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Timber - Other Litigation: Pilchuck v.  
Glickman [1]

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United States Forest  
Department of Service  
Agriculture

Umpqua National Forest  
PO Box 1008  
Roseburg, OR 97470  
(541) 672-6601  
FAX (541) 957-3495

REPLY TO: 2450

April 6, 1996

SUBJECT: First Timber Sale, Contract No. 083979 and  
Last Timber Sale, Contract No. 083847

TO: Scott Timber Company  
P.O. Box 1088  
Roseburg, OR 97470

LETTER OF AGREEMENT

Pursuant to the interim final rule for 36 CFR Part 223 (Disposal of National Forest System Timber; Modification of Timber Sale Contracts in Extraordinary Conditions) published in the Federal Register on April 3, 1996 and Public Law 104-19 Subsection 2001 (k), the Secretary of Agriculture authorized the Forest Service to modify the First and Last Timber Sales by substituting timber from outside the sale area specified in the contract for timber within the timber sale contract area.

In accordance with direction from the Regional Forester, the Forest Service proposes to substitute timber of equal volume and of like kind and value for the uncut volume on First and Last Timber Sales according to the following procedures for implementing the contract modifications to the First Timber Sale Contract No. 083979 and the Last Timber Sale Contract No. 083847 to consummate this action:

1. Both parties agree to substitute the entire sale volumes, minus the volume that has already been felled. The volume of the timber already felled will be determined by scaling the logs when they are delivered to an agreed upon scaling location. The volume of the sale will be the volume determined by the Forest Service's original sale cruise; however, because the original sale cruise was completed about ten years ago, there may have been some growth and mortality of the timber within the current sale units. If the Purchaser believes that the net growth was significant, the Purchaser may place sufficient funds on deposit with the Forest Service to pay for an independent cruiser to recruise the original sale units. The Forest Service will then contract with an independent cruiser to recruise to the cruising and quality standards that were used at the time of the original cruise. The results of the recruise will be mutually binding and will be used to determine the amount of the volume to be substituted.
2. The substitute volume will be the overstory trees in existing shelterwood harvest units on the Tillier Ranger District that are identified by the Forest Service with concurrence of the Level One Team, then presented to the Purchaser for review and acceptance.

Reserve trees will be marked in the identified riparian and cultural resource areas by the Forest Service. The substitute timber will be identified in a timely manner to permit uninterrupted operations by the Purchaser.

3. The Forest Service will cruise the volume in the units accepted for substitution to determine the volume counted toward the required substitute timber. The Purchaser will have an opportunity to review the cruise reports. The Forest Service and Purchaser will come to a mutual agreement on the cruise volume.
4. The Forest Service will complete an appraisal using the current Transaction Evidence Appraisal program and costs for the current timber sale contract and for the modified timber sale contract. The appraisal of the modified contract will be based on the substitute volume and will reflect the changed conditions between the original units and the substitution units including, but not limited to, the revised haul routes, volume per acre, move-in/move-out costs, average log size and logging systems. The difference in appraised value between the two appraisals will be used to adjust the Current Contract Rates. The Purchaser will have an opportunity to review the appraisal. The Forest Service and Purchaser will come to a mutual agreement on the appraised values.
5. The Current Contract Rates will be charged for any substituted volume that is removed prior to the completion of the appraisals. When the appraisals are completed, a retroactive adjustment will be made to the charges for timber removed so that all substituted volume is charged at the adjusted rates.
6. An executed Agreement to Modify Contract, 2400-9, will be prepared and offered to Scott Timber Company to delete the existing units and add the substitute units. This Letter of Agreement is sufficient to allow both parties to proceed with the substitution of volume.
7. If, for any reason, the substitute timber in paragraph 2 is not provided or cannot be harvested, the Purchaser can resume harvest of the First and Last Timber Sales. Both parties shall make all reasonable effort to avoid the necessity to resume harvesting of First and Last Timber Sales.
8. Upon the signing of this Letter of Agreement, cutting operations will cease in the existing units and may begin in the initial substitute units. However, both parties recognize that there may be additional felling required in Units 9 and 10 of Last Timber Sale in order to be able to remove the currently felled volume. Both parties intend to agree on the extent of this additional felling no later than Monday, April 8, 1996. The mutual intent is to keep any additional felling after the date of this agreement to the absolute minimum necessary for yarding feasibility and safety.

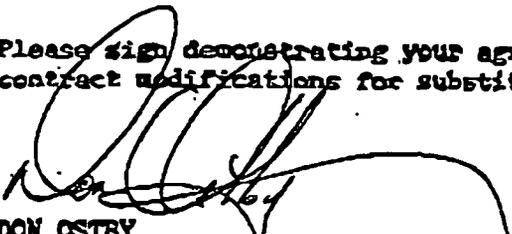
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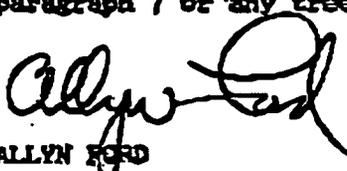
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Please sign demonstrating your agreement with these procedures to implement the contract modifications for substitute volume.

