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Timber - Other Litigation: Seattle  
Audubon v. Thomas [4]

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

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DATE: October 31, 1995

FROM: Lisa Holden, (202) 272-4698

MESSAGE: SAS v. Thomas (W.D. Wash.). Attached is WCLA's (industry) motion to transfer to the District of Oregon, or to stay proceedings.

NFRC is seeking an expedited schedule on these sales with Oppositions due 11/3, replies due 11/6 and the motion set for 11/6.

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Honorable William L. Dwyer

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

SEATTLE AUDUBON SOCIETY, et al.,	)	Civil No. C89-160WD
	)	
Plaintiffs,	)	WCLA'S MOTION TO TRANSFER
	)	TO THE DISTRICT OF OREGON
vs.	)	OR TO STAY PROCEEDINGS
	)	
JACK WARD THOMAS, et al.,	)	NOTE ON MOTION CALENDAR:
	)	November 17, 1995
Defendants,	)	
	)	SUBJECT TO SHORTENED TIME:
and	)	November 6, 1995
	)	
WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al.,	)	
	)	
Defendants-Intervenors.	)	

Defendants-Intervenors Washington Contract Loggers Association ("WCLA"), move to transfer this case to the District of Oregon, Eugene Division, for consolidation with Northwest Forest Resource Council v. Glickman, Civil No. 95-6244HO (D. Or.), or in the alternative, to stay these proceedings pending a final ruling in NFRC v. Glickman.

WCLA'S MOTION TO TRANSFER TO THE DISTRICT OF OREGON OR TO STAY PROCEEDINGS - 1

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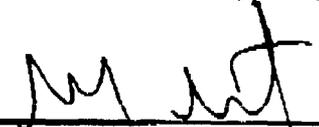
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In support of this motion this court is referred to the Memorandum In Support Of WCLA's Motion To Transfer To The District Of Oregon Or To Stay Proceedings filed herewith.

Dated this 30th day of October, 1995.

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.

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AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,	)	Civil No. C89-160WD
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT OF
	)	WCLA'S MOTION TO TRANSFER
vs.	)	TO THE DISTRICT OF OREGON
	)	OR TO STAY PROCEEDINGS
JACK WARD THOMAS, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al.,	)	
	)	
Defendants-Intervenors.	)	

**INTRODUCTION**

Defendant-intervenor Washington Contract Loggers Association ("WCLA") seeks to transfer this case to the District of Oregon, Eugene Division, for consolidation with *Northwest Forest Resource Council v. Glickman*, Civil No. 95-6244-HO (D. Or.), or in the alternative to stay these proceedings pending a final ruling in

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO TRANSFER TO THE DISTRICT OF OREGON OR TO STAY PROCEEDINGS - 1

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NO1-9508\RP90814.1AX

1 *NFRC v. Glickman.*

2       These motions result from the actions and positions taken by  
3 the federal defendants in their Response To Plaintiffs' Motion To  
4 Clarify And Enforce Judgment, filed October 25, 1995  
5 ("Response").

6       It is now apparent that the federal defendants are using  
7 this case to further their efforts to frustrate the intent of  
8 Congress in § 2001(k) of Pub. L. 104-19. They have taken  
9 positions in this court that contradict their representations to  
10 Judge Hogan in *NFRC v. Glickman*, they are attempting to  
11 relitigate issues they already have lost in *NFRC v. Glickman*.  
12 they have introduced new issues for the purpose of end-running  
13 Judge Hogan, and they have refused to address the threshold  
14 jurisdictional question whether there are any enforceable  
15 injunctions against the sales at issue here.

16       The government has converted this proceeding from a limited  
17 inquiry into the continuing validity of this court's prior  
18 injunctions into a broad review of the meaning and interpretation  
19 of § 2001(k). The applicability of § 2001(k) to the six Oregon  
20 timber sales at issue here, and similarly situated sales else-  
21 where, is scheduled for hearing before Judge Hogan on November 7,  
22 1995. The Ninth Circuit has already expressed confidence in  
23 Judge Hogan's earlier interpretation of § 2001(k) by denying the  
24 government's motion for a stay pending appeal on the ground its  
25 chances of success are "negligible" and its "appeal does not  
26 present a serious legal question." *NFRC v. Glickman*, No. 95-

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO TRANSFER TO  
THE DISTRICT OF OREGON OR TO STAY PROCEEDINGS - 2

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N01-9608\RP90814.1Ax

1 36042 (Order October 25, 1995) (attached to Federal Defendants'  
2 Informational Filing (October 26, 1995)).

3 This court should not interfere with the ongoing proceedings  
4 before Judge Hogan. The court should transfer the case to the  
5 District of Oregon, Eugene Division, where WCLA will, with the  
6 assistance of the Northwest Forest Resource Council,<sup>1</sup> seek  
7 consolidation with *NFRC v. Glickman* so that Judge Hogan need only  
8 rule once on the applicability of § 2001(k) to the six sales at  
9 issue here.

10 Transfer to the District of Oregon, Eugene Division is  
11 proper under 28 U.S.C. § 1404. This case could have been filed  
12 in the Eugene Division of the District of Oregon since all the  
13 sales are in Douglas County, Oregon. Transfer is in the interest  
14 of justice, and is not inconvenient for any party. Both the  
15 plaintiffs and the federal defendants are already litigating in  
16 Judge Hogan's court in *NFRC v. Glickman*, and WCLA is fully  
17 willing to litigate in Eugene.

18 If the court declines to transfer the case, in the alterna-  
19 tive, the court should stay this proceeding until *NFRC v.*  
20 *Glickman* is completed, or at least until some clear decision is  
21 issued by Judge Hogan on the applicability of § 2001(k) to the  
22 six sales at issue here. A stay will avoid the confusion,  
23 duplication and risk of inconsistency that would otherwise result  
24

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25 <sup>1</sup> The intervenors in this case are WCLA and its general  
26 manager, William Pickell. WCLA is a member of NFRC.

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1 from the government's inconsistent positions.

2 **STATEMENT OF FACTS**

3 The facts relevant to these motions are set forth in the  
4 summary judgment papers previously filed by the parties, and will  
5 not be repeated except as set forth herein.

6 What is apparent from the government's Response is that it  
7 is telling one story to Judge Hogan and telling something  
8 completely different to this court. On September 8, 1995 the  
9 government advised Judge Hogan that the Cowboy, Nita, South Nita  
10 and Garden timber sales are all subject to § 2001(k)(1), stating  
11 in sworn testimony: "The Forest Service has determined that the  
12 75 section 318 sales shown on the attached chart are subject to  
13 the provision of section 2001(k) of the Act," and listing the  
14 Cowboy, Nita, South Nita and Garden timber sales on the chart  
15 (along with the First and Last sales). Declaration of Richard A.  
16 Prausa, *NFRC v. Glickman* (September 8, 1995) (Exhibit A).

17 When the Northwest Forest Resource Council moved for  
18 injunctive relief to release these sales, the government claimed  
19 the motion was moot because it was already doing everything it  
20 could to release the sales. Defendants' Opposition To Plain-  
21 tiff's Third Motion For Summary Judgment And In support Of  
22 Defendants' Cross-Motion, *NFRC v. Glickman* (September 29, 1995)  
23 at 7-12 (Exhibit B). It conceded that the enjoined sales are  
24 subject to § 2001(k), but claimed: "As to the three [sic]  
25 subject sales that were enjoined, the Forest Service has deter-  
26 mined that the sales are subject to outstanding injunctions and

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1 cannot be released by the Forest Service." Exhibit B at 11. It  
2 assured Judge Hogan that it was taking all necessary actions to  
3 seek the release of the four sales. *Id.*

4 A hearing on NFRC's motion for summary judgment releasing  
5 these four sales has for some time been scheduled before Judge  
6 Hogan on November 7, 1995.<sup>2</sup>

7 In this court, however, the government has now contradicted  
8 everything it told Judge Hogan regarding these sales. Rather  
9 than attempt to release the sales, as it promised Judge Hogan, it  
10 proposes to acquiesce in the plaintiffs' motion to block the  
11 sales - claiming that the Cowboy, Nita, South Nita and Garden  
12 timber sales are not subject to § 2001(k)(1). Response at 17-21.

13 Even worse, the government asks this court to bless its  
14 reversal of position not by accepting any of plaintiffs' argu-  
15 ments, but by relitigating the issue it already lost in front of  
16 Judge Hogan - the interpretation of the phrase "subject to  
17 section 318" in § 2001(k)(1). Yet the government is currently  
18 appealing that very issue to the Ninth Circuit (the appeal whose  
19 chance of success is "negligible" according to the Ninth Cir-  
20 cuit).

21 In its eagerness to induce this court to relitigate the  
22 interpretation of § 2001(k) that it lost in *NFRC v. Glickman*, the  
23

24 <sup>2</sup> While there is a motion to transfer other issues in that  
25 case to the Western District of Washington, there is no motion to  
26 transfer the claims concerning these sales, so this issue will be  
decided by Judge Hogan.

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1 government has refused to address the threshold issue whether  
2 there is any injunction outstanding against Cowboy, Nita, South  
3 Nita and Garden.<sup>3</sup> Yet, according to its own logic, if there is  
4 no injunction against the four sales, they must be released under  
5 § 2001(k). Response at 21-23.

6 In a motion and memorandum filed in Oregon contemporaneously  
7 with this motion, NFRC is bringing the government's contradictory  
8 filings to the attention of Judge Hogan both in relation to these  
9 six timber sales and in relation to five other timber sales (two  
10 in Oregon, one in the Eastern District of Washington and two in  
11 the Western District of Washington) where the same issues are  
12 raised. Exhibit C. NFRC is asking Judge Hogan to specifically  
13 address these 11 sales at the November 7 hearing. *Id.*

#### 14 ARGUMENT

#### 15 I. THE COURT SHOULD TRANSFER THIS PROCEEDING TO THE 16 DISTRICT OF OREGON, EUGENE DIVISION.

17 This court has two means readily at hand to prevent the  
18 government from converting this proceeding into a relitigation of  
19 issues it has already lost, or are currently pending, in *NFRC v.*  
20 *Glickman*: transfer or stay.

21 Transfer of a case to another district is governed by 28  
22 U.S.C. § 1404(a). The transferee district must be one in which  
23 the action could originally have been filed, and the transfer

24  
25 <sup>3</sup> WCLA's counsel brought this issue to the attention of  
26 government counsel on October 20, 1995, so the government cannot  
claim that it was unaware of the issue.

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO TRANSFER TO  
THE DISTRICT OF OREGON OR TO STAY PROCEEDINGS - 6

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1 must be in the interest of justice and for the convenience of  
2 parties and witnesses. Those criteria are satisfied here.

3 This action could have been filed in the Eugene Division of  
4 the District of Oregon. All six of the timber sales at issue  
5 here are located in the Umpqua National Forest in Douglas County  
6 in southwestern Oregon. The events giving rise to the claims  
7 against the sales occurred in Douglas County, and the real  
8 property that is the subject of the action is in Douglas County.  
9 Under District of Oregon local rules, cases arising out of  
10 Douglas County are filed in the Eugene Division. District of  
11 Oregon Local Rule 105-2(a) (Exhibit D).

12 Transfer is in the interest of justice because of the  
13 overlap of the issues raised here with the issues already before  
14 Judge Hogan. Transfer which will expedite a case, avoid  
15 duplicative effort and avoid inconsistent rulings is in the  
16 interest of justice. *Armco Steel v. CSX Corp.*, 790 F. Supp. 311,  
17 323-24 (D.D.C. 1991); *Comptroller of Currency v. Calhoun First*  
18 *Nat. Bank*, 626 F. Supp. 137, 141 (D.D.C. 1985); *Cambridge Filter*  
19 *Corp. v. International Filter Co.*, 548 F. Supp. 1308 (D. Nev.  
20 1982).

