGARDING
vs.	)	DECLARATION OF TOM COINER
	)	
JACK WARD THOMAS, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
WASHINGTON CONTRACT LOGGERS	)	
ASSOCIATION, et al.,	)	
	)	
Defendants-Intervenors.	)	

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

1. I am one of the attorneys for Defendants-Intervenors Washington Contract Loggers Association, et al., in this action. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

DECLARATION OF MARK C. RUTZICK REGARDING  
DECLARATION OF TOM COINER - 1

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 205-0815

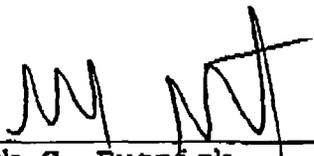
NO1-9508\IRP01149.05A

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

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

Executed on January 23, 1996.

  
\_\_\_\_\_  
Mark C. Rutzick

NO1-9508\1R\90940.1EJ

Honorable William L. Dwyer

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

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

SEATTLE AUDUBON SOCIETY, et )  
al.. )

Civil No. C89-160WD

Plaintiffs, )

DECLARATION OF TOM COINER

vs. )

JACK WARD THOMAS, et al., )

Defendants. )

and )

WASHINGTON CONTRACT LOGGERS )  
ASSOCIATION, et al., )

Defendants-Interveners. )

Tom Coiner, with full knowledge of the penalty of perjury,  
declares as follows:

1. I am the Timber Manager for Medite Corporation in  
Medford, Oregon. I make this declaration on personal knowledge,  
and if called to testify as a witness herein would testify as set  
forth below.

DECLARATION OF TOM COINER - 1

MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
333 S.W. Fifth Avenue  
Portland, OR 97204-2099  
(503) 466-4173 • Fax: (503) 296-0811

NOL-9508\10090940.1EJ

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

2. Medite Corporation (formerly known as Medford Corporation) operates two manufacturing facilities in Medford: a lumber mill and a veneer plant. Our plants consume 60-70 million board feet of timber per year at full operation.

3. Our company currently has less than 10 million board feet of federal timber under contract, mostly consisting of recently-sold salvage sales. Our private lands are capable of providing our company about 15-20 million board feet of timber per year. As a result, our current timber supply is extremely tight. We are attempting to supply our facilities with private logs bought on the open market.

4. In 1990 our company was the high bidder on the Garden Timber Sale on the Siskiyou National Forest, which was offered on September 12, 1990. We understand that this sale is subject to the provisions of section 2001(k) of the 1995 Rescissions Act, Public Law 104-19, and we would like this sale awarded and released as soon as possible.

5. We have a very strong immediate need for the timber from the Garden sale. The sale contains about 4.2 million board feet of timber which we will use to supply both our lumber mill and veneer plant.

6. We plan to log this sale as quickly as we can once it is awarded. We need to build roads on this sale, and we will be able to start road building as soon as the contract allows. The road building would take about three months, and we could start logging and deliveries to our mills during this logging season.

DECLARATION OF TOM COINER - 2

MARK C. PRYZEK LAW FIRM  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
808 S.W. Fifth Avenue  
Portland, OR 97204-2089  
503 486-1572 • Fax 503 798-0911

MO1-95D8\JRP90940.1EJ

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

7. The Garden timber sale will make a very important contribution to our company's timber supply for 1995. We hope the court will allow this sale to be awarded and released as soon as possible.

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

Executed on January 22, 1996.

Tom Coiner  
Tom Coiner

DECLARATION OF TOM COINER - 3

MARK C. RUTZOK LAW FIRM  
& Professional Corporation  
Attorneys at Law  
600 Pioneer Tower  
555 S.W. Fifth Avenue  
Portland, OR 97204-2088  
(503) 489-4579 • Fax (503) 296-0818

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

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

DATE: October 24, 1995  
FROM: Edward A. Boling  
PHONE NUMBER: 202-514-2715  
NUMBER OF PAGES TO BE TRANSMITTED (including cover): 30  
TO: Elena Kagen  
  
PHONE NUMBER: 456-7594  
MESSAGE: Draft brief in Seattle Audubon Society  
  
RECEIVING FAX NUMBER: 456-1647

1 DRAFT

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

2 SEATTLE AUDUBON SOCIETY, et al., )

3 Plaintiffs, )

4 v. )

5 JACK WARD THOMAS, et al., )

6 Defendants. )

Civil No. C89-160-WD

FEDERAL DEFENDANTS'  
RESPONSE TO MOTION TO  
CLARIFY AND ENFORCE  
JUDGMENT

8 INTRODUCTION

9  
10 This case concerns four timber sales that this Court  
11 enjoined by reason of their failure to comply with the ecological  
12 criteria set forth by Congress in section 318 of the  
13 Appropriations Act of 1990 to address the controversy regarding  
14 the management of the old growth forests of the Pacific  
15 Northwest, and two old growth sales which were withdrawn by the  
16 Forest Service in light of the Court's ruling.

17 Congress has passed a statute, Section 2001(k) of the  
18 Rescissions Act of 1995, which requires the Forest Service to  
19 award all sales previously offered under Section 318 according to  
20 their originally configured terms, "notwithstanding any other  
21 provision of law." Unless these sales were not within the  
22 contemplation of Congress in passing this statute, they must be  
23 released according to their original terms, regardless of their  
24 failure to accord with any ecological or planning criteria  
25 established by Congress.

26 Plaintiffs have moved on several grounds to request  
27 this Court to confirm and enforce its prior judgments such that

1 Section 2001(k) will not operate to compel the release of these  
2 sales. The Government, on the grounds stated in this memorandum,  
3 agrees with plaintiffs that 2001(k) cannot reasonably be  
4 interpreted to comprehend sales found by this Court to have  
5 violated section 318. It further suggests that the potential  
6 applicability of Section 2001(k) to the withdrawn sales should,  
7 for the same reasons, be resolved against the inclusion of these  
8 sales within the terms of Section 2001(k).