  
DON OSTBY  
Contracting Officer  
Unpqua National Forest

I agree with the above procedures to implement the contract modifications for substituting volume for First and Last Timber Sale Contracts and to cease cutting existing units upon the signing of this Letter of Agreement except for paragraph 7 or any trees agreed to be cut under paragraph 8.

  
ALLYN FORD  
Vice President  
Scott Timber Company

cc: Tiller RD, Regional Forester

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

FAX NUMBER (202) 272-6817, 6815, 5775  
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PLEASE DELIVER TO:

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NUMBER OF PAGES: **25**

DATE: December 4, 1995

FROM: Lisa Holden, (202) 305-0474

MESSAGE: PAS v. Glickman. Attached is plaintiffs' application and supporting memorandum for a TRO as to the Boulder Krab timber sale.

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KRISTEN L. BOYLES (WSB# 23806)  
Sierra Club Legal Defense Fund  
705 Second Avenue, Suite 203  
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(206) 343-7340

Attorneys for Plaintiffs

MARIANNE DUGAN (OSB #93256)  
Western Environmental Law Center  
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(503) 485-2471

Local Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

PILCHUCK AUDUBON SOCIETY, OREGON )  
NATURAL RESOURCES COUNCIL, )  
PORTLAND AUDUBON SOCIETY, BLACK )  
HILLS AUDUBON SOCIETY, WESTERN )  
ANCIENT FOREST CAMPAIGN, )  
HEADWATERS, COAST RANGE )  
ASSOCIATION, FRIENDS OF THE ELK )  
RIVER, LEAVENWORTH AUDUBON )  
ADOPT-A-FOREST, NORTH CENTRAL )  
WASHINGTON AUDUBON SOCIETY, KNUT )  
and ANN AAGAARD, ALPINE LAKES )  
PROTECTION SOCIETY, SEATTLE )  
AUDUBON SOCIETY, MITCHELL SMITH, )  
and WASHINGTON ENVIRONMENTAL )  
COUNCIL, )

Plaintiffs, )

v. )

DAN GLICKMAN, Secretary of )  
Agriculture, BRUCE BABBITT, )  
Secretary of Interior, UNITED )  
STATES FOREST SERVICE, and )  
BUREAU OF LAND MANAGEMENT, )

Defendants. )

Civ. # 95-06384-TC

PLAINTIFFS' APPLICATION  
FOR A TEMPORARY  
RESTRAINING ORDER

ORAL ARGUMENT REQUESTED

Motion for Preliminary  
Injunction scheduled for  
December 12, 1995 Hearing

Pursuant to Rule 65(b) of the Federal Rules of Civil  
Procedure, plaintiffs Pilchuck Audubon Society et al., hereby ask  
the Court to issue a temporary restraining order prohibiting on-

1 the-ground actions in the Boulder Krab timber sale area on the  
2 Siskiyou National Forest before this Court decides the pending  
3 motions that will determine whether that sale must be awarded and  
4 released under Section 2001(k) (1) of the Fiscal Year 1995 Emergency  
5 Supplemental Appropriations for Disaster Relief and Rescissions  
6 Act, Pub. L. No. 104-19 ("Rescissions Act").

7 Plaintiffs' counsel has notified both counsel for the federal  
8 defendants and counsel for the defendant-intervenors Northwest  
9 Forest Resources Council that this motion will be filed today.  
10 Second Declaration of Patti Goldman ¶ 6 (Dec. 4, 1995).

11 Motions are pending both in this case and in Northwest Forest  
12 Resources Council v. Glickman, No. 95-6244-HO, which will determine  
13 whether Boulder Krab falls within Section 2001(k) (1). Those  
14 motions are scheduled to be heard by this Court on December 12,  
15 1995.

16 Rather than wait for this Court's decision, defendant U.S.  
17 Forest Service has awarded this sale and has permitted logging to  
18 begin today, December 4, 1995. Scott Timber Company, the timber  
19 company that received the award of this sale last month, intends to  
20 begin cutting trees immediately. Declaration of Allyn C. Ford ¶ 4  
21 (Nov. 28, 1995), in NFERC v. Glickman. The Forest Service has  
22 informed plaintiffs' counsel that Scott Timber will begin falling  
23 trees today on one unit of the sale. Second Declaration of Patti  
24 Goldman ¶ 5 (December 4, 1995).

25 The Boulder Krab timber sale presents this Court with serious  
26 legal, indeed constitutional, questions that have not yet been  
27 decided by this or any other Court. This Court must decide whether



1 Section 2001(k) resurrects timber sales that were cancelled in the  
2 face of court challenges, and if so, whether Congress usurped the  
3 role of the Courts in violation of the doctrine of separation of  
4 powers. These are weighty issues that should not be lightly cast  
5 aside.

6 Nonetheless, the Forest Service has decided to go forward with  
7 Boulder Krab without first allowing the Courts to resolve these  
8 thorny questions. Trees will fall and previously removed and new  
9 roads will be built in a roadless area, forever changing the  
10 pristine and isolated character of this area. Sediment will pour  
11 into the North Fork of the Elk River -- a wild and scenic river  
12 that produces more salmon than any river of comparable size outside  
13 of Alaska. To preserve the authority of this Court to decide the  
14 important issues to be heard in just eight days, this Court should  
15 issue a temporary restraining order preventing tree falling,  
16 roadbuilding and other on-the-ground actions before this Court  
17 decides the pending motion for a preliminary injunction and the  
18 related motion in NERC v. Glickman.