21 Eugene is convenient for all parties. Indeed, all the  
22 parties and counsel to this case are already litigating in Eugene  
23 over § 2001 in *NFRC v. Glickman*, *Scott Timber Co. v. Glickman*,  
24 Civil No. 95-6267-HO (a companion to *NFRC*) and *CLR Timber*  
25 *Holdings, Inc. v. Sabbitt*, Civil No. 94-6403-TC. In addition  
26 plaintiffs here, represented by their counsel here, are currently

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO TRANSFER TO  
THE DISTRICT OF OREGON OR TO STAY PROCEEDINGS - 7

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1 litigating an action they filed in Eugene challenging four Umpqua  
2 National Forest § 2001 sales. Oregon Natural Resources Council  
3 v. Thomas, Civil No. 95-6272-HO (filed September 1, 1995). Since  
4 the sales and parties are in Oregon, Eugene is the most conve-  
5 nient district for this case.

6 For these reasons, transfer is proper in this case. The  
7 court should transfer the case to the District of Oregon, Eugene  
8 Division.

9 While an intervenor generally cannot question venue, 7C  
10 Wright, Miller & Kane, *Federal Practice and Procedure* § 1918 at  
11 485 (2d ed. 1986); 3B Moore's *Federal Practice* § 24.19 (2d ed.  
12 1975); *Consumers Union of U.S. v. Consumer Product*, 590 F.2d  
13 1209, 1222 n.65 (D.C. Cir. 1978); *Commonwealth Edison Co. v.*  
14 *Train*, 71 F.R.D. 391 (N.D. Ill. 1976), this rule does not apply  
15 when Congress has created special venue procedures. *Asbury*  
16 *Glen/Summit Ltd. v. Southeast Mortgage*, 776 F. Supp. 1093, 1096  
17 (W.D.N.C. 1991). In § 2001 Congress declared that § 2001 timber  
18 sales "shall be subject to judicial review only in the United  
19 States district court for the district in which the affected  
20 Federal lands are located." § 2001(f)(1).<sup>\*</sup> WCLA may properly  
21

22 <sup>\*</sup> This section does not apply directly to challenges to  
23 § 2001(k) sales, since Congress expected there would be no  
24 challenges due to the "notwithstanding any other provision of  
25 law" language in § 2001(k)(1). However, Congress' clearly  
26 expressed policy that challenges to a specific timber sale should  
be filed only in the district in which the sale is located is a  
factor this court should consider in determining the best venue,  
and allows WCLA, as an intervenor, to seek transfer to the  
appropriate district.

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO TRANSFER TO  
THE DISTRICT OF OREGON OR TO STAY PROCEEDINGS - 8

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1 bring this policy to the attention of the court through a  
2 transfer motion, especially when it is evident that the govern-  
3 mental defendants will not do so.

4 **II. IN THE ALTERNATIVE THE COURT SHOULD STAY THIS**  
5 **PROCEEDING PENDING A FINAL RULING IN NFRC V.**  
6 **GLICKMAN.**

7 The court has authority to stay a case pending the outcome  
8 of related litigation, *Landis v. North American Co.*, 299 U.S.  
9 248, 257 (1936), and should do so here. A stay will avoid  
10 conflict and inconsistency with *NFRC v. Glickman*, and will  
11 prevent the government from using this case to attempt to end-run  
12 Judge Hogan's rulings.

13 A stay of proceedings will not prejudice any party. The  
14 plaintiffs are active participants in *NFRC v. Glickman*,<sup>5</sup> and can  
15 present their arguments in that case, as can the government. If  
16 Judge Hogan decides that § 2001(k) does not apply to timber sales  
17 that are enjoined by another court, there will be nothing for  
18 this court to decide. If Judge Hogan decides to the contrary,  
19 this court will then have the opportunity to determine if any  
20 injunction against these sales exists, and, if so, whether there  
21 is any constitutional barrier that prevents Congress from  
22 changing the substantive environmental laws to mandate release of

23 <sup>5</sup> Judge Hogan has allowed the intervenors' counsel to  
24 participate actively in every phase of the case, and the Ninth  
25 Circuit allowed intervenors' counsel (Ms. Goldman of the Sierra  
26 Club Legal Defense Fund) to present oral argument on the hearing  
October 25, 1995 on the government's unsuccessful motion to stay  
Judge Hogan's October 17 injunction.

MEMORANDUM IN SUPPORT OF WCLA'S MOTION TO TRANSFER TO  
THE DISTRICT OF OREGON OR TO STAY PROCEEDINGS - 9

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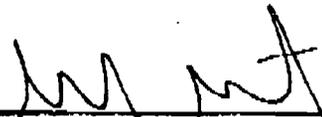
the enjoined sales. See Exhibit C at 10-11. A stay would also allow the court to avoid addressing the constitutional issue unnecessarily.

**CONCLUSION**

WCLA's motion to transfer, or its alternative motion to stay proceedings, should be granted.

Dated this 30th day of October, 1995.

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

**NORTHWEST FOREST RESOURCE COUNCIL,**

Plaintiff,

v.

**DAN GLICKMAN, in his capacity as**  
**Secretary of Agriculture,**  
**BRUCE BABBITT, in his capacity as**  
**Secretary of the Interior**

Defendants.

Civil No. 95-6244-MO

DECLARATION OF  
RICHARD A. PRAUSA

I, Richard A. Prausa, do hereby depose and say that:

1. My name is Richard A. Prausa. My position is a Forester on the Forest Ecosystems and Planning group within the Timber Management staff in the Washington office of the Forest Service.

2. My responsibilities include coordination with land management planning activities and issues, and collection of information related to Forest Service timber sales.

3. In particular, the Forest Service has been collecting information regarding the status of sales that were offered pursuant to section 318(b)-(j) of Public Law 101-121 (103 stat.

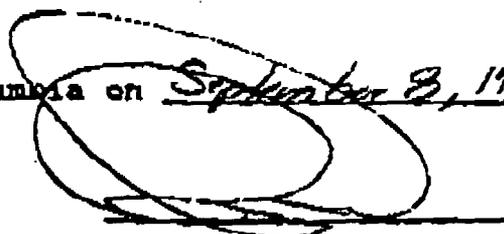
745), but which were either not awarded, or if awarded, subsequently suspended (hereafter "section 318 sales"). This information is contained in the attached chart. Figures set forth below may vary slightly from those in the attached chart due to rounding.

4. The Forest Service has determined that the 75 section 318 sales shown on the attached chart are subject to the provision of section 2001(k) of the Act. These 75 sales make up approximately 337 million board feet of timber. One hundred thirty five units on 51 sales will not be awarded due to a determination of marbled murrelet nesting on the basis of the Pacific Seabird Protocol. These 135 units include approximately 206 million board feet, which will have to be replaced. One sale of approximately 4.8 million board feet is being prepared for release. An additional 126 million board feet of timber is still undergoing further review, and may be released.

5. The Forest Service has also determined that there is approximately 121 million board feet of Nonsection 318 volume outstanding. These sales were prepared in FY 1989, and FY 1991-1995.

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

Executed at Washington, District of Columbia on September 8, 1995



Richard A. Prausa

Category/Forest	Number of Sales	MMBF Original Volume	MMBF Suspended/ Not Awarded	Comments:
<b>Section 318 Sales w/ Murrelets</b>				
Mt Baker/Snoqualmie	7	41.13	18.73	all sales awarded - 23 units delayed
Olympic NF	7	62.62	11.07	all sales awarded - 15 units delayed
Siskiyou NF	7	35.04	11.86	all sales awarded - 17 units delayed
Siuslaw NF	30	240.58	164.49	all sales awarded - 80 units delayed
<b>Region Totals</b>	<b>51</b>	<b>379.37</b>	<b>206.15</b>	<b>135 units delayed, 208 MMBF awarded</b>
<b>Section 318 Sales - Non-Murrelet Issues</b>				
Umpqua NF	11	98.71	68.50	6 sales awarded
Willamette NF	3	13.00	14.30	1 sale awarded
Siskiyou NF	3	13.42	13.42	no sales awarded
Rogue River NF	1	3.98	3.98	unawarded
Siuslaw NF	2	14.80	14.80	no sales awarded
Olympic NF	2	6.80	6.80	no sales awarded
Gifford Pinchot NF	1	6.00	6.00	unawarded
Mt. Hood NF	1	4.80	4.80	unawarded
<b>Region Totals</b>	<b>24</b>	<b>159.29</b>	<b>130.38</b>	<b>31 MMBF awarded, 99 MMBF unawarded</b>
<b>318 Sales Subtotal</b>	<b>75</b>	<b>538.57</b>	<b>336.53</b>	<b>237 MMBF awarded, 99 MMBF unawarded</b>
<b>Non-318 Sales in Geographic Region</b>				
Conville NF	1	13.70	11.88	1 sale awarded
Fremont NF	2	18.00	18.00	no sales awarded
Maiheur NF	2	6.00	6.00	no sales awarded
Ochoco NF	1	12.30	12.30	unawarded
Okanogan NF	1	0.89	0.89	unawarded
Siuslaw NF	1	1.80	1.80	unawarded
Umatilla NF	2	0.37	0.37	no sales awarded
Wallowa-Whitman NF	14	32.90	32.90	no sales awarded
Wenatchee NF	2	2.95	2.95	2 sales awarded
Winema NF	7	34.00	34.00	no sales awarded
<b>Region Totals</b>	<b>33</b>	<b>122.71</b>	<b>120.87</b>	<b>15 MMBF awarded, 105 MMBF unawarded</b>
<b>R6 Totals-All Sales</b>	<b>108</b>	<b>661.28</b>	<b>457.43</b>	<b>252 MMBF awarded, 205 MMBF unawarded</b>

**ORWA BLM SECTION 318 SALES - AWARDED OR DIRECTED TO AWARD BY 9/7/95**

88 Black Jack	Weyerhaeuser	Eugene	All	6,863		Yes
90 Pitcher Perfect Thinning	SwanCo	Eugene	All	2,438		Yes
90 Roman Dunn	Hull-Oakes	Eugene	Partial (MM)	5,382	5,264	No
Swinglog Thinning	SwanCo	Eugene	All	1,542		Yes
Summit Creek	Scott	Roseburg	All	7,910		Yes
Texas Gulch	D R Johnson	Roseburg	All	6,212		Yes
Upper Renhaven	Bohanna	Roseburg	All	1,798		Yes
Yellow Creek Mtn.	Scott	Roseburg	All	7,080		Yes
Big Winds	Spalding	Medford	All	6,864		Yes
Hoxie Griffin	Croman	Medford	All	2,809		Yes
Bear Air	Murphy Timber	Coos Bay	Partial (MM)	6,947	4,617	No
Whitt's End	Seneca	Eugene	All	1,097		Yes
Canton Creek II	Douglas Co FP	Roseburg	All	3,440		Yes
Chaney Road	Rogge	Coos Bay	All	3,600		No
<b>TOTALS</b>				<b>64,180</b>	<b>9,881</b>	

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6 IN THE UNITED STATES DISTRICT COURT  
 7 FOR THE WESTERN DISTRICT OF WASHINGTON  
 8

9 SEATTLE AUDUBON SOCIETY, et al., )  
 )  
 10 Plaintiffs, )  
 )  
 11 v. )  
 )  
 12 JACK WARD THOMAS, et al., )  
 )  
 13 Defendants. )

Civil No. C89-160-WD

PLAINTIFFS' REPLY BRIEF  
 IN SUPPORT OF MOTION TO  
 CLARIFY AND ENFORCE  
 JUDGMENT

14 INTRODUCTION

15  
 16 The fatal flaw in the arguments made by the Washington  
 17 Contract Loggers Association et al. ("WCLA") on both jurisdiction  
 18 and the merits is its insistence that section 2001(k) of the new  
 19 logging rider applies prospectively only without any reliance on  
 20 past events. The government's separation of powers arguments  
 21 suffer from the same flaw.