9 BACKGROUND

10 A. SECTION 318 TIMBER SALES

11 Section 318 of the Department of the Interior and Related  
12 Agencies appropriations Act, Fiscal year 1990, Pub. L. 101-121  
13 (Section 318), also referred to as the Hatfield/Adams Amendment,  
14 was signed into law on October 23, 1989. See 135 Cong. Rec. S  
15 8762, 8795-8797 (July 26, 1989). The intent of section 318 was:

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

19 Gifford Pinchot Alliance v. Butruille, 742 F.Supp. 1077, 1079

20 (D.Or. 1990). To achieve these goals, subsection 318(a) set an  
21 overall target level of timber from national forests and BLM  
22 lands in Oregon and Washington for fiscal years 1989 and 1990.  
23 The substance of the statute was set out in subsections 318(b) -  
24 (k), which set forth procedures for expedited review,

1 prohibitions on injunctions and restraining orders<sup>1</sup> and numerous  
2 environmental safeguards.

3 Of particular relevance to this motion, subsection 318(b)  
4 directed the Forest Service to sell ecologically significant old  
5 growth within the 13 forests known to contain northern spotted  
6 owls only in accordance with specific criteria and procedures  
7 designed to preserve ecologically significant old growth forest  
8 stands in a manner which allowed direct input from all  
9 constituencies involved with the old growth controversy.  
10 These criteria included the direction to minimize fragmentation  
11 of the most ecologically significant old growth stands,  
12 318(b)(1); direction regarding the definition of "old growth  
13 forest stands", id.; direction that spotted owl habitat was to be  
14 considered an important factor in identification of ecologically  
15 significant old growth forest stands, 318(b)(2); preclusion of  
16 offering sales in the SOHA's identified in the 1988 Record of  
17 Decision, as adjusted, and adherence to the balance of the  
18 standards and guidelines of that decision, 318(b)(3); and  
19 direction to prefer sales of lesser quality and location as  
20 spotted owl habitat for offering over those of greater quality  
21 and location, 318(b)(4). The procedures included the creation of  
22 "advisory boards" consisting of representatives of the  
23 environmental and business communities, 318(c)(1), who were to  
24 make recommendations to the Forest Service and the Bureau of Land  
25 Management, id., in implementing the direction to identify

---

26  
27 <sup>1</sup> See Section 318 (d), (f)(1), (g).

1 ecologically significant old growth stands. See 318(b)(1) and  
2 (2). The Forest Service and Bureau of Land Management were  
3 directed to consider the recommendations of the advisory boards  
4 regarding suggested modifications to individual sales, together  
5 with considering recommendations by the Fish and Wildlife Service  
6 pursuant to its Endangered Species Act responsibilities.

7 318(c)(2).

8 These criteria and procedures applied exclusively to "all  
9 timber sales from the thirteen national forests in Oregon and  
10 Washington and [BLM] Management districts in western Oregon known  
11 to contain northern spotted owls [NSOs]." See Subsection 318(i);  
12 Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 433 (1992).

13 Subsection 318(k) provided that timber sales offered to meet the  
14 target requirements of subsection (a) would continue "to be  
15 subject to the terms and conditions of" section 318 for the  
16 duration of the contracts. "All other provisions of this section  
17 shall remain in effect until September 30, 1990." Subsection  
18 318(k). Accordingly, Section 318 expired at the end of fiscal  
19 year 1990. See Robertson, 503 U.S. at 433. Section 318 was the  
20 subject of extensive litigation, with the Supreme Court  
21 ultimately affirming the constitutionality of the law against  
22 plaintiffs' claims that it violated the separation of powers  
23 doctrine. Robertson, supra, 503 U.S. 429 (1992).

24 Timber sales totalling approximately 4.3 billion board feet  
25 were configured according to the specific ecological criteria and  
26 procedures established by Section 318(b) and offered through the  
27

1 auction process by the Forest Service and the Bureau of Land  
2 Management. cite 8/22 interpretation Approximately 4 billion  
3 feet of these sales were awarded to the high bidders. Many  
4 auctioned section 318 sales, however, did not go forward as a  
5 result of concerns about significant impacts to species listed  
6 under the Endangered Species Act (ESA), as the following history  
7 discloses.

8 In June 1990, after enactment of Section 318, the United  
9 States Fish and Wildlife Service (FWS) listed the northern  
10 spotted owl as a threatened species under the ESA. See 55 Fed.  
11 Reg. 26189 (June 26, 1990). Because of the listing of the NSO as  
12 threatened species, a number of Forest Service section 318 sales  
13 were "modified, eliminated or held in abeyance." See Gifford  
14 Pinchot, 742 F.Supp. at 1080.

15 On September 28, 1992, the FWS listed the marbled murrelet  
16 as a threatened species. 57 Fed. Reg. 45328 (Oct. 1, 1992). As  
17 a result of the listing, the Forest Service reinitiated  
18 consultation with the FWS under ESA § 7(a)(2), 16 U.S.C. §  
19 1536(a)(2), regarding the effects on murrelets of continuing to  
20 harvest section 318 sales that had already been awarded. In June  
21 1995, the FWS subsequently concluded that further logging of a  
22 number of the Forest Service section 318 sales would likely  
23 jeopardize the continued existence of the marbled murrelet. As a  
24 result, these section 318 sales were suspended pending further  
25 survey work. [Documentation]

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

7 The contracting process was further delayed by litigation.  
8 After it was determined, in development of the Forest Plan, that  
9 sales could go forward as modified in conformity with the FWS's  
10 biological opinion, timber companies brought suit in the Federal  
11 Claims Court to prevent BLM from awarding the modified sales.  
12 The Claims Court issued a declaratory judgment that the award  
13 letter for the modified contract was null and void because the  
14 agency lacked authority to negotiate a sale of the particular  
15 quantity of timber outside the competitive bidding process. See  
16 Croman Corp. v. United States, No. 94-48C (Ct. Cl. Aug. 16,  
17 1994). As a consequence, the BLM withdrew all of the outstanding  
18 award letters and was in the process of negotiating with the high  
19 bidders on the unawarded contracts when the Congress introduced  
20 the legislation described below.<sup>2</sup>

21 B. THE 1995 RESCISSIONS ACT

---

22  
23  
24 <sup>2</sup> Another timber company brought suit in the U.S.  
25 District Court of Oregon seeking a declaratory judgment and  
26 injunction requiring the BLM to reinitiate consultation on a  
27 section 318 timber sale in light of information in the Forest  
28 Plan. Action in this litigation was stayed because of the  
pendency of the subject legislation. See D.R. Johnson Lumber Co.  
v. Zielinski, No. 94-6371-TC (D.Or.).