19 In support of this motion, plaintiffs are submitting a  
20 memorandum, the second declaration of Patti Goldman, and an  
21 attachment. While Local Rule 220-8 ordinarily requires an order to  
22 show cause setting a hearing for the motion for a preliminary  
23 injunction, such an order is not necessary here. The Court has

24 //  
25 //  
26 //  
27 //

1 already set a hearing on that motion for December 12, 1995, and all  
2 briefs will be filed prior to the hearing.

3 DATED this 4th day of December, 1995.

4 Respectfully submitted,

5   
6 PATTI A. GOLDMAN (WSB# 24426)  
7 KRISTEN L. BOYLES (WSB# 23806)  
8 Sierra Club Legal Defense Fund  
9 705 Second Avenue, Suite 203  
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12 MARIANNE DUCAN (OSB #93256)  
13 Western Environmental Law Center  
14 1216 Lincoln Street  
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(503) 485-2471

15 Local Counsel for Plaintiffs

16 518TRO.MOT

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PROTECTION SOCIETY, SEATTLE )  
18 AUDUBON SOCIETY, MITCHELL SMITH, )  
and WASHINGTON ENVIRONMENTAL )  
19 COUNCIL, )

Civ. # 95-06384-TC

MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' APPLICATION  
FOR A TEMPORARY  
RESTRAINING ORDER

ORAL ARGUMENT REQUESTED

Motion for Preliminary  
Injunction Scheduled for  
December 12, 1995 Hearing

20 Plaintiffs, )

21 v. )

22 DAN GLICKMAN, Secretary of )  
Agriculture, BRUCE HABBITT, )  
23 Secretary of Interior, UNITED )  
STATES FOREST SERVICE, and )  
24 BUREAU OF LAND MANAGEMENT, )

25 Defendants. )  
26  
27

INTRODUCTION

1  
 2 In this application, plaintiffs Pilchuck Audubon Society at  
 3 al., seek an order prohibiting irreversible on-the-ground actions  
 4 in the Boulder Krab timber sale area on the Siskiyou National  
 5 Forest before this Court decides the pending motions that will  
 6 determine whether that sale must be awarded and released under  
 7 Section 2001(k) (1) of the Fiscal Year 1995 Emergency Supplemental  
 8 Appropriations for Disaster Relief and Rescissions Act, Pub. L. No.  
 9 104-19 ("Rescissions Act"). Motions are pending both in this case  
 10 and in Northwest Forest Resources Council v. Glickman, No. 95-6244-  
 11 HO, which will determine whether Boulder Krab falls within Section  
 12 2001(k) (1). Those motions are scheduled to be heard by this Court  
 13 on December 12, 1995.

14 Rather than wait for this Court's decision, defendant U.S.  
 15 Forest Service has awarded this sale and has permitted logging to  
 16 begin today, December 4, 1995. Scott Timber Company, the timber  
 17 company that received the award of this sale last month, intends to  
 18 begin cutting trees immediately. Declaration of Allyn C. Ford ¶ 4  
 19 (Nov. 28, 1995), in NFRC v. Glickman. The Forest Service has  
 20 informed plaintiffs' counsel that Scott Timber will begin falling  
 21 trees today on one unit of the sale. Second Declaration of Patti  
 22 Goldman ¶ 5 (December 4, 1995).

23 The Boulder Krab timber sale presents this Court with serious  
 24 legal, indeed constitutional, questions that have not yet been  
 25 decided by this or any other Court. This Court must decide whether  
 26 Section 2001(k) resurrects timber sales that were cancelled in the  
 27 face of court challenges, and if so, whether Congress usurped the

1 role of the Courts in violation of the doctrine of separation of  
2 powers. These weighty issues should not be lightly cast aside.

3 Nonetheless, the Forest Service has decided to go forward with  
4 Boulder Krab without first allowing the Courts to resolve these  
5 thorny questions. Trees will fall and previously removed and new  
6 roads will be built in a roadless area, forever changing the  
7 pristine and isolated character of this area. Sediment will pour  
8 into the North Fork of the Elk River -- a wild and scenic river  
9 that produces more salmon than any river of comparable size outside  
10 of Alaska. To preserve the authority of this Court to decide the  
11 important issues to be heard in just eight days, this Court should  
12 issue a temporary restraining order preventing tree falling,  
13 roadbuilding and other on-the-ground actions before this Court  
14 decides the pending motion for a preliminary injunction and the  
15 related motion in NFRG v. Glickman.