22 The plain language of section 2001(k) disproves this  
 23 assertion. Section 2001(k) reaches back into the past to define  
 24 what timber sale contracts must go forward today; it does not  
 25 change the law for timber sales to be offered in the future. By  
 26 drawing its meaning from the past, section 2001(k) must give  
 27 credence to the determinations made by this Court and the actions

1 taken by federal agencies responding to the law and court orders  
2 then in effect. Any contrary reading that would mandate logging  
3 of the six sales at issue in this motion would constitute the  
4 type of legislative overreaching prohibited by the doctrine of  
5 separation of powers. For this reason, this Court should  
6 construe its past orders and section 2001(k)(1) to preclude the  
7 release of the Cowboy, Garden, Nita, South Nita, First, and Last  
8 timber sales.

9 I. THIS COURT HAS JURISDICTION TO DETERMINE THE  
MEANING OF ITS PAST COURT ORDERS.

10 Perhaps recognizing the weakness of its position on the  
11 merits, WCLA devotes most of its brief to various (we believe  
12 meritless) reasons why this Court should not decide this motion  
13 to clarify and enforce. In contrast, the government recognizes  
14 that it is appropriate for this Court to determine the meaning of  
15 its past decisions in light of a new statute and even invites  
16 such a ruling to clarify its obligations. Indeed, if this Court  
17 refrains from deciding this motion, it would leave this issue to  
18 another court to decide in a proceeding in which the plaintiffs  
19 in this action who obtained the orders preventing logging of four  
20 of the timber sales and the withdrawal of the other two have not  
21 been permitted to participate as parties. See infra Section II.

22 In our opening brief in support of the motion to clarify and  
23 enforce, plaintiffs provided extensive statutory and case law  
24 support for this Court's authority clarify the effect of its past  
25 orders in light of changed circumstances and to entertain motions  
26 to enforce such orders. See Opening Brief at 11-12. WCLA does  
27 not refute this impressive body of authority from the Supreme

1 Court, the Ninth Circuit, the all writs act, and decades of  
2 judicial practice. Instead, it puts forward, without any  
3 pertinent authority, an overly crabbed view of this Court's power  
4 to clarify and enforce its past orders. According to WCLA, a  
5 district court has such authority only with respect to those  
6 matters specifically addressed in the four corners of the final  
7 judgment in a case. There is no support for this assertion, and  
8 the three cases cited by WCLA are wide of the mark.

9 Two of the cases cited by WCLA involve a party's ability to  
10 appeal a district court determination. Thus, in Azeez v.  
11 Fairman, 795 F.2d 1296, 1297 (7th Cir. 1986), the Seventh Circuit  
12 stated that the defendants may not appeal from a district court  
13 opinion stating that the plaintiffs are entitled to declaratory  
14 relief, when the district court never entered judgment granting  
15 that declaratory relief. However, because the judgment granted  
16 money damages, an appeal lay to decide issues underlying the  
17 award of damages. Similarly, Bethune Plaza, Inc. v. Lumpkin,  
18 863 F.2d 525, 526-28 (7th Cir. 1988), raised the question of  
19 whether a preliminary or permanent injunction had issued because  
20 the separate judgment entered pursuant to Fed. R. C. P. 58 had  
21 failed to order injunctive relief. Nonetheless, the Seventh  
22 Circuit gave meaning to the district court's intent as expressed  
23 in the opinion and allowed an appeal of the injunction.

24 No one ever disputed that this Court had properly entered  
25 injunctions preventing four of the timber sales from proceeding.  
26 Nor was the appealability of those injunctions ever called into  
27 question. Indeed, the Ninth Circuit decided the appeal of the

1 first such injunction stopping the Cowboy timber sale.  
2 Similarly, no one ever disputed that this Court dismissed  
3 plaintiffs' challenges to the First and Last other timber sales  
4 as moot and that those orders became final some time ago.

5 The other case cited by WCLA concerns the ability of a court  
6 to hold a party in contempt of a court order issued more than a  
7 decade earlier. In Glover v. Johnson, 934 F.2d 703, 705-06, 709  
8 (6th Cir. 1991), the Sixth Circuit held that any findings of  
9 contempt had to be based on the 1981 order issued in that case  
10 because it resulted from and superseded the previous order issued  
11 in 1979. It is an understatement to state that the conclusions  
12 reached in that case were heavily dependent on the facts  
13 surrounding the content and development of the past orders.  
14 Nothing in that case announces any overarching general  
15 proposition that injunctions that are not specifically included  
16 in a final judgment can never be enforced by a court. Glover  
17 simply reiterates the well-established principle that a party may  
18 not be held in contempt unless it runs afoul of clear obligations  
19 spelled out in court orders.

20 These cases say nothing about a court's jurisdiction to  
21 determine the vitality of its prior decisions and orders. While  
22 a court may be required to issue a new order specifically laying  
23 out the parties' obligations before holding a party in contempt,  
24 that limitation is clearly not at issue here.

25 This motion asks this Court to determine the continuing  
26 effect of its past orders in light of a new statute that commands  
27 that certain old timber sales go forward today. Since this Court

1 previously held that these sales could no go forward as they were  
2 proposed in 1990, the new statute threatens to undo this Court's  
3 prior rulings, if construed as broadly as WCLA and even the  
4 government suggest. Clearly, this Court's past determinations  
5 continue to have res judicata and collateral estoppel effect as  
6 to whether the sales complied with Section 318 and could have  
7 proceeded at various times in the past. It is appropriate and  
8 necessary for this Court to determine the extent to which those  
9 past rulings and the factual determinations on which they were  
10 based preclude the broad constructions of the new statute being  
11 offered both in this and in other cases.<sup>1/</sup>

12 An analogy may help elucidate the point. In 1992, this  
13 Court held that the March 3, 1992 record of decision for a  
14 spotted owl plan was illegal and could not be implemented. See  
15 Seattle Audubon Society v. Moseley, 798 F. Supp. 1473 (W.D. Wash.  
16 1992), aff'd, 998 F. 2d 699 (9th Cir. 1993). Of course, that  
17 record of decision has since been superseded by Option 9, and  
18 this Court's prior injunction is no longer in effect. However,  
19 if the Forest Service announced tomorrow that it intended to  
20 revert to the 1992 record of decision, this Court's prior

---

21  
22 <sup>1/</sup> WCLA contends that any challenge to and relief sought with  
23 respect to Section 318 timber sales was limited by plaintiffs to  
24 fiscal year 1990. That is not true. Plaintiffs' Second Amended  
25 Complaint sought an order bringing the fiscal year 1990 timber  
26 program into compliance with Section 318 and permanent  
27 injunctions prohibiting the government from proceeding with  
Section 318 timber sales that violate Section 318. Plaintiffs'  
Second Amended Complaint ¶ 7, ¶ H (WCLA Ex. B at 3, 17). Since  
Section 318 continues to govern timber sales originally offered  
in fiscal year 1990, any such orders would likewise continue be  
effective with respect to such sales beyond that fiscal year.  
Nothing in the complaint or in the previous proceedings in this  
case suggests otherwise.

1 decisions would have res judicata effect, and this Court would  
2 have the authority to decide the extent to which past injunctions  
3 would have renewed vitality. Similarly, if Congress mandated  
4 that the Forest Service must operate under the 1992 record of  
5 decision for the next year, this Court would certainly have the  
6 authority to determine whether Congress had overstepped its  
7 bounds and interfered impermissibly with the prior orders and  
8 factual determinations of the court. This Court could determine  
9 the extent to which its past orders have effect in light of those  
10 changes.

11 Similarly, if the Forest Service had tried to go forward  
12 with the Cowboy timber sale in May 1992, after final judgment was  
13 entered in this case, it would have had to do so under the  
14 environmental laws then in effect. If, instead, the Forest  
15 Service had tried to proceed with the Cowboy sale under Section  
16 318, plaintiffs could have asked this Court to enforce its prior  
17 injunction. The fact that the final judgment did not incorporate  
18 the terms of that injunction would not have barred this Court  
19 from enforcing the injunction.

20 Moreover, the only conceivable result would have been  
21 enforcement of the old injunction. A sale offered in fiscal year  
22 1990 had to comply with Section 318, and, as this Court held, the  
23 Cowboy timber sale violated Section 318's fragmentation  
24 requirements. The conference report to Section 318 made it  
25 absolutely clear that "[s]ales offered under this section but not  
26 awarded and withdrawn after October 1, 1990 under normal Forest  
27 Service or BLM procedures may not be re-offered in subsequent

1 fiscal years under the terms of this section." Conf. Rep. No.  
2 101-264, 101st Cong., 1st Sess. 87 (1989). Accordingly, the 1990  
3 sale could not go forward, and any new formulation of the sale  
4 would have been subject to then-applicable environmental laws,  
5 administrative appeals, and judicial challenges. If the Forest  
6 Service had tried to resurrect the enjoined or withdrawn sales  
7 under Section 318, it would have been acting in blatant disregard  
8 of the past rulings of this Court.

9 There is no distinction for these purposes between the four  
10 enjoined sales and the two that were withdrawn in the face of  
11 pending motions for injunctions. Even WCLA concedes that the  
12 First and Last sales were withdrawn "because they faced the  
13 prospect of injunction on the same grounds." Indeed, this Court  
14 dismissed challenges to those sales as moot because the Forest  
15 Service did not plan to go forward with the sales. If, after the  
16 dismissal became final, the Forest Service had proceeded with  
17 these sales under Section 318, certainly this Court would have  
18 the power to reopen that decision and hear the merits of  
19 plaintiffs' challenges to the sales. See Fed. R. Civ. P. 60(b).

20 The only way that the Forest Service could proceed with the  
21 six timber sales at issue would have been to begin anew under the  
22 environmental laws in effect after fiscal year 1990. It is  
23 undisputed that the Forest Service never did so. While WCLA  
24 suggests in an oblique reference (at 18) that the environmental  
25 laws may not have been an obstacle to these sales, neither it nor  
26 the government contends that these sales would pass muster under  
27

1 Option 9. Indeed, these sales could not proceed because they all  
2 are located in late successional reserves.

3 At its core, this motion asks this Court to determine  
4 whether Congress has commanded timber sales to go forward in  
5 contravention of this Court's past rulings. If it has, this  
6 motion asks the Court to decide whether Congress overstepped its  
7 bounds and meddled impermissibly in judicial prerogatives in  
8 essentially setting aside these prior judicial decisions.  
9 Clearly, this Court has the power to make these decisions.

10 II. THIS COURT SHOULD NOT REFRAIN FROM DECIDING  
11 THESE QUESTIONS; PLAINTIFFS HAVE NOT BEEN  
12 PERMITTED TO PARTICIPATE AS PARTIES IN THE  
13 OTHER PENDING CASE IN WHICH WCLA SUGGESTS  
14 THEY MAY BE RESOLVED.

15 WCLA makes the remarkable suggestion that this Court should  
16 not decide plaintiffs' motion to clarify and enforce because the  
17 issues might be decided in Northwest Forest Resource Council v.  
18 Glickman, No. 95-6244-HO (D. Or.), and a ruling in plaintiffs'  
19 favor by this Court might be inconsistent with a ruling on a  
20 different question issued on September 13, 1995 in NFERC v.  
21 Glickman.