1 The Rescissions Act of 1995 (the Act) was signed into law by  
2 President Clinton on July 27, 1995. See Pub. L. 104-19 §2001  
3 (1995). The Act essentially contains three primary parts.  
4 Subsection 2001(b) describes procedures for proceeding with  
5 salvage timber sales. Subsection 2001(d) directs the expedited  
6 implementation of the Pacific Northwest Forest Plan. Both  
7 subsections (b) and (d) provide for expedited judicial review,  
8 borrowing extensively from Section 318 as a model for design of  
9 the expedited procedure. Compare subsections 2001(f)(1)-  
10 (7) (providing for expedited judicial review and prohibiting  
11 restraining orders and injunctions) with subsections 318(g)(1)-  
12 (3) (setting forth procedures for expedited judicial review and  
13 restrictions on injunctions).

14 Subsection 2001(k) seeks to resolve continuing delays in the  
15 release of the remaining section 318 sales. It reads as follows:

16 (k) AWARD AND RELEASE OF PREVIOUSLY OFFERED AND  
17 UNAWARDED TIMBER SALE CONTRACTS. -----

18 (1) AWARD AND RELEASE REQUIRED.-----  
19 Notwithstanding any other provision of law,  
20 within 45 days after the date of the  
21 enactment of this Act, the Secretary  
22 concerned shall act to award, release, and  
23 permit to be completed in fiscal years 1995  
24 and 1996, with no change in originally  
25 advertised terms, volumes, and bid prices,  
26 all timber sale contracts offered or awarded  
27 before that date in any unit of the National  
28 Forest System or district of the Bureau of  
Land Management subject to section 318 of  
Public Law 101-121 (103 Stat. 745). The  
return of the bid bond of the high bidder  
shall not alter the responsibility of the  
Secretary concerned to comply with this  
paragraph.

(2) THREATENED OR ENDANGERED BIRD SPECIES.-----  
No sale unit shall be released or completed  
under this subsection if any threatened or

1 endangered bird species is known to be  
2 nesting within the acreage that is the  
subject of the sale unit.

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

8 1. The Land Management Agencies' Interpretations

9 On August 22, 1995, the land management agencies issued  
10 their interpretation of the scope of subsection 2001(k) (1),  
11 explaining that the provision applies to the release of a set of  
12 sales that had been offered pursuant to section 318 of the Fiscal  
13 Year 1990 Interior and Related Agencies Appropriations Act, but  
14 which had not proceeded. See August 22, 1995 Memorandum to Jack  
15 Ward Thomas, Chief of the Forest Service and Elaine Zielinski,  
16 Oregon State Director of BLM, from James R. Lyons, Under  
17 Secretary of Agriculture, Natural Resources and Environment and  
18 Mike Dombeck, Director of the BLM, attached as Ex. \_\_\_\_.

19 On August 23, 1995, the land management agencies issued  
20 direction regarding implementation of subsection 2001(k) (2) for  
21 sales with murrelet habitat. In the August 23 Memorandum, the  
22 land management agencies explained that the survey data collected  
23 pursuant to the Pacific Seabird Protocol and the Protocol  
24 criteria were the best available scientific information upon  
25 which to base a determination of whether murrelets were known to  
26 be nesting in a sale unit. See August 23, 1995 Memorandum to  
27  
28

1 Jack Ward Thomas, Chief of the Forest Service and Elaine  
2 Zielinski, Oregon State Director of BLM, from James R. Lyons,  
3 Under Secretary of Agriculture, Natural Resources and Environment  
4 and Mike Dombeck, Acting Director of the BLM, attached as Ex.

5 \_\_\_\_\_. Following this direction, the land management agencies  
6 conferred with the Fish and Wildlife Service to review survey  
7 data and verify their documentation, and after conducting this  
8 review, issued their respective determinations that approximately  
9 \_\_\_\_\_ of section 318 sales were prohibited from release under  
10 subsection 2001(k)(2).

11 2. Litigation Over Section 2001 In The United  
12 States District Court At Eugene, Oregon

13 a. Subsection 2001(k)(1) Claims

14 On August 8, 1995, Northwest Forest Resources Council (NFRC)  
15 filed a complaint seeking mandamus and a permanent injunction to  
16 compel the Secretaries to award and release by September 10,  
17 1995, "all timber sales offered prior to the date of enactment  
18 [of the Act] in all national forests in Oregon and Washington and  
19 Bureau of Land Management ("BLM") districts in western Oregon."  
20 See Northwest Forest Resource Council v. Glickman, Civil Action  
21 No. 95-6244-HO, Complaint at ¶ 1, attached hereto as Ex. \_\_\_\_\_.

22 At the core of NFRC's complaint is its interpretation of  
23 subsection 2001(k)(1) which would require the Secretaries to  
24 interpret the term "subject to section 318" in the subsection to  
25 include all timber sales offered in the larger geographical area  
26 defined by section 318(a), without the temporal limitation  
27 imposed by section 318(k) or the more limited geographical area

1 imposed by Section 318(b). This interpretation would encompass  
2 sales not previously offered under the provisions of Section 318.

3 The federal defendants opposed NFRC's challenge to  
4 subsection 2001(k)(1) on the ground that plain language of the  
5 statute, its legislative history, and the principle of deference  
6 to agency interpretation required that the subsection only  
7 applied to a the discrete set of sales prepared and offered in  
8 the 13 northern spotted owl forests pursuant to the ecological  
9 criteria and procedures specified in section 318 during the  
10 period it was in effect, fiscal year 1990. See Memorandum in  
11 Support of Motion of Appellants, Dan Glickman, et al., for Stay  
12 Pending Appeal, Northwest Forest Resource Council v. Dan Glickman  
13 and Bruce Babbitt, Ninth Circuit No. 95 -- , attached as  
14 Exhibit .