16 **BACKGROUND**

17 I. THE PRISTINE WILDERNESS AND INVALUABLE FISHERIES IN THE  
18 BOULDER KRAB SALE AREA.

19 The Boulder Krab timber sale is located in the North Fork of  
20 the Elk River on the Siskiyou National Forest. The sale area is  
21 part of a large unbroken and undisturbed old-growth stand in the  
22 Copper Mountain roadless area. It is de facto a pristine  
23 wilderness area adjacent to the Grassy Knob Wilderness Area. Most  
24 of the trees are 4-6 feet in diameter and more than 250 years old;  
25 some trees are over 6 feet in diameter. The trees are very healthy  
26 and have the potential to become majestic, giant trees that could  
27 live to be more than 1000 years old. In contrast, many other trees

1 in the Elk River have been damaged by fire and have less potential  
2 to continue to age and grow. Declaration of Jim Rogers ¶¶ 4, 7  
3 (Nov. 17, 1995).

4 In 1988, the Elk River was designated as a wild and scenic  
5 river to protect this outstanding fishery. Id. ¶ 5. After that  
6 designation, a Forest Service fisheries scientist found that the  
7 North Fork of the Elk River produces more salmon than any river of  
8 its size outside of Alaska. He recommended keeping this premier  
9 salmon stream intact and free of logging. Id. ¶¶ 4, 9. The Elk  
10 River continues to attract and enchant anglers from near and far.

11 II. THE SUCCESSFUL COURT CHALLENGE TO THE BOULDER KRAB SALE

12 In September 1990, the Forest Service advertised the Boulder  
13 Krab timber sale under Section 318, along with the Elk Fork sale,  
14 which is also located in the North Fork of the Elk River.  
15 Together, the two sales would clearcut more than 220 acres and  
16 generate almost 8.5 million board feet.

17 Within 15 days of the advertisement, Friends of Elk River,  
18 Oregon Natural Resources Council, Oregon Rivers Council,  
19 Association of Northwest Steelheaders, and Kalmiopsis Audubon  
20 Society challenged these sales in this Court. Id. ¶ 8.1/ In the  
21 lawsuit, the environmental plaintiffs claimed, based on the  
22 assessment of the Forest Service's own fisheries scientist, that  
23 these sales would adversely impact the fisheries and water quality  
24 of the Elk River. Ultimately, the Forest Service agreed and  
25 cancelled the sales. Id. ¶ 9.

26 \_\_\_\_\_  
27 1/ Friends of Elk River and Oregon Natural Resources Council  
are plaintiffs in this case.

1 On March 20, 1991, the Forest Service entered into a  
2 stipulation with the plaintiffs in which the Forest Service assured  
3 the plaintiffs and this Court that it had rejected all bids and  
4 that it would not proceed with these timber sales in the future  
5 without a new environmental review, a new decision notice, and a  
6 new auction. Exhibit 10 to Motion for Preliminary Injunction.  
7 Based expressly on that stipulation, U.S. District Judge Owen  
8 Panner dismissed the lawsuit without prejudice and ordered the  
9 government to pay the plaintiffs' attorneys' fees and costs.  
10 Exhibit 11 to Motion for Preliminary Injunction.

11 III. THE FOREST SERVICE'S UNEQUIVOCAL ABANDONMENT OF THIS SALE

12 Since the Boulder Krab sale was cancelled, the Forest Service  
13 has abandoned all plans to log this area. The Boulder Krab timber  
14 sale is located in an area that the President's Northwest Forest  
15 Plan (or Option 9) has designated as a late successional reserve  
16 and a key watershed. Rogers Declaration ¶ 16. Under current  
17 environmental standards, this area cannot be logged. Id.

18 Even before the finalization of Option 9, the Forest Service  
19 took definitive actions to preserve this area for its wilderness  
20 and fisheries values. After the Forest Service cancelled the  
21 Boulder Krab sale, it closed and obliterated the road that would  
22 have led to the sale area. Id. ¶ 17. It also reconstructed the  
23 old hiking trail that would be converted into the principal  
24 logging road for the Boulder Krab sale. Id. ¶ 18.

25 In addition, the Forest Service stopped taking other actions  
26 that were required for old timber sales that still were in the  
27 timber pipeline. For example, the Forest Service has not conducted

1 the in-depth marbled murrelet surveys that are called for under the  
2 Pacific Seabird Group Protocol. Had the Forest Service envisioned  
3 that the Boulder Krab sale might ever be logged, there can be no  
4 doubt that it would have conducted such surveys.

5 The Boulder Krab site provides key habitat for the threatened  
6 marbled murrelet. Indeed, in the summer of 1992, marbled murrelet  
7 egg shell fragments and a marbled murrelet nest were located near  
8 unit 1 of the Boulder Krab sale in the same contiguous old-growth  
9 stand where the Boulder Krab sale area is located. Id. ¶¶ 11-14.  
10 Since marbled murrelets use a stand for nesting and show high  
11 fidelity to a stand, the best scientific evidence supports a  
12 finding that marbled murrelets are nesting in the Boulder Krab sale  
13 area. Id. ¶ 14. However, because the Forest Service never  
14 intended to proceed with this sale, it has not conducted surveys to  
15 confirm nesting in the Boulder Krab sale area.