22 What WCLA has failed to tell the Court is that Oregon  
23 Natural Resources and several other plaintiffs in this case  
24 (hereinafter called "ONRC") sought to intervene as defendants in  
25 NFERC v. Glickman, just days after that case was filed.<sup>2/</sup> While

26 2/ ONRC, Portland Audubon Society, Pilchuck Audubon Society,  
27 and four other environmental organizations sought to intervene in  
NFERC v. Glickman. These named organizations, along with  
Washington Environmental Council, Lane County Audubon Society,  
and Seattle Audubon Society are the plaintiffs that join in the  
motion to clarify and enforce. It is bizarre to suggest that  
Washington organizations, like Seattle Audubon Society and

1 the government took no position, NFRC strenuously opposed ONRC's  
2 intervention on the scope of section 2001(k) of the 1995 logging  
3 rider. Judge Hogan accepted NFRC's arguments and denied ONRC  
4 intervention on all issues pertaining to which timber sales fall  
5 within section 2001(k)(1). ONRC has intervenor status only with  
6 respect to the meaning of the "known to be nesting" language in  
7 section 2001(k)(2), which is quite distinct from the issues  
8 presented in this motion to clarify and enforce.

9 While Judge Hogan has permitted ONRC the opportunity to file  
10 amicus briefs on the other issues, ONRC has been unable to  
11 conduct discovery to identify the timber sales covered by NFRC's  
12 legal theories and to learn the extent to which those sales were  
13 withdrawn because they violated applicable environmental laws.  
14 Moreover, ONRC has been unable to file motions seeking to block  
15 the release of particular sales, like the six at issue here. And  
16 of course, as a nonparty, ONRC cannot appeal adverse decisions.  
17 While ONRC is appealing the denial of intervention, the district  
18 court proceedings are moving apace in the meantime.

19 The Oregon district court proceedings with regard to Section  
20 318 timber sales are illustrative. NFRC filed a motion for  
21 summary judgment seeking the immediate release of every timber  
22 sale originally offered in the time period covered by Section  
23 318. In response, the government indicated that it was releasing  
24 all Section 318 sales, except for the six at issue in this motion  
25 to clarify and enforce, two others that had previously been

26 \_\_\_\_\_  
27 Washington Environmental Council, should be forced to seek  
intervention in an Oregon district proceeding, especially when  
that move would be futile.

1 before a district court in Portland, and those implicated by  
2 pending motions concerning the meaning of the "known to be  
3 nesting" language in section 2001(k)(2). Since the government  
4 was releasing Section 318 sales, NFRC has indicated that there is  
5 little, if anything, left of its motion for summary judgment  
6 motion. Nonetheless, it has asked the Oregon district court to  
7 hold that motion in abeyance in case future disputes arise  
8 between the government and NFRC.

9       Meanwhile, ONRC (along with the additional plaintiffs in  
10 this case) take great issue with the government's actions to  
11 release several of the "Section 318 sales." However, because  
12 they are not parties to NFRC v. Glickman, they cannot raise their  
13 objections in a meaningful way in that case. Even though the  
14 motion for summary judgment on the Section 318 sales is  
15 technically still scheduled to be heard by Judge Hogan on  
16 November 7, 1995, it is not at all clear that he will decide that  
17 motion, but it is clear that ONRC is not in a position to appeal  
18 any decision that is adverse to it.

19       Moreover, it is not a foregone conclusion that any ruling in  
20 plaintiffs' favor on the motion to clarify and enforce will  
21 necessarily be inconsistent with the decision issued by Judge  
22 Hogan in NFRC v. Glickman on September 13, 1995, or the  
23 injunction subsequently issued on October 17, 1995. Only one  
24 issue was fully briefed by the parties and present to Judge Hogan  
25 for decision prior to September 13, 1995 and that was whether  
26 section 2001(k)(1) reaches timber sale contracts offered after  
27

1 the time period covered by Section 318. That issue is now before  
2 the Ninth Circuit on an expedited schedule.

3 The parties briefed that issue strictly as a matter of  
4 statutory construction without discussing its effect on  
5 particular timber sales. In fact, NFRC has never identified the  
6 specific timber sales that it claims must be released under a  
7 broad reading of section 2001(k)(1), and the government did not  
8 do so until after Judge Hogan issued an injunction. ONRC, as  
9 amicus, raised the prospect of the injunction including sales  
10 that had been enjoined by courts or withdrawn because they  
11 violated environmental laws. Transcript of October 17, 1995  
12 Hearing at 11-16 (WCLA Ex. F). Judge Hogan recognized that there  
13 would be disagreements over whether particular sales must be  
14 released under section 2001(k)(1). Accordingly, on the same day  
15 that he issued an injunction ordering release of all timber sales  
16 offered in October 1, 1990 to July 27, 1995, he issued another  
17 order retaining jurisdiction over disputes between the parties  
18 concerning whether particular sales must be released. WCLA Ex. H  
19 at 2. While the transcript and the second order issued on  
20 October 17, 1995 demonstrate that Judge Hogan has not decided  
21 whether enjoined and withdrawn sales fall within section  
22 2001(k)(1), ONRC and the other organizations joining the motion  
23 to clarify and enforce have no meaningful way to participate  
24 fully as parties in future proceedings in NFRC v. Glickman with  
25 respect to those issues or the fate of particular timber sales  
26 that were previously enjoined or withdrawn.

1 It would be fundamentally unfair to have the fate of these  
2 six timber sales resolved in a case in which the plaintiffs  
3 cannot participate as parties. While WCLA is not a party in NFRC  
4 v. Glickman, NFRC is both the plaintiff in that case and a  
5 defendant-intervenor before this Court.<sup>3/</sup> Accordingly, this  
6 Court should decline the invitation to leave these issues to the  
7 Oregon district court to decide.

8 III. THIS COURT SHOULD CLARIFY THAT ITS PREVIOUS ORDERS  
9 ENJOINING FOUR TIMBER SALES AND DISMISSING CHALLENGES  
10 TO TWO OTHERS AS MOOT PRECLUDE RESURRECTION OF THESE  
11 SALES UNDER SECTION 2001(K) (1).

12 Both WCLA and the government suggest that section 2001(k) (1)  
13 does no more than make prospective changes in the law governing  
14 future timber sale contracts and thus it is permissible under  
15 Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992). WCLA  
16 takes this point even further and argues that this Court's past  
17 rulings have become irrelevant under that new law.

18 Not only is this an inaccurate characterization of section  
19 2001(k) (1) as explained below, but there is simply no limit to  
20 this separation of powers loophole. Any time Congress eradicates  
21 a judicial order through legislation it could be said to make a  
22 prospective change in the law, even if the only change made is  
23 elimination of the judicial order. The Supreme Court's decision  
24 in Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447 (1995), and  
25 the Ninth Circuit's recent decision in Alaska Wilderness

26 <sup>3/</sup> On April 1, 1991, this Court granted WCLA, NFRC, and others  
27 defendant-intervenor status. While WCLA participated as a  
plaintiff in a consolidated case in the proceedings leading to  
the demise of the six timber sales, it is seeking to participate  
as defendant-intervenor in this motion to clarify and enforce.  
Presumably, NFRC has that same status.

1 Recreation & Tourism Association v. Morrison, No. 95-35222 (Order  
2 & Amended Opinion Sept. 28, 1995) (Exhibit 1) downloaded from the  
3 Ninth Circuit Bulletin Board), do not permit such an  
4 interpretation.

5 In Plaut, the majority described the nub of the infringement  
6 as the legislative nullification of a prior, authoritative  
7 judicial action. 115 S. Ct. at 1463. As the dissent explained,  
8 the restrictions on congressional interference ensure that "the  
9 impartial application of rules of law, rather than the will of  
10 the majority, must govern the disposition of individual cases and  
11 controversies. Any legislative interference in the adjudication  
12 of the merits of a particular case carries the risk that  
13 political power will supplant evenhanded justice, whether the  
14 interference occurs before or after entry of final judgment. Id.  
15 at 1476. Nothing in Plaut limits the bar on legislative  
16 interference to the four corners of a final judgment, as WCLA  
17 suggests. Nor does Plaut permit a legislative nullification of a  
18 final judicial decision so long as it is done as a prospective  
19 mandate to go forward with the action "notwithstanding any other  
20 provision of law."

21 Similarly, the Ninth Circuit recently decided that a rider  
22 providing that a specific environmental impact statement shall be  
23 deemed sufficient did not override the prior decision of that  
24 Court that the environmental impact statement was, in fact, not  
25 sufficient. According to the Ninth Circuit, the rider did not  
26 remove the basis for the court's decision by changing the  
27 underlying law. Alaska Wilderness Recreation & Tourism

1 Association v. Morrison, No. 95-35222 (Order & Amended Opinion  
2 Sept. 28, 1995). More specifically, the court stated that the  
3 rider offered no new statutory basis on which to analyze the  
4 effect of the cancellation of a pre-existing timber sale contract  
5 on the environmental impact statement process. Nor was there any  
6 indication that Congress had eliminate the core requirements of  
7 an environmental impact statement.

8 Under these decisions, Congress may not prescribe the legal  
9 significance to be given to federal agencies' past actions in  
10 order to render them legal, in contravention of a past judicial  
11 ruling. Yet that is precisely what section 2001(k)(1) would do  
12 if it were applied to enjoined and cancelled timber sale  
13 contracts.

14 On its face, section 2001(k)(1) does not simply prescribe  
15 rules governing future conduct. Instead, it directs the Forest  
16 Service and the Bureau of Land Management to go forward with  
17 timber sale contracts offered long ago. In other words, section  
18 2001(k)(1) defines what must be done only by reference to past  
19 actions taken by executive branch agencies. What WCLA is urging  
20 is that the past matters only to the extent that it supports  
21 logging particular sales, and not if it would stand in the way of  
22 such logging. Since the statute itself borrows from the past,  
23 however, it must take the past as it, in fact, occurred, and as  
24 this and other courts found the facts to be or limited the  
25 government's ability to proceed.

26 This motion focuses on a narrow subset of timber sales that  
27 the government proposed under Section 318. When this Court

1 prohibited the sales from going forward under Section 318, and  
2 the Forest Service realized that others would similarly be  
3 blocked, the government did a complete about-face. It no longer  
4 planned to go forward with these sales under Section 318 (or  
5 otherwise for that matter). Under ordinary contract principles,  
6 there no longer was a willing offeror. While the government had  
7 previously advertised and even auctioned the sales, it stopped  
8 that process and made it clear that this timber was no longer for  
9 sale.

10 Reading section 2001(k)(1) to force the Forest Service to  
11 sell the six timber sales at issue in their original form would  
12 intrude impermissibly into judicial prerogatives. This Court  
13 previously declared four of the sales in violation of Section 318  
14 and enjoined them. Congress cannot make these sales legal under  
15 Section 318. On a prospective basis, Congress could mandate  
16 logging of particular tracts of land that include these sale  
17 locations and the terms of that new law would control, but  
18 Congress has not done that. WCLA's construction of section  
19 2001(k)(1) would resurrect old timber sales that have been found  
20 by the courts to be unlawful. That type of congressional  
21 revision of judicial decisions is prohibited under the doctrine  
22 of separation of powers. Since section 2001(k)(1) looks solely  
23 to past actions to identify which timber sales are covered by its  
24 mandates, it must be read to include actions taken by the courts  
25 with respect to those timber sales.