15 In an order dated September 13, 1995 (attached as Ex. \_\_\_)  
16 the district court adopted in full the interpretation offered by  
17 NFRC, holding held that Section 2001(k)(1) applies to timber  
18 sales previously offered or awarded in all national forests in  
19 Washington and Oregon and BLM districts in western Oregon up to  
20 July 27, 1995. The order did not take the form of an injunction  
21 against the agencies directing them to award the sales, but  
22 simply granted NFRC's motion for summary judgment on this  
23 issue ( NFRC's "first motion for summary judgment").

24 b. Subsection 2001(k)(2) Claims

25 NFRC subsequently amended its complaint to challenge the  
26 agencies' interpretation of subsection 2001(k)(2), as set forth  
27

1 in the August 23, 1995 memorandum. This provision prohibits the  
2 release of timber sales otherwise subject to subsection  
3 2001(k) (1) where threatened or endangered bird species are known  
4 to be nesting. NFRC argues in its second motion for summary  
5 judgement that the agencies have not applied the correct standard  
6 for making "nesting determinations" for marbled murrelet under  
7 the statute. <sup>3</sup>

8 The federal defendants opposed NFRC's challenge to the  
9 agencies' interpretation of subsection 2001(k) (2) on the ground  
10 that the subsection prohibits the release of sales where survey  
11 data collected under the Pacific Seabird Group protocol shows  
12 that murrelets are utilizing a stand for nesting and breeding.

13 The federal defendants and defendants-intervenors, the  
14 Oregon Natural Resource Council, et al., have moved to transfer  
15 the claims relating to subsection 2001(k) (2) to Judge Rothstein  
16 in the Western District of Washington.<sup>4</sup> In the interests of  
17 expediting resolution of the matter, the parties submitted briefs  
18 on the subsection 2001(k) (2) issue while the motions to transfer  
19 the action were pending. The transfer motions and the cross-  
20 motions for summary judgment on this issue currently are  
21 scheduled to be heard by Judge Hogan on November 7, 1995.

---

22  
23 <sup>3</sup> On August 28, 1995, Scott Timber Company filed a  
24 separate action challenging the agencies' interpretation under  
25 subsection 2001(k) (2), which was assigned to Judge Hogan. See  
26 Scott Timber co. v. Glickman, Civil no. 95-6267-HO. The case,  
which raised claims similar to NFRC's third and fourth claims for  
relief in its amended complaint, was consolidated with the NFRC  
case.

27 <sup>4</sup> Description of the action before Judge Rothstein.

1 c. Additional Claims for Immediate Release  
2 of 24 Remaining Section 318 Sales

3 In addition to filing its first and second motions for  
4 summary judgment addressing the subsection 2001(k)(1) geographic  
5 scope issue and the subsection 2001(k)(2) nesting determinations  
6 for the marbled murrelet issue, NFRC also filed a third motion  
7 for summary judgment seeking to compel the release of a set of 24  
8 Forest Service section 318 sales that had not been released  
9 within the 45 days directed by subsection 2001(k)(1). This set  
10 of sales had been undergoing further review to address issues  
11 unique to the particular sales. Six of the sales are those sales  
12 that before this Court pursuant to plaintiff's Motion to Clarify:  
13 Cowboy, Nita, South Nita, Garden, First and Last.

14 In response to NFRC's third motion for summary judgment, the  
15 Forest Service explained that it has acted to award or release  
16 the 24 remaining section 318 sales where possible. However, with  
17 respect to sales which had been enjoined in other litigation or  
18 which although not enjoined, had been challenged in other  
19 litigation, the Forest Service took the position that it could  
20 not unilaterally release such sales.

21 As to the ... subject sales that were enjoined, the  
22 Forest Service has determined that the sales are  
23 subject to outstanding injunctions and cannot be  
24 released by the Forest Service. Before these ...  
25 enjoined sales could proceed, a court would have to  
26 determine that the sales fall within the scope of  
27 section 2001(k) and therefore should be released from  
28 the injunction. That determination has not been made.  
Similarly, as to the ... sales that had been subject to  
dismissals, the Forest Service has determined that such  
sales cannot be released without, at a minimum,  
alerting the interested parties and relevant court of  
the potential applicability of section 2001(k).

1     See Defendants' Opposition to Plaintiff's Third Motion for  
2 Summary Judgment and in Support of Cross-Motion for Summary  
3 Judgment at \_\_\_\_.

4             On October 16, 1995, the Forest Service provided the notice  
5 referred to above.     See Notice of Intent to Release attached  
6 hereto as Ex. \_\_\_\_; Notice to parties dated October 16, 1995,  
7 attached hereto as Ex. \_\_\_\_.<sup>5</sup>

8             d.     The District Court's Entry of Injunction  
9                     and Defendants' Emergency Motion for Stay

10            On September 21, 1995, NFRC filed a motion for contempt,  
11 seeking to impose sanctions against James Lyons, Undersecretary  
12 of Agriculture who oversees the Forest Service, and Thomas  
13 Tuchmann, Director of the U.S. Office of Forestry and Economic  
14 Development. NFRC claimed that the failure to release  
15 immediately sales "in all national forests in Oregon and  
16 Washington and all Bureau of Land Management (BLM) districts in  
17 Western Oregon" amounted to contempt of the district court's  
18 September 13 summary judgment order. In the alternative, NFRC  
19 requested that court amend its order by specifically granting a  
20 "permanent injunction compelling Secretary Glickman and Secretary  
21 Babbitt "to immediately award, release, and permit to be  
22 completed in fiscal years 1995 and 1996 . . . all timber sale

---

23  
24            <sup>5</sup>     These notices also were filed with the NFRC v. Glickman  
25 court. See Notice of Filing dated October 16, 1995, attached  
26 hereto as Ex. \_\_\_\_\_. In addition to the First and Last timber  
27 sales which had been the subject of prior litigation in this  
28 Court but where the merits had not been reached, the Forest  
Service gave similar notices regarding two sales subject to prior  
litigation in the District of Oregon.