16 IV. THE FOREST SERVICE'S RECENT ACTIONS TO RESURRECT THE  
17 BOULDER KRAB SALE

18 On October 30, 1995, NERC filed a supplemental memorandum in  
19 support of its third motion for summary judgment arguing that  
20 Section 2001(k)(1) requires the release of eight Section 318 sales,  
21 including Boulder Krab, that had been enjoined or withdrawn in  
22 court proceedings. This motion is scheduled to be heard on  
23 December 12, 1995.<sup>2/</sup>

24 <sup>2/</sup> Many of the plaintiffs, including Oregon Natural  
25 Resources Council ("ONRC"), had previously asked Judge Dwyer of  
26 the Western District of Washington to determine whether six  
27 timber sales enjoined or withdrawn in court proceedings in 1990  
must be released under Section 2001(k). On November 3, 1995,  
Judge Dwyer stayed that motion pending the outcome of motions  
pending before this Court. Order entered Nov. 3, 1995, in

1 On November 2, 1995, undersigned counsel informed counsel for  
2 the Forest Service that they had been asked to represent some of  
3 the plaintiffs in Friends of Elk River in challenging the release  
4 of the Boulder Krab sale under the logging rider, and on November  
5 3, 1995, undersigned counsel implored the Forest Service to refrain  
6 from awarding that sale until the courts decided whether Section  
7 2001(k) resurrected timber sales cancelled in the face of court  
8 challenges. Declaration of Patti Goldman ¶¶ 8, 10 (Nov. 20, 1995).

9 Nonetheless, on November 3, 1995, the Forest Service sent a  
10 letter awarding the Boulder Krab sale to the high bidder. The  
11 award letter cautioned that "the issue of whether or not this sale  
12 is subject to that law is currently in litigation. If a court  
13 rules that this sale is not subject to Public Law 104-19, this  
14 award and any contract executed as a result of this award, is null  
15 and void." Exhibit 12 to Amici Opposition to NFRC's Supp. Mem. in  
16 Support of Third Motion for Summary Judgment, in NFRC v. Glickman.

17 Undersigned counsel has repeatedly asked the Forest Service  
18 not to permit the Boulder Krab sale to be logged until the courts  
19 decide the pending motions concerning that sale. Goldman Decl. ¶¶  
20 11-16; Second Goldman Decl. ¶ 3 (Dec. 4, 1995).

21 Late on November 30, 1995, counsel for the Forest Service  
22 revealed that Scott Timber Company planned to begin cutting unit 5  
23 on Monday, December 4, 1995, and that it appeared that the Forest  
24 Service would complete any required paperwork by that time. Id.  
25 On Friday, December 1, 1995, the Forest Service's counsel confirmed

26  
27 Seattle Audubon Society v. Thomas, C89-160WD (W. D. Wash.).



1 adversely affect and potentially jeopardize Oregon coho salmon and  
 2 Klamath Mountain Province steelhead. Letter from National Marine  
 3 Fisheries Service to Forest Service and Bureau of Land Management  
 4 (Oct. 3, 1995) (attachment to Second Goldman Decl.) These losses  
 5 constitute irreparable harm in the purest sense. See Amoco  
 6 Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987)  
 7 ("Environmental injury, by its nature, can seldom be adequately  
 8 remedied by money damages and is often of long duration, i.e.,  
 9 irreparable.").

10 On the other side of the balance, Scott Timber Company will  
 11 not be harmed by waiting until this Court can rule on the pending  
 12 motions, which will be fully briefed and argued within eight days.  
 13 This Court has ruled quickly on other motions concerning the scope  
 14 of Section 2001(k), and will likely rule promptly here. Moreover,  
 15 Scott Timber Company accepted award of the sale, knowing that the  
 16 contract might be nullified by judicial challenges.

17 A temporary restraining order should issue to preserve the  
 18 status quo until this Court can rule on plaintiffs' motion for  
 19 preliminary injunction and NERC's third motion for summary judgment  
 20 in NERC v. Glickman. Whether Section 2001(k)(1), in fact,  
 21 encompasses and constitutionally may encompass the Boulder Krab  
 22 timber sale is hotly contested. The serious statutory and  
 23 constitutional issues underlying the pending motions deserve close  
 24 scrutiny by this Court before the trees are cut.

25 On the merits, plaintiffs show below that Section 2001(k)(1)  
 26 is inapplicable to timber sales cancelled before enactment of the  
 27 logging rider. In addition, however, at least one unit of the

1 Boulder Krab sale is in the same old-growth stand and so close to  
2 where a marbled murrelet nest was actually observed that it falls  
3 within the "known to nesting" exception to Section 2001(k) (1)'s  
4 mandate to release sales. Rogers Decl. ¶¶ 11-14. While the  
5 meaning of that exception is disputed in another pending motion,  
6 unit 1 of the Boulder Krab sale satisfies even a rigid construction  
7 that requires physical evidence of nesting behavior. Accordingly,  
8 that unit may not be released under Section 2001(k) (2).

9 II. SECTION 2001(k) (1) IS LIMITED TO TIMBER SALE OFFERS THAT  
10 STILL WERE VIABLE WHEN THE 1995 LOGGING RIDER BECAME LAW.