26 This same logic precludes reading section 2001(k)(1) to  
27 encompass the First and Last timber sales that were irrevocably

1 withdrawn by the federal agencies. After this Court enjoined  
2 four timber sales, and plaintiffs filed motions seeking  
3 injunctions against two more, the Forest Service realized that  
4 the two sales faced a similar fate. It did not wait for the  
5 Court to rule. Instead, it withdrew the sales and made it clear  
6 to the Court that it had no intention with proceeding with the  
7 sales under Section 318.

8 Based on those actions and representations, this Court found  
9 that the government was not proceeding with the sales and held  
10 that plaintiffs' challenges to those sales were moot. If section  
11 2001(k)(1) is construed to require the First and Last timber  
12 sales to go forward, it would clash directly with this Court's  
13 factual determination that they had been cancelled and would not  
14 proceed. Either that determination must continue to have weight  
15 or the original challenges to the sales should be reinstated.  
16 Indeed, under ordinary principles of mootness and fairness, the  
17 government cannot cease challenged conduct in order to render a  
18 case moot and then avoid judicial review when it reinstates the  
19 challenged conduct. While not directly applicable here, this  
20 principle counsels in favor of honoring this Court's  
21 determination that the timber sales were no longer in the timber  
22 pipeline. While Congress can create legal mandates to initiate  
23 new timber sales, it cannot resurrect these cancelled sales.

24 This conclusion is also compelled out of respect for the  
25 actions taken by the executive branch under delegated contract  
26 powers. While Congress has the power to "make all needful rules  
27 and regulations" respecting federal property, if it exercises

1 that power by delegating authority to the executive branch, it is  
2 then the power of the executive branch to carry out those  
3 delegated functions.

4 Here, as is often the case, Congress has delegated to the  
5 Forest Service the authority to enter into federal contracts  
6 subject to applicable statutes. While Congress may change the  
7 governing statutes, it may not interfere with or control a  
8 federal agency's exercise of delegated contract functions. See  
9 Hechinger v. Metropolitan Washington Airports Authority, 36 F.3d  
10 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995); Lear  
11 Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988),  
12 irrelevant portion withdrawn en banc, 893 F.2d 205 (9th Cir.  
13 1989); Ameron v. Army Corps of Engineers, 809 F.2d 979 (3d Cir.  
14 1986), cert. dismissed, 488 U.S. 918 (1988).

15 Under its delegated authority, the Forest Service decided to  
16 offer certain timber sales in fiscal year 1990. Then, in the  
17 face of this Court's rulings, the Forest Service changed its mind  
18 and decided not to offer these sales. Federal statutes give the  
19 Forest Service the discretion to decide whether to offer a  
20 particular timber sale, and here the Forest Service has exercised  
21 that discretion not to offer these sales.

22 Again, section 2001(k)(1) does not, itself, define the  
23 particular timber sales that must go forward. Instead, it refers  
24 to timber sale contracts offered by federal agencies under their  
25 delegated contracting authority. Either that power was delegated  
26 and the Forest Service had the latitude to decide which timber  
27 sales to offer or it did not. In 1990, the Forest Service had

1 that authority. The 1995 logging rider does not expressly take  
2 that discretion away. Instead, it builds on it, requiring the  
3 Forest Service to go forward with its prior offers.

4 Congress cannot tread lightly on the authority delegated to  
5 executive branch agencies. In the absence of a clear  
6 congressional intent to override those past decisions, section  
7 2001(k)(1) should be read to take those offers as the new law  
8 finds them. In cancelling the timber sales, the Forest Service,  
9 which then had the power to decide whether willingly to offer a  
10 particular sale, exercised its delegated power. Congress did not  
11 specifically identify, let alone overrule, the rulings of this  
12 Court or the decisions made by the Forest Service with respect to  
13 the particular timber sales. In contrast, Section 318  
14 specifically identified the two pending cases that were  
15 sidetracked by the legislation.

16 The new logging rider's legislative history likewise never  
17 indicates a clear intent to override executive branch decisions  
18 to cancel contract offers or court orders barring particular  
19 timber sales. The legislative history indicates that section  
20 2001(k)(1) pertains to timber sales that were still in the timber  
21 pipeline, but that had been held up because of the listing of  
22 threatened species and consultations over the sales' effects on  
23 those species, and section 2001(k)(2) continues to protect many  
24 of those sales from logging. 141 Cong. Rec. H 5050 (May 16,  
25 1995). Nothing in the legislative history suggests that Congress  
26 thought it was resurrecting cancelled timber sales or that it was  
27 mandating that the Forest Service go forward with sales that had

1 been enjoined by the courts.

2 The 45-day time frame established for releasing these sales  
3 strongly suggests that Congress did not mean to include cancelled  
4 and enjoined timber sales in the section 2001(k)(1) mandate.

5 Section 2001(k)(2) creates an exception to the release of sales  
6 mandated in section 2001(k)(1) for sale units where threatened or  
7 endangered bird species are known to be nesting. This provision  
8 makes sense when applied to the Section 318 timber sales that had  
9 been held up for consultations over their effects on threatened  
10 marbled murrelets or spotted owls. Surveys have been underway  
11 for some time on such sales. However, it is completely  
12 unworkable for sales that had been cancelled. Since the marbled  
13 murrelet surveys take two years, cancelled sales would often be  
14 released because insufficient knowledge exists. Ignorance would  
15 require release. There is no indication that Congress had such a  
16 harsh result in mind.

17 Because construing section 2001(k)(1) to encompass the six  
18 timber sales at issue would violate the doctrine of separation of  
19 powers, this Court should adopt a narrower construction of the  
20 statute that respects that decision previously made by this Court  
21 and by the Forest Service in the face of this Court's rulings.  
22 Section 2001(k)(1) should be limited to timber sale contract  
23 offers that were still outstanding or that had led to timber sale  
24 contracts that were still outstanding. It should not be read to  
25 resurrect cancelled offers.

26 WCLA points to the section 2001(k)(1) statement that the  
27 return of the bid bond of the high bidders does not alter section

1 2001(k) (1). That statement is too obscure and thin a reed on  
2 which to hang a draconian interpretation that eradicates past  
3 court orders and executive branch decisions. WCLA does not  
4 explain when a bid bond may be returned and whether it always  
5 reflects a decision by the government not to go forward with the  
6 sale. Nor is there any indication that Congress ascribed any  
7 particular meaning (or any meaning at all) to this phrase.

8 Finally, WCLA seizes on the phrase "notwithstanding any  
9 other provision of law" and argues that the mere use of this  
10 phrase wipes out all laws, court decisions, and executive branch  
11 actions without any limitation. It is inconceivable that the  
12 Ninth Circuit would have reached a different conclusion in Alaska  
13 Wilderness Recreation & Tourism Association v. Morrison, if the  
14 rider at issue there had used these magic words. Even when  
15 constitutional principles have not been at stake, the Ninth  
16 Circuit has refused to give this phrase such a broad, all-  
17 encompassing meaning. In re Glacier Bay, 944 F.2d 577, 582 (9th  
18 Cir. 1991). Instead, the phrase must be assessed in the context  
19 in which it is used. Here, because there is no clear evidence  
20 that Congress meant to eradicate past court orders and resurrect  
21 cancelled timber sales, section 2001(k) (1) should not be read to  
22 reach that extreme result.<sup>4/</sup>

23  
24 4/ In other provisions of the new logging rider, Congress  
25 specifically listed the laws that are superseded, even in  
26 connection with timber sales offered "notwithstanding any other  
27 provision of law." Rescissions Act, § 2001(d) (Option 9 sales to  
be offered expeditiously notwithstanding any other provision of  
law); id. § 2001(i) (listing laws that are deemed to be satisfied  
by such sales). Moreover, Congress specifically stated when it  
would permit timber sales to go forward without complying with  
the Competition in Contracting Act. Id. § 2001(b) (5) (B) (i).

CONCLUSION

For the reasons set forth above, this Court should declare that its previous orders and injunctions remain valid under the Section 2001(k) of the new logging rider.

Respectfully submitted this 30th day of October, 1995.

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None of these limitations on the applicability of specific statutes is applicable to section 2001(k)(1).

JUDGE DWYER

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 7 FOR THE WESTERN DISTRICT OF WASHINGTON  
 8

9 SEATTLE AUDUBON SOCIETY, et al., )  
 )  
 10 Plaintiffs, )  
 )  
 11 v. )  
 )  
 12 JACK WARD THOMAS, et al., )  
 )  
 13 Defendants. )  
 14

Civil No. C89-160-WD

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 JUDGMENT

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INTRODUCTION

In 1990, plaintiffs, Pilchuck Audubon Society, Portland Audubon Society, Oregon Natural Resources Council, Lane County Audubon Society, and Washington Environmental Council, challenged several timber sales offered under Section 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, Tit. III, 103; Stat. 745-750 (1989) ("Section 318") (Exhibit 1).<sup>1/</sup> Specifically, plaintiffs alleged that these sales violated the environmental constraints imposed on timber sales by Section 318. This Court agreed with plaintiffs and enjoined four of the timber sales. Seeing the writing on the wall, the Forest Service withdrew two other challenged sales. As a result of this Court's rulings, and an affirmance by the Court of Appeals, the Forest Service decided not to go forward with these six sales.

Invoking another rider that mentions neither these sales nor this Court's rulings, the timber industry is pressuring the Forest Service to go forward with these enjoined and withdrawn timber sales under their original unlawful terms and conditions. The Forest Service has indicated that it may resurrect these sales, even though Section 318 has long since expired, the violations of Section 318 have never been corrected, and logging these sales is prohibited by current forest plans.

Federal courts retain jurisdiction to determine the validity

---

<sup>1/</sup> At this time, the above-named former plaintiffs join in this motion. Due to the urgency with which this matter has arisen, many of the former plaintiffs have not yet determined whether to join in these renewed proceedings.

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1 of their past orders in light of a changing legal landscape.  
2 Such clarification is needed here. Broad constructions of the  
3 new logging rider that would undo this Court's past orders are  
4 being asserted in other court cases, in vigorous advocacy to  
5 federal agencies, and in statements made by individual Members of  
6 Congress. Because this Court and only this Court has the  
7 authority to modify and enforce its past orders, it is  
8 appropriate for this Court to determine the continued vitality of  
9 those orders. Specifically, plaintiffs ask this Court to declare  
10 that: (1) the new rider constitutes congressional interference  
11 with judicial prerogatives in violation of the doctrine of  
12 separation of powers; and (2) nothing in that new rider compels  
13 the resurrection of the enjoined and withdrawn sales previously  
14 before this Court. Accordingly, this Court should direct the  
15 Forest Service to abide by the decisions and orders issued in  
16 this case with respect to those sales.

17 BACKGROUND -

18 A. Section 318's Fragmentation Requirements.

19 Section 318 put into place what one of its sponsors called  
20 "a holding pattern solution" to the controversies over preserving  
21 and logging the remaining old-growth forest of the Pacific  
22 Northwest. See 135 Cong. Rec. 8795 (July 26, 1989) (remarks of  
23 Sen. Mark Hatfield, one of Section 318's co-sponsors). While  
24 Section 318 is best known for its establishment of one-year  
25 timber quotas for Washington and Oregon national forests and its  
26 direction that sales conducted under Section 318's terms satisfy  
27 the claims in this and another pending case, Section 318 also

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1 prescribed some minimal requirements for timber sales offered  
2 during fiscal year 1990 and the end of fiscal year 1989.

3 More specifically, Section 318 required the Forest Service  
4 to avoid fragmenting ecologically significant old-growth forest  
5 stands, except to the extent necessary to meet Section 318's  
6 timber quotas. Section 318(b)(2). Moreover, where such  
7 fragmentation was necessary, the Forest Service had an obligation  
8 to "minimize such fragmentation . . . on a national forest-by-  
9 national forest basis. Id.