1 contracts offered or awarded prior to July 27, 1995 in any  
2 national forest in Oregon and Washington or BLM district in  
3 western Oregon . . . ."

4 The government filed its response on October 6, 1995. In  
5 addition to a defense on the merits of the contempt motion, the  
6 response indicated to the court that the government, because of  
7 its desire to obtain an appealable order, would not object to the  
8 entry of an injunction. At a hearing held on October 17, 1995,  
9 the district court denied the motion for contempt, and entered an  
10 order granting a permanent injunction. The injunction "compelled  
11 and directed" the Secretaries, "to award, release and permit to  
12 be completed in fiscal years 1995 and 1996, with no change in  
13 originally advertised terms, volumes, and bid prices, all timber  
14 sale contracts offered or awarded between October 1, 1990 and  
15 July 27, 1995, in any national forest in Oregon and Washington or  
16 BLM district in western Oregon, except for sale units in which a  
17 threatened or endangered bird species is known to be nesting."  
18 October 17, 1995 Injunction attached hereto as Ex. \_\_\_\_\_. The  
19 court then denied from the bench the Secretaries' oral request  
20 for a stay pending appeal.

21 On October 18, 1995, the defendants filed a Notice of Appeal  
22 of the October 17, 1995 Order with the district court. On  
23 October 19, 1995, defendants filed an Emergency Motion Under Rule  
24 27-3 with the Ninth Circuit seeking a stay of the injunction  
25 pending appeal. On October 24, 1995, [insert re ninth circuit  
26 ruling on tuesday].

27  
28

1 C. THE SALES SUBJECT OF THIS MOTION AND LITIGATION CONCERNING  
2 THEM

3 In 1989 plaintiffs' Seattle Audubon Society et al. ("SAS")  
4 filed a complaint for declaratory and injunctive relief alleging  
5 that the Forest Service's adoption of the 1988 ROD and FSEIS for  
6 an Amendment to the Pacific Northwest Regional Guide ("Spotted  
7 Owl Guidelines") violated the National Environmental Policy Act,  
8 42 U.S.C. §§ 4321 et seq., the National Forest Management Act, 16  
9 U.S.C. §§ 1600 et seq., and the Migratory Bird Treaty Act, 16  
10 U.S.C. §§ 703 et seq. in failing to provide for the long-term  
11 viability of the Northern Spotted Owl. See Complaint (2/8/89)  
12 (Dkt# 1). Plaintiffs' further sought a preliminary injunction  
13 pending a hearing on the merits, and on March 24, 1989 this Court  
14 preliminarily enjoined certain planned timber sales. See Order  
15 (3/24/89) (Dkt # 97).

16 Then, in October 1989, Congress enacted Section 318 of the  
17 Department of the Interior and Related Appropriations Act for  
18 Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat 701, 745-750  
19 (1989), establishing the procedures and criteria for Fiscal Year  
20 1990 timber sales outlined above, and declaring timber sales  
21 released under the 1988 ROD and FSEIS as valid for purposes of  
22 meeting the statutory requirements alleged to be violated in the  
23 Plaintiffs' 1989 complaint.

24 Among the timber sales offered by the Forest Service  
25 pursuant to Section 318 were the Cowboy, Nita, South Nita, First  
26 and Last on the Umpqua National Forest, and the Garden timber  
27 sale on the Siskiyou National Forest. All of these sales were

1 auctioned on various dates in 1990, and the high bidders  
2 identified. For the Umpqua sales, Scott Timber Company was  
3 identified as the high bidder; Medford Corp. was identified as  
4 high bidder on the Garden sale. See Declaration of Wells Burgess  
5 attached as Exhibit .

6 In response to the enactment of Section 318, defendants  
7 moved to vacate the preliminary injunction, and it was so granted  
8 in November of 1989. See Order (11/6/89) (Dkt. # 277), See  
9 generally Seattle Audubon Society v. Robertson, 914 F.2d 1311  
10 (9th Cir. 1990), **subsequent history.**

11 In March of 1990, while litigation was ongoing in the Ninth  
12 Circuit as to the constitutionality of Section 318, plaintiffs'  
13 amended their complaint to add, inter alia, claims under Section  
14 318. The amended complaint sought an injunction against all  
15 sales that were not in compliance with Section 318 and  
16 specifically alleged violations of subsection 318(b) that sets  
17 forth the Forest Service's duties to minimize fragmentation of  
18 the most ecologically significant old-growth forests ("ESOG")  
19 when possible within the parameters of Section 318. See First  
20 Amended Complaint (3/30/90) (Dkt# 337).

21 In April 1990, plaintiffs' filed the first challenge to the  
22 six sales at issue in this Motion to Clarify and Enforce  
23 Judgment. The motion for summary judgment and a permanent  
24 injunction as to the Cowboy Timber Sale located on the Umpqua  
25 National Forest alleged that the Forest Service failed to comply  
26 with the fragmentation requirements of Section 318(b)(2).

1 Challenges to the Nita, South Nita, First and Last sales also  
2 located on the Umpqua National Forest, and the Garden timber sale  
3 located on the Siskiyou National Forest, were brought on similar  
4 grounds.<sup>6</sup> The result of these actions were four injunctions  
5 prohibiting the Forest Service from advertising, offering,  
6 awarding or operating the Cowboy, Nita, South Nita and Garden  
7 timber sales "until such time as the agency shows that a non-  
8 ESOG-fragmenting sale . . . cannot be substituted feasibly and  
9 consistently with existing management plans." Order on Cross  
10 Motions for Summary Judgment re Cowboy Timber Sale at 30; Order  
11 re Nita and South Nita Timber Sales at 7; See Order re Garden  
12 Timber Sale. Prior to a ruling on the First and Last timber  
13 sale, the Forest Service rejected all bids on those sales and  
14 informed the apparent high bidder of its intention not to reoffer  
15 the sales as part of the fiscal year 1990 timber sale program.  
16 See Defendants' Memorandum in Response to SAS' Motion for Summary  
17 Judgment and Permanent Injunction in Re Last Timber Sale  
18 (10/3/90) (Dkt. #638), Exhibit A to Declaration of Allan Brock;  
19 Defendants' Memorandum in Response to SAS' Motion for Summary  
20 Judgment and Permanent Injunction in Re First Timber Sale  
21 (10/3/90) (Dkt. #670), Exhibit A to Declaration of Allan Brock.  
22 Consequently, the actions against the First and Last timber sales  
23 were stricken as moot. Minute Order (10/16/90) (Dkt# 675).