11 Plaintiffs have set forth their position in their November 21,  
12 1995 amici opposition to NFRC's third motion for summary judgment  
13 in NFRC v. Glickman and in their memorandum in support of their  
14 motion for a preliminary injunction in this case. That motion was  
15 filed on November 21, 1995, the government's opposition is due  
16 early this week, and plaintiffs plan to file a reply memorandum  
17 before the argument scheduled for December 12, 1995. Plaintiffs  
18 summarize their arguments here for the convenience of the Court.

19 A. Section 2001(k) (1)'s Plain Meaning Applies Only  
20 to Timber Sale Contract Offers that Remained  
21 Viable on July 27, 1995.

22 By its plain terms, Section 2001(k) (1) applies only to timber  
23 sale contract offers and awards. Specifically, Section 2001(k)  
24 directs the Secretary concerned (of Agriculture for Forest Service  
25 lands) "to award, release, and permit to be completed" previously  
26 offered or awarded timber sale contracts. In other words, Section  
27 2001(k) directs the Forest Service and BLM to complete the contract  
award and permit performance; it does not compel the agencies to

1 initiate that process, which would need to be done if a previous  
2 offer had been cancelled.

3 Section 2001(k) (1) applies to timber sale contracts "offered"  
4 before the date the logging rider was enacted. The reach of  
5 Section 2001(k) (1), therefore, hinges on the meaning of the word  
6 "offer." Section 2001(k) does not define the word "offer," nor it  
7 that word a term of art in timber contracting procedures. However,  
8 under contract law, the word "offer" is commonly understood to  
9 involve a willingness to enter into a contract. See Restatement of  
10 Contract (2d), § 24 (Offer defined) (offer "is the manifestation of  
11 willingness to enter into a bargain, so made as to justify another  
12 person in understanding that his assent to that bargain is invited  
13 and will conclude it.") An offer is not present if "the person to  
14 whom it is addressed knows or has reason to know that the person  
15 making it does not intend to conclude a bargain until he has made  
16 further manifestation of assent." Id. § 26 (Preliminary  
17 Negotiations).

18 No offer exists when the government has cancelled a timber  
19 sale. Any previous offer then becomes a nullity, and if the agency  
20 later wants to pursue that sale, it must start the contract  
21 formation process over with a new advertisement. Fifth Declaration  
22 of Jerry L. Hofer ¶ 4 (Nov. 15, 1995), in NFRC v. Glickman  
23 ("Typically, if an offered sale is not awarded for any purpose, the  
24 bids are rejected and the "timber sale" ceases to be an entity.")  
25 In these circumstances, the government is unwilling to enter into a  
26 bargain, and no one would be justified in assuming otherwise. See  
27 Restatement of Contracts (2d), § 24 (Offer defined). Particularly

1 where the agency cancelled the sale to avoid judicial review of a  
2 meritorious claim, any future reconfiguration of the sale would be  
3 vastly different from that previously planned and would be subject  
4 to a new offer. See Groman Corporation v. United States, 31 Fed.  
5 Cl. 741 (1994).

6 In 1991, in the face of a strong court challenge, the Forest  
7 Service cancelled the Boulder Krab timber sale. Indeed, NFRC  
8 (which represents Scott Timber Company, the timber company that has  
9 been awarded the Boulder Krab sale) concedes that Boulder Krab "in  
10 fact conflicted with NEPA [the National Environmental Policy Act]  
11 or another previously-applicable environmental law." In the face  
12 of these illegalities, the Forest Service rejected all bids and  
13 agreed not to proceed with the Boulder Krab sale without making a  
14 new decision and holding a new auction. Settlement Stipulation  
15 (Mar. 20, 1991), in Friends of Elk River.<sup>4</sup>

16 After the Forest Service decided to cancel the Boulder Krab  
17 sale, the sale area was designated a late successional reserve and  
18 a key watershed off-limits to logging under Option 9. Rogers  
19 Declaration ¶ 16. As a result, the Forest Service abandoned all  
20 plans to log this area. The Forest Service closed and obliterated  
21

22 4/ Since Boulder Krab was cancelled after Section 318  
23 expired, it could not have been reoffered under Section 318. H.  
24 Conf. Rep. No. 101-264, 101st Cong., 1st Sess. 87 (1989)  
25 ("[s]ales offered under this section but not awarded and  
26 withdrawn after October 1, 1990 under normal Forest Service or  
27 BLM procedures may not be re-offered in subsequent fiscal years  
under the terms of this section"). Accordingly, if the Forest  
Service wanted to proceed with Boulder Krab after the  
cancellation of that sale in 1991, it would have had to begin  
anew under applicable environmental laws, contracting procedures,  
and administrative and judicial review provisions.

1 the road that would have led to the Boulder Krab sale area, and it  
2 reconstructed the old hiking trail that would be converted into  
3 the principal logging road for the Boulder Krab sale. Roger  
4 Declaration ¶¶ 17-18. The Forest Service's actions unequivocally  
5 demonstrate that it is not, and for some time has not been, willing  
6 to offer the Boulder Krab timber sale.