10 B. The Six Timber Sales.

11 Section 318's fragmentation requirements formed the basis of  
12 plaintiffs' challenge to the six timber sales at issue here.

13 Five of the sales -- Cowboy, Nita, South Nita, First, and Last  
14 timber sales, were on the Tiller Ranger District of the Umpqua  
15 National Forest. On motions for summary judgment, the following  
16 undisputed facts emerged.

17 The Cowboy sale comprised 219 acres of ecologically  
18 significant old-growth, including over 203 acres of spotted owl  
19 habitat. The Forest Service's own biologist recommended  
20 significant modifications to reduce fragmentation in spotted owl  
21 habitat, but the Forest Service refused to modify the sale.  
22 Order at 25-26 (May 11, 1990) ("First Order") (Exhibit 2).

23 Together, the Nita and South Nita sales would have logged  
24 295 acres of ecologically significant old-growth, which the  
25 Forest Service concluded would result in a highly fragmented  
26 landscape. Order at 4 (signed Sept. 29, 1990; entered Oct. 1,  
27 1990) ("Second Order") (Exhibit 3).

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1 The First timber sale would have logged 142 acres of  
2 ecologically significant old-growth, which the Forest Service  
3 characterized as "high quality spotted owl habitat" where  
4 "priority should be given to protecting this area for its  
5 attributes of high owl densities, extensive block of high quality  
6 habitat and potential as a SOHA [spotted owl habitat area]  
7 network expansion site." First Biological Evaluation at 3  
8 (Exhibit A to SAS' Mem. in Support of Motion for Summary Judgment  
9 and Permanent Injunction Against First Timber Sale (Sept. 17,  
10 1990)). Although a Forest Service wildlife biologist recommended  
11 dropping three of the five sale units to reduce fragmentation,  
12 the Forest Service refused to do so. Id. at 4; Mem. at 3  
13 (Exhibit 4).

14 The bulk of the Last timber sale likewise was located in an  
15 ecologically significant old-growth grove of the Tiller Ranger  
16 District, a large continuous block of unfragmented old-growth  
17 that enjoyed high owl densities. A Forest Service wildlife  
18 biologist recommended dropping four of the seven sale units, but  
19 only one sale unit was dropped because it was located within 1/2  
20 mile of a spotted owl pair. Last Biological Evaluation at 4-5  
21 and Last Timber Sale Modification and Implementation Record  
22 (Exhs. A & B to SAS' Memorandum in Support of Motion for Summary  
23 Judgment and Permanent Injunction Against the Last Timber Sale  
24 (Sept. 5, 1990)) (Exhibit 5).

25 The sixth timber sale -- the Garden timber sale on Siskiyou  
26 National Forest -- would have logged 137 acres of old-growth  
27 forest. It was undisputed before this Court that the Garden sale

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1 would have fragmented a contiguous block of ecologically  
 2 significant old-growth in an area then proposed for complete  
 3 preservation. The Siskiyou National Forest had proposed the  
 4 Garden timber sale to meet its Section 318 timber quotas without  
 5 looking beyond the sale planning area for any other potential  
 6 sales that would have less egregious effects on ecologically  
 7 significant old-growth stands because it wanted to have those  
 8 other sales available for future years. Order on Cross-Motions  
 9 for Summary Judgment Re: Garden Timber Sale at 4-6 (Oct. 19,  
 10 1990) (Exhibit 6).

11 C. This Court's Decisions And Orders With Respect To These  
 12 Six Timber Sales.

13 Plaintiffs filed timely challenges to each of these timber  
 14 sales under Section 318, contending that the sales violated  
 15 Section 318's fragmentation provisions.

16 On May 11, 1990, this Court agreed with plaintiffs and  
 17 enjoined the Cowboy sale. First, the Court held that Section  
 18 318's mandate to distribute the sales volume in proportion to  
 19 historic sale volumes applied to the states as a whole. First  
 20 Order at 17-18. This interpretation called into question the  
 21 Forest Service's apparent reliance on ranger district quotas as a  
 22 reason for allowing fragmentation of ecologically significant  
 23 old-growth stands. *Id.* at 21, 27-28.

24 Second, this Court held that "[t]he Forest Service is  
 25 required to avoid fragmenting ESOG except to the extent necessary  
 26 to meet the statewide sales quotas, and to minimize fragmentation  
 27 where it is found to be necessary" on a national forest-by-  
 national forest basis. *Id.* at 23-24. Accordingly,

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1 the agency is not entitled to adhere to a rigid,  
 2 predetermined quota for each district within a national  
 3 forest without regard to impact on ESOG. . . . In  
 4 determining whether a timber sale that will fragment  
 5 ESOG is necessary to achieve the sales quota, the  
 6 Forest Service must consider whether another sale or  
 7 sales in the same district could feasibly be  
 8 substituted that would avoid, or better minimize, any  
 9 fragmentation of ESOG. It must also consider whether  
 10 such other sale or sales could feasibly be offered  
 11 elsewhere in the same forest.

12 Id. at 24.

13 Because the Forest Service had set ranger district quotas  
 14 and limited its fragmentation analysis to the ranger district,  
 15 this Court held that the agency had failed to adhere to Section  
 16 318's forest-wide fragmentation mandate. Id. at 27. The Court,  
 17 therefore, enjoined the Cowboy timber sale until the agency  
 18 demonstrated that it could not substitute a non-ESOG-fragmenting  
 19 sale from elsewhere in the forest. Id. at 30.

20 The Ninth Circuit affirmed, agreeing with the district court  
 21 that "the requirements of Section 318 have not been met," because  
 22 the Forest Service had failed to determine whether the Cowboy  
 23 sale (and its inevitable fragmentation of ecologically  
 24 significant old-growth) was necessary. Seattle Audubon Society  
 25 v. Robertson, No. 90-35519 (9th Cir. Aug. 27, 1990) (Exhibit 7).  
 26 Moreover, the Court of Appeals concluded that "Section  
 27 318(B)(2)'s requirement that fragmentation be minimized is a  
 substantive limit on USFS timber sale decision, not a set of  
 procedures . . . ." Id. at 3.

On October 1, 1990, this Court enjoined the Nita and South  
 Nita sales until the agency demonstrated that it could not  
 feasibly conduct non-fragmenting sales elsewhere in the Umpqua

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1 National Forest. Second Order at 6-7. The Court relied on its  
2 prior decision regarding the Cowboy sale, but also found that the  
3 agency selected Section 318 timber sales not based on Section  
4 318's fragmentation requirements, but rather based on its ability  
5 to substitute other timber for such sales in the future. Id. at  
6 4-5.

7 In the face of this flurry of rulings condemning the Forest  
8 Service's quota-driven timber sales on the Tiller ranger  
9 district, the Forest Service withdrew the First and Last timber  
10 sales. Accordingly, this Court struck plaintiffs' motions for  
11 summary judgment and permanent injunction as to these sales as  
12 moot. Order at 1-2 (Oct. 16, 1990) ("Third Order") (Exhibit 8).

13 This Court likewise found that the Garden timber sale would  
14 fragment ecologically significant old-growth and that the Forest  
15 Service arbitrarily limited the geographical scope of its  
16 investigation of alternatives that would minimize fragmentation  
17 from Section 318 sales. Accordingly, the district court enjoined  
18 the Forest Service from advertising, offering, awarding, or  
19 operating the Garden timber sale until it ensured that  
20 fragmentation of ecologically significant old-growth would be  
21 minimized. Order on Cross-Motions for Summary Judgment re:  
22 Garden Timber Sale.

23 When plaintiffs subsequently asked this Court to rule on  
24 further motions for summary judgment as to five of these six  
25 sales under NEPA and NFMA after Section 318 had expired, the  
26 Court refused to do so because the controversy had become moot.  
27 More specifically, four of the sales had been enjoined, the

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1 Forest Service had withdrawn the other two, and "[n]othing in the  
2 record suggests that the Forest Service plans to go forward with  
3 these sales. There is accordingly no case or controversy as to  
4 them." Order at 12 (Mar. 7, 1991) ("Fourth Order") (Exhibit 9).

5 D. The Logging Rider.

6 This past summer, Congress passed another logging rider.  
7 Fiscal Year 1995 Emergency Supplemental Appropriations for  
8 Disaster Relief and Rescissions Act, Pub. L. No. 104-19 (Exhibit  
9 10). Although the congressional debates focused principally on  
10 the rider's provisions pertaining to salvage sales, the rider  
11 also contains provisions pertaining to timber sales under the  
12 President's Northwest Forest Plan and under Section 318. With  
13 respect to the Northwest Forest Plan, the rider directs the  
14 Secretaries of Agriculture and Interior to expeditiously prepare,  
15 offer, and award timber sales and it expedites judicial review of  
16 such sales. Sections 2001(d) & (f).

17 With respect to Section 318 timber sales, Section 2001(k)(1)  
18 provides:

19 Notwithstanding any other provision of law, within 45 days  
20 after the date of the enactment of this Act, the Secretary  
21 concerned shall act to award, release, and permit to be  
22 completed in fiscal years 1995 and 1996, with no change in  
23 originally advertised terms, volumes, and bid prices, all  
24 timber sale contracts offered or awarded before that date in  
25 any unit of the National Forest System or district of the  
26 Bureau of Land Management subject to section 318 of Public  
27 Law 101-121 (103 Stat. 745).

28 The only express exception is for sale units in which threatened  
29 or endangered bird species are known to be nesting. *Id.* §  
30 2001(k)(2). If a sale cannot be completed in accordance with the  
31 rider's mandate, the purchaser must be provided an equal volume

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1 of timber, of like kind and value, subject to the original  
2 contract terms. Id. § 2001(k)(3).

3 This provision has already led to lawsuits by the timber  
4 industry seeking to broaden its reach beyond the discrete  
5 identifiable category of Section 318 sales held up for various  
6 environmental reasons. In one lawsuit of particular relevance to  
7 the instant motion, the Northwest Forest Resources Council  
8 ("NFRC") is asking an Oregon district court to order the  
9 immediate release of all timber contracts offered under Section  
10 318. NFRC's Third Motion for Summary Judgment in Northwest  
11 Forest Resources Council v. Glickman, No. 95-6244-HO (dated  
12 Sept. 14, 1995) (Exhibit 11).

13 Some of the plaintiffs in this case sought to intervene in  
14 Northwest Forest Resources Council v. Glickman, but Judge Hogan  
15 denied their motion for intervention except as to certain issues  
16 concerning the meaning of the nesting exception to the Section  
17 2001(k) mandate. Despite the fact that NFRC is asking Judge  
18 Hogan to order the resurrection of timber sales that had  
19 previously been enjoined or cancelled due to the efforts of the  
20 plaintiffs, including the six sales at issue here, Judge Hogan  
21 has limited their participation with respect to those aspects of  
22 the case to that of amici.

23 A Forest Service memorandum dated September 13, 1995, lists  
24 unawarded and suspended section 318 timber sales and specifically  
25 includes the Garden, Cowboy, Nita, South Nita, First and Last  
26 Timber Sales. Exhibit 12. The notations on that list indicate  
27 that the Forest Service plans to award these six sales after

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1 surveys are conducted to locate nesting behavior of threatened  
2 birds and the sales are modified to be consistent with the  
3 aquatic screens in the Northwest Forest Plan. Id. at 2.