24 \_\_\_\_\_  
25 <sup>6</sup> In fact, each subsequent motion referenced the Motion  
26 for Summary Judgment and Permanent Injunction in re the Cowboy  
27 Timber Sale. See e.g. Memorandum in Support of SAS' Motion for  
28 Summary Judgment and Permanent Injunction in Re the Garden Timber  
Sale at 9 (9/4/90) (Dkt# 504).

1 In the pendency of this Court's rulings relating to the six  
2 sales at issue here, the Forest Service undertook to manage  
3 suitable spotted owl habitat through interim guidelines pending  
4 completion of a new ROD and EIS that would consider the new and  
5 continually growing body of information relating to the northern  
6 spotted owl. A notice was published in the Federal Register  
7 vacating the 1988 ROD as it relates to the management of suitable  
8 spotted owl habitat in the Pacific Northwest and mandating that  
9 management be undertaken not inconsistent with a report completed  
10 in 1990 by the Interagency Steering Committee ("ISC") entitled A  
11 Conservation Strategy for the Northern Spotted Owl. See 55 Fed.  
12 Reg. 40413 (10/3/90).

13 Thus, plaintiffs amended their complaint a second time to  
14 include allegations as to this interim action claiming that the  
15 Forest Service had violated NEPA, NFMA, MBTA and the  
16 fragmentation provision of Section 318 in failing to provide  
17 adequate standards and guidelines for the management of suitable  
18 spotted owl habitat. Second Amended Complaint (10/22/90) (Dkt. #  
19 731). Plaintiffs' also renewed their motion for summary  
20 judgment and a permanent injunction as to Garden, Nita, South  
21 Nita, First and Last timber sales alleging violations of NEPA,  
22 NFMA, MBTA and the APA. See SAS' Supplemental Motion for Summary  
23 Judgment and Permanent Injunction in re the Garden, Nita, South  
24 Nita, First and Last Timber Sales (9/27/90) (Dkt # 595).

25 Prior to issuing the May 23, 1991 Memorandum Decision and  
26 Injunction compelling the Forest Service to complete and adopt  
27

28

1 revised standards and guidelines for management of spotted owl  
2 habitat, this Court denied plaintiffs' renewed motion as to the  
3 five sales indicating that "nothing in the record suggests the  
4 Forest Service plans to go forward with these sales." Order on  
5 Motions for Summary Judgment and for Dismissal (3/7/91) (Dkt.  
6 #824); See also Seattle Audubon Soc'y v. Evans, 771 F. Supp.  
7 1081 (W.D. Wash. 1991).

8 This phase of the litigation relating to the management of  
9 northern spotted owl habitat concluded in April 1992 with the  
10 entry of a Final Judgment dismissing all claims as to the 1988  
11 ROD and plaintiffs' NEPA claims as moot, granting summary  
12 judgment in favor of plaintiffs' NFMA claims and granting summary  
13 judgment for defendants' MBTA claims. See Judgment (4/9/92) (Dkt.  
14 #1022).

15 ARGUMENT

16 I. 2001(K) DOES NOT ENCOMPASS SALES FOUND NOT TO BE IN  
17 COMPLIANCE WITH THE PROCEDURES AND ECOLOGICAL CRITERIA OF  
18 SECTION 318.

18 In the context of plaintiffs' motion<sup>7</sup>, the meaning of  
19 "subject to section 318" is clear. As an initial matter, common  
20 sense dictates that a description of timber sales "subject to  
21

---

22 <sup>7</sup> Federal defendants do not intend to raise before this  
23 Court the issues raised in NFRC v. Glickman now on appeal to the  
24 Ninth Circuit. cite to Al's papers Federal defendants recognize  
25 that in the event that the Ninth Circuit were to affirm Judge  
26 Hogan's interpretation, these sales would be required to be  
27 released from the injunction, since it could not then reasonably  
28 be argued that "subject to section 318" imposed any of Section  
318's substantive requirements on the sales. That fact may  
counsel the Court to stay its ruling on this issue until the  
Ninth Circuit rules on the Government's appeal from Judge Hogan's  
ruling.

1 section 318" would exclude those sales found by a court not to  
2 have complied with the very criteria and procedures established  
3 by section 318 for the form of those sales. See Church of  
4 Scientology v. U.S. Dept. of Justice, 612 F.2d 417, 421 (9th Cir.  
5 1979) ( "[I]n the vast majority of its legislation Congress does  
6 mean what it says and thus the statutory language is normally the  
7 best evidence of congressional intent." The matter is so clear  
8 that resort to definition should be unnecessary, but if it were,  
9 the definition clearly supports this conclusion. "Subject" is  
10 defined as "likely to be conditioned, affected, or modified in  
11 some indicated way: having a contingent relation to something and  
12 usu[ally] dependent on such relation for final form, validity, or  
13 significance . . . ." Webster's Third New International  
14 Dictionary, 2275.<sup>8</sup> The fiscal year 1989 and 1990 sales depend  
15 on section 318 in the most basic sense to define their very form  
16 and validity. Furthermore, resort to Section 318, the model for  
17 much of 2001, reinforces this conclusion, for the use of the  
18 phrase "subject to" in section 318 clearly connotes a sense that  
19 the substantive requirements of the statute are key. Subsection  
20 318(k) provided that timber sales offered to meet the target  
21 requirements of subsection (a) would continue "to be subject to  
22 the terms and conditions of" section 318 for the duration of the  
23 contracts.