7 Moreover, the 45-day time frame established by Section 2001(k)  
8 for releasing these sales strongly suggests that Congress did not  
9 mean to include cancelled timber sales in the Section 2001(k)(1)  
10 mandate. Section 2001(k)(2) creates an exception to Section  
11 2001(k)(1)'s mandated release of sales for sale units where  
12 threatened or endangered bird species are known to be nesting.  
13 This provision makes sense when applied to the Section 318 timber  
14 sales that had been held up for consultations over their effects on  
15 threatened marbled murrelets or spotted owls and where surveys have  
16 been underway for some time. However, the 45-day time frame is  
17 completely unworkable for sales that had been cancelled. At least  
18 one unit of the Boulder Krab sale falls within a rigid construction  
19 of Section 2001(k)(2) -- the "known to be nesting" exception to the  
20 mandated release of sales. See supra at 9. It is quite likely  
21 that other units also are important nesting areas for marbled  
22 murrelets. Id. ¶ 14. However, because the sale was not in the  
23 timber pipeline, adequate surveys have not been undertaken. Since  
24 the marbled murrelet surveys take two years, Boulder Krab might be  
25 logged because insufficient knowledge exists to ascertain whether  
26 it is in a nesting area. There is no indication that Congress had  
27 such a harsh result in mind.

1 Finally, Section 2001(k)(1) says nothing about requiring  
2 timber sales to proceed in defiance of prior court orders. In  
3 contrast, the logging rider's salvage and Option 9 provisions  
4 provide specifically that particular timber sales may go forward  
5 despite previous judicial orders, even in provisions that contain  
6 the phrase "notwithstanding any other provision of law."  
7 Section 2001(b)(1), (d). Given the controversy surrounding these  
8 aspects of the rider, see, e.g., 141 Cong. Rec. H3233 (Mar. 15,  
9 1995) (Rep. Miller); *id.* at H3235 (Rep. Skaggs), it is  
10 inconceivable that Congress would so lightly trample on prior court  
11 orders in Section 2001(k)(1) without making that intent clear, as  
12 it did in other provisions of the rider.

13 In sum, Section 2001(k)(1) draws its meaning entirely from the  
14 past actions of federal agencies. It does not independently  
15 identify tracts of land to be logged. Instead, Section 2001(k)(1)  
16 defines the timber sale contracts subject to Section 2001(k)(1) as  
17 those offered or awarded in the past. Because Section 2001(k)(1)  
18 draws its meaning from the past actions of federal agencies, it must  
19 take those actions as it finds them. If a past offer was  
20 rescinded, as is the case with Boulder Krab, it did not exist on  
21 July 27, 1995 when the new logging rider was enacted. That past  
22 cancelled offer cannot be resurrected under Section 2001(k)(1).

23 B. Section 2001(k)(1)'s Legislative History  
24 Demonstrates that Congress Never Intended It to  
25 Resurrect Cancelled Timber Sales.

26 The new logging rider's legislative history fully supports  
27 such a reading. Throughout the legislative consideration of the  
logging rider, congressional reports and Members of Congress

1 described Section 2001(k) as pertaining to timber sales that were  
2 still in the timber pipeline, but had been held up by consultations  
3 over the sales' effects on threatened and endangered species.<sup>5/</sup> In  
4 addition, the legislative history repeatedly stresses that Section  
5 2001(k) will eliminate potential government liability for  
6 cancelling such timber sale contracts. H. Rep. No. 104-71, at 22;  
7 S. Rep. No. 104-17, at 123; Gorton Letter at 1; 141 Cong. Rec. at  
8 H3231-33 (Mar. 15, 1995) (Rep. Taylor). Finally, the legislative  
9 history is filled with assurances that the President's Northwest  
10 Forest Plan had assumed that the sales covered by Section  
11 2001(k) (1) would be logged. See cites, supra at 14.

12 The Boulder Krab timber sale lacks these three  
13 characteristics. As a long since cancelled sale, it was not held  
14 up for any reason and it could not expose the government financial  
15 liability. Moreover, the President's Northwest Forest Plan did not  
16 assume that cancelled sales that are now in late successional  
17 reserves and key watersheds would be logged.

18 Nothing in the legislative history suggests that Congress  
19 thought it was resurrecting cancelled timber sales or that it was  
20 forcing the Forest Service to defy its sworn representations to  
21

---

22 <sup>5/</sup> See H. Rep. No. 104-71, 104th Cong., 1st Sess. 22 (Mar. 8,  
23 1995); S. Rep. No. 104-17, 104th Cong. 1st Sess. 123 (Mar. 24,  
24 1995); H. Conf. Rep. No. 104-124, 104th Cong., 1st Sess. 137 (May  
25 16, 1995); 141 Cong. Rec. at H3233 (Mar. 15, 1995) (Rep. Taylor);  
26 id. at H357-58 (May 24, 1995) (Rep. Taylor); Letter to Members  
27 of the Senate Interior Appropriations Subcomm. from Senator  
Gorton (Mar. 20, 1995) (Exhibit 1 to Mem. In Support Prelim.  
Injunction Motion) ("Gorton Letter"); 141 Cong. Rec. at S4881  
(Mar. 30, 1995) (Sen. Hatfield); id. at S4875 (Sen. Gorton); id.  
at 4870, 4873 (Sen. Murray); id. at S10,464-65 (July 21, 1995)  
(Sen. Gorton).