4 By letter dated September 13, 1995, undersigned counsel  
5 urged Secretary of Agriculture Dan Glickman to ensure that the  
6 Garden Timber Sale would not be re-offered under the 1995 logging  
7 rider. Exhibit 13. Plaintiffs had at that time been informed  
8 that the Forest Service was planning to proceed with the Garden  
9 Timber Sale, but had not then heard of any plans to proceed with  
10 the five enjoined or withdrawn Umpqua National Forest timber  
11 sales. To date, undersigned counsel have received no formal  
12 response to their letter. However, in opposition to the timber  
13 industry's third motion for summary judgment, the Justice  
14 Department informed the Oregon district court that the Forest  
15 Service was not currently proceeding with these sales. See  
16 Memorandum from Jack Ward Thomas, Chief, to Regional Forester,  
17 Region 6 (dated Sept. 27, 1995; filed Oct. 1, 1995) (Exhibit 14).  
18 It is interesting to note that the Justice Department  
19 differentiates between enjoined sales and withdrawn sales. While  
20 the government firmly believes that the Oregon district court has  
21 no jurisdiction over enjoined sales, it is more vague about  
22 withdrawn sales. At this time, the Forest Service is notifying  
23 the relevant court and the parties to the prior litigation over  
24 withdrawn sales "of the applicability of Section 2001(k) and the  
25 Administration's proposal to proceed with these sales upon  
26 resolution of any outstanding issues." Id.

27 Despite the government's position, NFRC's third motion for

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1 summary judgment in NFRC v. Glickman seeks to resurrect and  
2 compel the release of both the enjoined and withdrawn sales. In  
3 other words, NFRC is asking another federal judge to undo the  
4 injunctions and orders issued by this Court in a case in which  
5 the other Court has, at the behest of NFRC, denied plaintiffs  
6 party status.

#### 7 AUTHORITY TO CLARIFY PAST ORDERS AND INJUNCTIONS

8 Federal courts retain authority to modify, clarify, and  
9 enforce the orders, injunctions, and judgments that they have  
10 entered. See Fed. R. Civ. P. 60(b); 28 U.S.C. § 1651 (courts  
11 have power to "issue all writs necessary or appropriate in aid of  
12 their respective jurisdictions"); Swann v. Charlotte-Mecklenberg  
13 Board of Education, 402 U.S. 1, 15-16 (1971) ("Once a right and a  
14 violation have been shown, the scope of a district court's  
15 equitable powers to remedy past wrongs is broad, for breadth and  
16 flexibility are inherent in equitable remedies").

17 It has long been established that the federal courts have  
18 the power to clarify the effect of their past injunctions in  
19 light of changed circumstances. As Justice Cardozo observed:

20 We are not doubtful of the power of a court of equity  
21 to modify an injunction in adaptation to changed  
22 conditions . . . . A continuing decree of injunction  
directed to events to come is subject always to  
adaptation as events may shape the need.

23 United States v. Swift & Co., 286 U.S. 106, 114 (1932). In  
24 System Federation No. 91, Railway Employees' Department, AFL-CIO  
25 v. Wright, 364 U.S. 642, 647 (1961), the Court elaborated:

26 There is also no dispute but that sound judicial  
27 discretion may call for the modification of the terms  
of an injunctive decree if the circumstances, whether  
of law or fact, obtaining at the time of its issuance

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1 have changed, or new ones have since arisen. The  
 2 source of the power to modify is of course the fact  
 3 that an injunction often requires continuing  
 4 supervision by the issuing court and always a  
 continuing willingness to apply its powers and  
 processes on behalf of the party who obtained that  
 equitable relief.

5 Underlying the power to enforce or modify injunctions and  
 6 other court orders is the power to determine the effect of  
 7 changed circumstances on the vitality of such orders. See Clark  
 8 v. Coye, 60 F.3d 600 (9th Cir. 1995) (district court should have  
 9 determined whether existing injunction retained vitality in light  
 10 of new state law). Moreover, it is the Court issuing an  
 11 injunction that has the power to modify or enforce that  
 12 injunction, not some other Court. Leman v. Krentler-Arnold Hinge  
 13 Last Co., 284 U.S. 448, 452 (1932) (court issuing injunction has  
 14 jurisdiction to hear motion to enforce injunction and such a  
 15 motion is part of original case, not an independent one); Donovan  
 16 v. Sureway Cleaners, 656 F.2d 1368, 1373 (9th Cir. 1981) (a  
 17 motion to enforce an injunction is part of the original cause of  
 18 action). Therefore, this Court has the power to construe the  
 19 orders issued in this case to determine their continued effect in  
 20 the face of the 1995 logging rider.

21 ARGUMENT

22 I. INTERPRETING THE 1995 LOGGING RIDER TO RESURRECT THE  
 23 ENJOINED AND CANCELLED TIMBER SALES WOULD VIOLATE THE  
 DOCTRINE OF SEPARATION OF POWERS

24 The U.S. Constitution divides the delegated powers of the  
 25 federal government into three defined categories: legislative,  
 26 executive, and judicial. INS v. Chadha, 462 U.S. 919, 951  
 27 (1983). As a general rule, no branch of the federal government

1 may exercise the functions of another branch. Springer v.  
 2 Government of the Philippine Islands, 277 U.S. 189, 201-02  
 3 (1928); The Federalist No. 48, at 308 (E. Earle ed. 1937) (J.  
 4 Madison) ("none of [the branches] ought to possess, directly or  
 5 indirectly, an overruling influence over the others, in the  
 6 administration of their respective powers").

7 Article III of the Constitution assigns an independent and  
 8 nonpolitical judiciary the task of interpreting and applying the  
 9 law to particular cases and controversies. Therefore, "[i]t is  
 10 emphatically the province and duty of the judicial department to  
 11 say what the law is" in particular cases. Marbury v. Madison, 1  
 12 Cranch. 137, 177 (1803).

13 While Congress has the power to change the law, it may not  
 14 prescribe a rule of decision for a pending case. United States  
 15 v. Klein, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871); Robertson  
 16 v. Seattle Audubon Society, 503 U.S. 429, 112 S.Ct. 1407 (1992).

17 As the Ninth Circuit has elaborated: "The constitutional  
 18 principle of separation of powers is violated where . . .  
 19 'Congress has impermissibly directed certain findings in pending  
 20 litigation, without changing any underlying law.'" Gray v. First  
 21 Winthrop Corp., 989 F.2d 1564, 1568 (9th Cir. 1993) (quoting  
 22 Seattle Audubon Society v. Robertson, 914 F.2d 1311, 1315-16 (9th  
 23 Cir. 1990), rev'd on other grounds, 503 U.S. 429 (1992)).

24 The seminal case -- United States v. Klein -- is  
 25 illustrative of the kinds of determinations and meddling in the  
 26 judicial function that are off-limits to Congress. In that case,  
 27 an individual sought to recover property seized during the Civil

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1 War under a statute that permitted recovery upon proof of  
2 loyalty. The property owner had received a presidential pardon,  
3 which the Supreme Court had previously held to be conclusive  
4 proof of loyalty. Accordingly, the Court of Claims awarded  
5 recovery. However, while the case was on appeal, Congress passed  
6 a law providing that receipt of a presidential pardon was  
7 conclusive proof of disloyalty, requiring dismissal of cases  
8 seeking property recovery. 20 L.Ed. at 520-24.

9 The Supreme Court held this statute unconstitutional because  
10 it "prescribe[d] a rule for decision of a cause in a particular  
11 way." Id. at 525. The statute entered judicial terrain  
12 forbidden to the legislature because, under it, "the court is  
13 forbidden to give the effect to evidence which, in its own  
14 judgment, such evidence should have, and is directed to give it  
15 an effect precisely contrary." Id.

16 In other cases, the Court has sought to draw a line between  
17 permissible lawmaking that affects pending cases and legislative  
18 actions that intrude into the judicial function. Thus, in  
19 Robertson, the Supreme Court upheld the provision of Section 318  
20 that directed that management of national forests according to  
21 other Section 318 provisions "is adequate consideration for the  
22 purpose of meeting the statutory requirements that are the basis  
23 for" cases then pending before this Court. Section 318(b)(6)(A).  
24 Pointing to Section 318's logging mandates and environmental  
25 restrictions, the Court concluded that Section 318 "compelled  
26 changes in law, not findings or results under old law." 112 S.  
27 Ct. at 1413; see also Pennsylvania v. Wheeling & Belmont Bridge

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1 Co., 54 U.S. (13 How.) 518 (1852) (Congress changed operative  
2 legal framework by designating a bridge as a postal road, a  
3 designation traditionally made by Congress); Apache Survival  
4 Coalition v. United States, 21 F.3d 895 (9th Cir. 1994) (because  
5 Congress established new requirements for a telescope project  
6 that replaced laws underlying pending court case, it did not  
7 exceed its legislative authority).

8 Just last Term, the Supreme Court elaborated further on the  
9 separation of powers constraints imposed on Congress. In Plaut  
10 v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995), the Court held  
11 that Congress may not retroactively command the federal courts to  
12 reopen final judgments. According to the Court, the Framers  
13 decried the practice common in colonial legislatures of setting  
14 aside final judgments and ordering new trials and other  
15 legislative corrections of final judgments. Id. at 1453. Once  
16 the courts issue a final judgment in a case, "a judicial decision  
17 becomes the last word of the judicial department with regard to a  
18 particular case or controversy, and Congress may not declare by  
19 retroactive legislation that the new law applicable to that very  
20 case was something other than what the courts said it was." Id.  
21 at 1457; see also Hayburn's Case, 2 Dall. 409, 411 (1792)  
22 (opinion of Wilson, and Blair, J.J., Peters, D.J.) ("revision and  
23 control" of Article III judgments is "radically inconsistent with  
24 the independence of that judicial power which is vested in the  
25 courts"); id. at 413 (opinion of Iredell, J., Sitgreaves, D.J.)  
26 ("no decision of any court of the United States can, under any  
27 circumstances, . . . be liable to a revision, or even suspension,

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1 by the [l]egislature itself, in whom no judicial power of any  
2 kind appears to be vested"). It did not matter in Plaut that the  
3 statute at issue reopened an entire class of closed cases; the  
4 statute still constituted impermissible legislative interference  
5 with judicial decisions. Id. at 1457.

6 Here, this Court definitively decided whether four of the  
7 six timber sales -- Cowboy, Nita, South Nita, and Garden --  
8 violated Section 318's fragmentation requirements. The Ninth  
9 Circuit affirmed that "the requirements of Section 318 have not  
10 been met" with respect to the Cowboy sale and noted that "Section  
11 318(B)(2)'s requirement that fragmentation be minimized is a  
12 substantive limit on USFS timber sale decision, not a set of  
13 procedures . . ." Seattle Audubon Society v. Robertson at 3.  
14 The Forest Service never appealed this Court's rulings on the  
15 Nita, South Nita, and Garden sales, and thus this Court's orders  
16 became final in late 1990. This court definitively and finally  
17 decided years ago that these four sales violated Section 318.

18 While this Court's decisions permitted the Forest Service to  
19 offer these sales again, the Forest Service could only do so if  
20 it made significant modifications to bring them into compliance  
21 with Section 318. No such re-offer was made during the period  
22 Section 318 remained in effect. Because any re-offer would  
23 necessarily have been made under terms and conditions  
24 significantly different from those presented to this Court, a re-  
25 offer would initiate the timber contracting process anew and  
26 could not piggyback on the enjoined sales. Croman Corp. v.  
27 United States, 31 Fed. Cl. 741 (1994) (significant modifications

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1 to Section 318 timber sale called for rejecting offers made  
 2 previously and re-initiating competitive bidding process). Any  
 3 re-offer would, therefore, not be subject to Section 318, since  
 4 it would have been made after Section 318 expired. See Oregon  
 5 Natural Resources Council v. BLM, 996 F.2d 1226 (table); 23  
 6 Env'tl. L. Rep. 21,317 (9th Cir. 1993) (Section 318 applied to  
 7 sale re-advertised after Section 318 expired only because its  
 8 contract terms were substantially similar to those offered under  
 9 Section 318).