24

25

---

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

1 This interpretation is consistent with, and gives meaning  
2 to, the overall purpose of the statute. An analysis of section  
3 2001 as a whole reveals that Congress intended to reach an  
4 accommodation between expediting the release of timber while  
5 acknowledging the overall forest planning strategies regarding  
6 the old-growth forests of the Pacific Northwest that have taken  
7 years to develop and put into place.<sup>9</sup> Subsection 2001(d)  
8 expressly directs expedited implementation of the Pacific  
9 Northwest Forest Plan. See Subsection 2001(d). The Forest Plan  
10 consists of extensive standards and guidelines and land  
11 allocations that comprise a comprehensive ecosystem management  
12 strategy, designed to accommodate the need for sustained yield of  
13 timber and protection of forest resources.<sup>10</sup> Section 318 sales  
14 were considered in development of the Forest Plan, which  
15 authorized their release in modified form. cite ROD  
16 For 318 sales, Congress has overridden this provision of the  
17 Record of Decision for the Forest Plan by directing that the  
18

---

19 <sup>9</sup> For example, in connection with salvage sales, while  
20 the Act provides an expedited procedure for proceeding with such  
21 sales, at the same time, the Act expressly authorizes the  
22 Secretary to consider the environmental effects of any salvage  
23 timber sale, the effects on threatened or endangered species, and  
24 consistency with any management plans standards and guidelines,  
25 including those set forth in the Forest Plan. See Subsection  
26 2001(c); see also 141 Cong. Rec. S 4881.

27 <sup>10</sup> ROD at 3-4 (Ex. B). The two primary categories of land  
28 allocations in the Forest Plan include (1) "Reserve Areas" within  
which possible timber sales and related ground-disturbing  
activities are severely limited or prohibited and (2) remaining  
unreserved areas designated as Matrix, in which programmed timber  
harvest may go forward subject to restrictions intended to  
preserve conservation objectives. ROD at 6-11.

1 sales be released according to their original terms and  
2 conditions. 2001(k)(1). To hold that Congress intended also to  
3 release 318 sales which were found to have violated those  
4 provisions of section 318 designed to protect the old growth  
5 forest, would attribute to Congress a purpose to allow sales to  
6 go forward in this sensitive and critical area which were not  
7 authorized by any land management plan, and in particular, the  
8 land management planning provisions of section 318 which they  
9 themselves had drafted.

10 This Court must also be guided in its interpretation of  
11 Section 2001(k) by Congress's intentions regarding judicial  
12 review of the sales subject to its prescriptions. The phrase  
13 "notwithstanding any other provision of law" intends to preclude  
14 judicial review under the environmental laws. *cite*  
15 The Ninth Circuit recently explicitly held that exemptions from  
16 the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the  
17 National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*,  
18 must be strictly construed. Mount Graham Coalition v. Thomas, 53  
19 F.3d 970, 975 (9th Cir. 1995). In ruling on a legislative  
20 exemption from the ESA and NEPA, the Ninth Circuit held that  
21 "[t]o extend an exemption to other than those plainly and  
22 unmistakably within its terms and spirit is to abuse the  
23 interpretative process." *Id.* (quoting A.H. Phillips, Inc. v.  
24 Walling, 324 U.S. 490, 493 (1945)).

25 To the extent necessary to aid the Court in its  
26 interpretation, resort to legislative history confirms that  
27

1 Congress did not intend to compel the release of sales which had  
2 avoided the critical ecological criteria of Section 318. ✓  
3 Analysis of the legislative history confirms that Congress  
4 enacted subsection 2001(k) to require the Forest Service and BLM  
5 to address the continuing delay in the completion of section 318  
6 timber sales, either through award or through provision of  
7 replacement timber. Section 2001 of Public Law 104-19 was  
8 originally introduced as Section 307 of H.R. 1159, a bipartisan  
9 effort known as the Taylor-Dicks Amendment, and what became  
10 subsection 2001(k) originally contained only the language of  
11 paragraph 2001(k) (1) with 30 days provided for compliance. H.R.  
12 1159, § 307(i). The description of subsection 307(i) in the  
13 Report of the House Appropriations Committee makes clear that  
14 subsection 307(i) was intended "to release a group of sales that  
15 have been already sold under the provisions of section 318 . . .  
16 The harvest of these sales was assumed under the President's  
17 Pacific Northwest Forest Plan . . . ." 104 H. Rept. 71.  
18 What is equally significant for the purposes of this motion is  
19 that the legislative history strongly suggests that Congress  
20 believed that it could authorize the release of these sales "not ✓  
21 withstanding any other provision of law" because the sales had  
22 met the ecological requirements of section 318. As  
23 Representative Taylor, one of the sponsors of the legislation,  
24 stated after the President announced that he would veto the  
25 original version of the rescissions bill:

26 For instance, the section 318 timber, it is in  
27 Washington and Oregon, this area has already met all

1 the environmental requirements. This is green timber  
2 but it has not yet been released. It has been waiting  
3 since 1990, over 5 years. And this meets all the  
4 environmental requirements, and it meets, it has  
5 already been approved to move, but it has been held up  
6 for over 5 years while people in Washington and Oregon  
7 are without jobs.

8 141 Cong. Rec. H 5558. See also 141 Cong. Rec. H 5559.

9 For the above reasons, it is clear that this Court's  
10 findings that the four enjoined sales did not meet the  
11 requirements of the statute compels a conclusion that they are  
12 not comprehended within 2001(k).

13 II. THE COURT SHOULD CONSIDER THE ABOVE ARGUMENTS IN RULING UPON  
14 THE POTENTIAL APPLICABILITY OF 2001(K) TO THE WITHDRAWN  
15 SALES.

16 But for the fact that this Court did not reach the merits of  
17 the First and Last timber sales' compliance with 318, the above  
18 analysis is equally applicable to these sales as well. It is  
19 very clear that the First and Last sales, which were also on the  
20 Tiller Ranger District of the Umpqua National Forest, were  
21 withdrawn by reason of this Court's findings as to the other 318  
22 sales located on that District. These sales also have not had the  
23 benefit of the environmental review and planning according to the  
24 dictates of Congress's own plan for the release of Section 318  
25 sales. For that reason, defendants accede to the plaintiffs'  
26 motion with respect to these sales.