10 It is doubtful whether it would have been possible to bring  
 11 these sales into compliance with Section 318's fragmentation  
 12 requirements. In any event, such a re-offer could have been made  
 13 only if this Court modified its injunctions and decided that the  
 14 re-offer complied with Section 318. That was never done.

15 In addition, this Court decided after Section 318 expired  
 16 that any case or controversy as to these and the other two timber  
 17 sales at issue had become moot because the Forest Service had  
 18 voluntarily, or involuntarily in the case of the enjoined sales,  
 19 withdrawn the sales. Moreover, "[n]othing in the record suggests  
 20 that the Forest Service plans to go forward with these sales.  
 21 There is accordingly no case or controversy as to them." Fourth  
 22 Order. Since the Section 318 period had expired, if the Forest  
 23 Service ever decided to resurrect these sales at a later date,  
 24 including the two that were withdrawn, the sales would not then  
 25 be subject to Section 318.

26 Congress cannot constitutionally compel the Forest Service  
 27 to re-offer these six sales under their original terms and

1 conditions. This Court decided that those terms and conditions  
2 violated Section 318, and thus these sales could not lawfully go  
3 forward under Section 318. Moreover, this Court determined that  
4 the sales that the Forest Service had planned to offer under  
5 Section 318 had been withdrawn. In other words, they were no  
6 longer sales offered under or subject to Section 318. Congress  
7 cannot reverse this judicial finding. Moreover, because the  
8 sales had essentially become a nullity, this Court terminated  
9 judicial review of them. Congress cannot breathe new life into  
10 these long since abandoned sales in defiance of the  
11 determinations made by this Court. Accordingly, this Court  
12 should declare that its previous orders preclude the Forest  
13 Service from resurrecting these six sales under section 2001(k),  
14 and that if the Forest Service resurrects these sales, it must do  
15 so in compliance with current legal requirements.<sup>2/</sup>

16 II. THE 1995 LOGGING RIDER DOES NOT COMPEL THE RE-OFFER OF  
17 THESE SIX SALES

18 On its face, the 1995 logging rider does not compel the re-  
19 offer of these enjoined and withdrawn timber sales. To avoid  
20 ruling on the constitutional issues discussed above, this Court  
21 may declare that the new logging rider does not compel any  
22 modifications in the injunctions and orders previously issued in  
23 this case.

24 First, Section 2001(k) directs the Secretary concerned (of  
25 Agriculture for Forest Service lands or of Interior for Bureau of

26 <sup>2/</sup> These areas are now governed by the Northwest Forest Plan.  
27 All of them are located in late successional reserves that are  
off limits to logging and roadbuilding. Accordingly, the sales  
could not proceed under current legal requirements.

1 Land Management lands) "to award, release, and permit to be  
2 completed" previously offered timber sale contracts. In the case  
3 of enjoined or withdrawn sales, the Secretary concerned would  
4 also need to offer or re-offer those sales. As discussed above,  
5 the Forest Service withdrew the sales (either by Court order or  
6 because the Forest Service realized the sales would violate  
7 Section 318) and had no plans to resurrect them under Section 318  
8 or otherwise for that matter. In other words, the Forest Service  
9 was no longer a willing offeror. If the Forest Service ever  
10 proceeded with sales in these areas in the future, the sales  
11 would be so different from those planned in 1990 that the sales  
12 and the contract negotiations would need to begin anew. Croman  
13 Corporation v. United States, 31 Fed. Cl. 741 (1994); Oregon  
14 Natural Resources Council v. BLM, 996 F.2d 1226 (table); 23  
15 Env'tl. L. Rep. 21,317 (9th Cir. 1993). Section 2001(k) directs  
16 the Forest Service and BLM to complete the contract formulation  
17 and performance process; it does not compel the agencies to  
18 initiate that process.

19 Second, the Forest Service never actually made offers for  
20 the six timber sales at issue. In each instance, the Forest  
21 Service had advertised the sales, the challenges were initiated  
22 within 15 days of the advertisement, and the Forest Service was  
23 barred from taking any action to award the sales for 45 days.  
24 Section 318(g)(1). This Court enjoined four of the sales before  
25 the expiration of the 45 days, and the Forest Service withdrew  
26 the other two sales within that timeframe.

27 The advertisement of a timber sale does not constitute an

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1 offer. Both Section 318 and the new logging rider use the word  
2 "offer" to mean something distinct from "prepare," "advertise,"  
3 and "award." See Section 318(a)(1) & (b) (directing the Forest  
4 Service to offer timber sales and establishing requirements for  
5 such offered sales); Section 318(g)(1) (providing for judicial  
6 review within 15 days of advertisement and authorizing relief  
7 with respect to "decision to prepare, advertise, offer, award, or  
8 operate such sale"); Section 2001(k)(1) (directing Secretary to  
9 "award, release, and permit to be completed" certain old sales);  
10 Section 2001(b)(1) (directing Secretaries to "prepare, advertise,  
11 offer, and award contracts" for salvage timber sales); Section  
12 2001(d) (directing Secretaries to "expeditiously prepare, offer,  
13 and award timber sale contracts" under the Northwest Forest  
14 Plan). An advertisement merely indicates that the Forest Service  
15 is interested in receiving offers from willing bidders. It is  
16 the prospective purchasers that then make offers at auctions or  
17 in sealed bids. The Forest Service identifies a high bidder and  
18 specifies the particular contract terms under which it is willing  
19 to sell the timber. Those actions could be said to be an offer.  
20 If the high bidder then "accepts" the specific contract terms  
21 offered by the Forest Service, the Forest Service may then award  
22 the contract to the high bidder or reject all bids and re-  
23 initiate the process. See Croman, supra.

24 Third, Section 2001(k) does not eviscerate the fragmentation  
25 requirements of Section 318. Section 2001(k) directs the Forest  
26 Service

27 to award, release, and permit to be completed in fiscal  
years 1995 and 1996, with no change in originally

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1 advertised terms, volumes, and bid prices, all timber  
2 sale contracts offered or awarded before that date in  
3 any unit of the National Forest System or district of  
4 the Bureau of Land Management subject to section 318 of  
5 Public Law 101-121 (103 Stat. 745).

6 The plain and most logical reading of this provision is that  
7 it applies to timber contracts "subject to Section 318." The  
8 only time Section 318 uses the phrase "subject to" the statute  
9 specifies that the timber sales are governed by Section 318  
10 provisions. See Section 318(k) ("Timber sales offered to meet  
11 the requirements of subsection (a) of this section shall be  
12 subject to the terms and conditions of this section for the  
13 duration of those sale contracts.")

14 We recognize that Judge Hogan adopted a contrary  
15 interpretation in holding that section 2001(k) requires the  
16 Forest Service and the Bureau of Land Management to allow every  
17 timber sale contract offered in all Oregon and Washington forests  
18 since 1989 to go forward to completion. NFRC v. Glickman, No.  
19 95-6244-HO (D. Or. Sept. 13, 1995) (Order granting NFRC's first  
20 motion for summary judgment).<sup>3/</sup> This construction is erroneous  
21 because Section 2001(k)(1) and its legislative history refer  
22 specifically to Section 318, which has come to represent a fixed

23 3/ On September 13, 1995, Judge Hogan of the district court of  
24 Oregon declared that section 2001(k) pertains to all units of the  
25 national forest and Bureau of Land Management districts that were  
26 subject to Section 318, thereby embracing the geographical, but  
27 not the temporal, limitations inherent in Section 318. Northwest  
Forest Resources Council v. Glickman, No. 95-6244-HO (D.Or. Sept.  
13, 1995) (Order granting NFRC's first motion for summary  
judgment). Judge Hogan did not issue an injunction and his  
ruling has not yet otherwise led to an appealable order, but will  
likely be appealed. NFRC has filed a motion for contempt,  
seeking to fine and imprison two high-level government officials.  
NFRC's Motion for Order of Contempt (dated Sept. 21, 1995).

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1 body of timber sales. Section 318 never refers to geographic  
2 areas as being "subject to" the statutory provisions. Instead,  
3 the logging rider explicitly identifies the geographical areas  
4 covered by its provisions by using the phrase "Federal lands  
5 described in" other provisions of law. See § 2001(b)(1)  
6 ("Federal lands described in subsection (a)(4)"); § 2001(d)  
7 ("Federal lands described in" Option 9); § 2001(g) (excluding  
8 various wilderness "lands described in paragraph (2)"). Congress  
9 knew how to describe geographical areas clearly; Section 2001(k)  
10 deviates significantly from that type of succinct designation.

11 Construing Section 2001(k) to compel logging of all sales  
12 offered in Washington and Oregon without any environmental  
13 standards or judicial review would eradicate the rider's  
14 preservation of Option 9's environmental standards and some  
15 opportunities for judicial review of such sales. See Section  
16 2001(d), (f). Section 318 sales were also subject to a set of  
17 prescribed environmental standards and judicial review provisions  
18 -- those set forth in Section 318. Expanding Section 2001(k) to  
19 all timber sales on Washington and Oregon forests breaks the mold  
20 by purporting to exempt those sales from all environmental  
21 standards and judicial review.

22 Since Section 2001(k) specifically refers to timber sales  
23 subject to Section 318, those sales remain subject to all of  
24 Section 318's requirements, including its fragmentation  
25 requirements. This Court previously held that four of these  
26 sales violated Section 318, and the Forest Service conceded that  
27 two others similarly ran afoul of Section 318. Accordingly,

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This is  
position, equivalent  
of guru's position  
in NFRC case.

1 these sales cannot go forward under either Section 318 or Section  
2 2001(k).

3 Admittedly, Section 2001(k) directs most Section 318 sales  
4 to go forward "notwithstanding any other provision of law."  
5 However, the Ninth Circuit has refused to read into that phrase a  
6 blanket eradication of all other laws. In re Glacier Bay, 944  
7 F.2d 577, 582 (9th Cir. 1991). Instead, it has applied ordinary  
8 standards for determining whether a statute implicitly repeals a  
9 previous law, such as whether there is a direct conflict between  
10 the new law containing that phrase and other laws that otherwise  
11 would apply. Id. Here, there is no irreconcilable conflict,  
12 because Section 2001(k) can easily be read not to apply to  
13 withdrawn offers or to sales that violate Section 318. Moreover,  
14 Section 2001(k) expressly uses the phrase "subject to Section  
15 318," thereby overriding any inference from the use of the  
16 general phrase "notwithstanding any other provision of law" that  
17 Section 318 has been overridden.

18 Repeals by implication are strongly disfavored, particularly  
19 in appropriations riders, Tennessee Valley Authority v. Hill, 437  
20 U.S. 153, 190 (1978), and there is a "strong presumption that  
21 Congress intends judicial review of administrative action."  
22 Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670  
23 (1986). If Section 2001(k) is read to compel the consummation of  
24 contracts based on withdrawn offers or offers that were clearly  
25 unlawful when made, it would repeal all laws for such sales and  
26 all judicial review. Rather than offend notions of fair play and  
27 fair process, and abandon the preservation of some environmental

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1 standards and judicial review of timber sales in both Section 318  
 2 and the new logging rider, Section 2001(k) should be limited to  
 3 timber sales that truly were offered under and in compliance with  
 4 Section 318 and with respect to which interested parties had an  
 5 opportunity to obtain judicial review.

6 CONCLUSION

7 For the reasons set forth above, this Court should declare  
 8 that its previous orders and injunctions remain valid under the  
 9 Section 2001(k) of the new logging rider.

10 Respectfully submitted,

11  
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