27 \* \* \*

28 In making their motion, plaintiffs advance certain other  
arguments to which the Government must speak. There is no basis  
for holding that 2001(k) violates the separation of powers

1 doctrine in its application to these sales. The sales were  
2 clearly "offered" within the meaning of 2001(k). And while the  
3 matter is less clear, the Government does not believe that the  
4 circumstances of sales will support an argument that the offer  
5 was withdrawn to otherwise exclude the sales from the operation  
6 of 2001(k).

7 III. 2001(K) DOES NOT VIOLATE THE SEPARATION OF POWERS.

8 Plaintiffs argue that interpreting 2001(k) to permit award  
9 of the six timber sales would violate the doctrine of separation  
10 of powers. They are mistaken. In all of the jurisprudence  
11 regarding the separation of powers there are only three types of  
12 legislation that require federal courts to exercise the judicial  
13 power in a manner that Article III forbids. Plaut v. Spendthrift  
14 Farm, Inc., 115 S.Ct. 1447, 1452-53 (1995). None of these types  
15 are present in this case.

16 The first category of potentially unconstitutional  
17 legislation gives the Executive branch review of judicial  
18 decisions and is plainly not an issue with respect to 2001(k).  
19 See Plaut at 1453.

20 A second category of suspect legislation is that which  
21 attempts to direct the outcome of particular litigation pending  
22 before the Courts at the time the legislation is passed. The  
23 seminal case on this issue is Robertson v. Seattle Audubon  
24 Society, 503 U.S. 429, 112 S.Ct. 1407 (1992).

25 The legislation at issue in Robertson was Section 318 of the  
26 Department of Interior and Related Agencies Appropriations Act  
27

1 for Fiscal Year 1990. The reason for the Article III concerns  
2 discussed in Robertson was that 318 was drafted in response to  
3 litigation pending at that time, including two cases ( one then  
4 pending before this Court) specifically mentioned in the statute.  
5 Robertson at 1410. The Article III legal issue was whether 318  
6 unconstitutionally directed the judiciary to reach specific  
7 results and make specific findings in the mentioned pending  
8 cases. Robertson at 1412, 1413. After a careful examination of  
9 the operation of the statute, the Court determined that 318 did  
10 not violate Article III because even though the statute  
11 specifically identified two pending cases by name and was  
12 obviously intended to resolve the concerns raised in those cases,  
13 it "compelled changes" in the law underlying the lawsuits, but  
14 did not direct "findings or results under old law." Robertson at  
15 1413.

16 Recognizing that 2001(k) does not fit into either of the  
17 first two categories of Article III violations identified in  
18 Plaut, Plaintiffs attempt to argue that the statute belongs to  
19 the third category identified in the Plaut decision, claiming  
20 that 2001(k) retroactively commands this Court to open a final  
21 judgment. See Plaut, supra at . That is not the case.

22 First, retroactive legislation is "legislation that  
23 prescribes what the law was at an earlier time, when the act  
24 whose effect is controlled by the legislation occurred." Plaut at  
25 1456. Measured against this definition, §2001(k) is clearly  
26 prospective. See 2001(k), passim, and compare Plaut.

27  
28

1 Second, even assuming that the statute was intended to  
2 accomplish this result, there is a serious question whether there  
3 is any "final judgment" upon which the law could so operate.  
4 Section 318 has expired by its terms. cite and see also,  
5 Plaintiffs' second amended complaint Plaintiffs' action under  
6 section 318 was dismissed as moot, and the final judgment in this  
7 action did not carry forward the earlier judgment and injunction  
8 of this Court.

9 Recognizing the infirmity of their position, Plaintiffs  
10 state that Plaut applies because this Court had made a "judicial  
11 finding" that these sales "were no longer sales offered under or  
12 subject to 318." This "finding" is a creature of plaintiffs'  
13 invention; this Court made no such finding. cite opinions

14 IV. THE TIMBER SALES WERE OFFERED WITHIN THE MEANING OF SECTION  
15 2001(K).

16 Plaintiffs argue that because the sales were enjoined or  
17 withdrawn by the Forest Service, they were "no longer a willing  
18 offeror" and the sales would have to be reoffered under different  
19 terms and conditions. This misreads Section 2001(k). The  
20 statute only requires that the sales have been previously offered  
21 under Section 318. They were and a high bidder was identified.  
22 See attachment 1 to Declaration of Wells Burgess attached as  
23 Exhibit . Were the sales to be subject to the 2001(k) ( and we  
24 contend they are not for the reasons alleged above), they would  
25 be awarded to those high bidders according to their original  
26 terms and conditions. See 2001(k)(1). No reoffer is or would be  
27 necessary. Indeed, the statute expressly provides that the

1 return of the bid bond of the high bidder shall not alter the  
2 responsibility of the Secretary.

3 Indeed the strictness of the statutory provisions makes a  
4 more compelling argument for holding that Congress did not intend  
5 sales which were not configured according to the terms of Section  
6 318 to be released pursuant to Section 2001(k).

7 CONCLUSION

8 For the reasons stated above, and on those grounds alone,  
9 the Court should rule that the Garden, Nita, South Nita and  
10 Cowboy sales are not within the terms of Section 2001(k) of the  
11 For the same reasons, the Court should resolve the issue of the  
12 potential applicability of Section 2001(k) to the First and Last  
13 timber sales by ruling that those sales also are not within the  
14 terms of Section 2001(k).

15 Dated this 24th day of October, 1995.

16

17 LOIS J. SCHIFFER  
18 Assistant Attorney General

19 PETER D. COPPELMAN  
20 Deputy Assistant Attorney General

21 KATRINA C. PFLAUMER  
22 United States Attorney

23

24 WELLS D. BURGESS  
25 U.S. Department of Justice  
26 Environment & Natural Resources  
27 Division  
28 P.O. Box 663  
Washington, D.C. 20044-0663  
(202) 272-8056

Attorney for Defendants

28