1 this Court. This understanding is underscored in a recent letter  
2 from 14 Members of Congress, including the principal sponsors of  
3 the logging rider, which makes it abundantly clear that Section  
4 2001(k) applies only to sales "that have already been sold and for  
5 which the government has outstanding contract liability." Letter  
6 to President Clinton from 14 Members of Congress at 1 (Nov. 6,  
7 1995) (Exhibit 5 to Mem. in Support of Prelim. Injunction Motion).  
8 It does not, in their view, extend to sales for which the  
9 government has "already incurred financial liability associated  
10 with cancelling already-sold timber sales." Id. This letter,  
11 along with the unbroken explanation for Section 2001(k) (1) in  
12 Congress, confirms that Section 2001(k)'s proper scope does not  
13 encompass cancelled or withdrawn timber sales because no offer was  
14 viable with respect to such sales when the rider was enacted.

15 III. INTERPRETING THE 1995 LOGGING RIDER TO RESURRECT TIMBER  
16 SALES ENJOINED OR WITHDRAWN IN COURT PROCEEDINGS WOULD  
17 VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.

18 Not only does the most logical reading of Section 2001(k)  
19 pertain solely to timber sale contract offers that remained viable  
20 on July 27, 1995, but such a reading is also required to avoid a  
21 major constitutional confrontation. Where a construction of a  
22 statute might collide with the doctrine of separation of powers,  
23 the Courts are admonished to decide first whether the statute is  
24 "susceptible of a reconciling interpretation" that does not create  
25 such a collision. American Foreign Service Association v.  
26 Garfinkel, 490 U.S. 153, 161-62 (1989) (per curiam); Rescue Army v.  
27 Municipal Court of Los Angeles, 331 U.S. 549 (1947); Ashwander v.  
TVA, 297 U.S. 288, 346-48 (Brandeis, J., concurring in part).

1 A. Separation of Powers Principles Prevent  
2 Congress from Legislatively Revising Closed  
3 Cases.

4 Two separation of powers principles have evolved to protect  
5 the judicial sphere from political interference by Congress.  
6 First, Congress may not prescribe a rule of decision or direct  
7 certain factfindings for a pending case. United States v. Klein,  
8 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871); Robertson v. Seattle  
9 Audubon Society, 503 U.S. 429, 112 S.Ct. 1407 (1992). Second,  
10 Congress may not legislatively revise the final judicial resolution  
11 of a case. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447  
12 (1995). Both of these safeguards ensure that parties to court  
13 proceedings will have their disputes resolved through judicial  
14 processes without legislative meddling.

15 Under the first principle, the Supreme Court, in Robertson v.  
16 Seattle Audubon Society, upheld the provision of Section 318 that  
17 directed that management of national forests according to other  
18 Section 318 provisions "is adequate consideration for the purpose  
19 of meeting the statutory requirements that are the basis for" cases  
20 then pending before the Western District of Washington. Section  
21 318(b)(6)(A). Pointing to Section 318's environmental restrictions  
22 and procedures governing timber sales, the Court concluded that  
23 Section 318 "compelled changes in law, not findings or results  
24 under old law." 112 S. Ct. at 1413.

25 Recently, the Ninth Circuit applied Robertson to refuse to  
26 allow a budget rider providing that a certain environmental impact  
27 statement shall be deemed sufficient to override the Ninth  
Circuit's prior decision that the environmental impact statement

1 was, in fact, not sufficient. According to the Ninth Circuit, the  
2 rider did not remove the basis for the court's decision by changing  
3 the underlying law. Alaska Wilderness Recreation & Tourism  
4 Association v. Morrison, 67 F.3d 723 (9th Cir. 1995). More  
5 specifically, the rider neither eliminated the core requirements of  
6 the underlying law, nor offered any new statutory test for  
7 determining the sufficiency of the environmental impact statement.  
8 Simple passage of a statute did not, regardless of content, change  
9 the law for the future in a way that excuses congressional  
10 interference with pending litigation.<sup>6</sup>

11 Under the second separation of powers principle, Congress may  
12 not, even by passing a statute, direct the courts to change the  
13 result or findings made in a case that has been finally resolved by  
14 the courts. This principle ensures that "the impartial application  
15 of rules of law, rather than the will of the majority, must govern  
16 the disposition of individual cases and controversies. Any  
17 legislative interference in the adjudication of the merits of a  
18 particular case carries the risk that political power will supplant  
19 evenhanded justice, whether the interference occurs before or after  
20 entry of final judgment." Plaut v. Spendthrift Farm, Inc., 115 S.  
21 Ct. at 1476 (dissent).

22 In Plaut, the Supreme Court held that Congress may not

23  
24  
25 <sup>6/</sup> NFRC has argued that the phrase "notwithstanding any other  
26 provision of law" constitutes such a change in the underlying  
27 law. However, it is inconceivable that the Ninth Circuit would  
have reached a different result in Alaska Wilderness Recreation & Tourism if those magic words had been used. Instead, the Ninth Circuit looked beneath the attempt to dictate a different result in court to the substance of the statutory change.



1 March 25, 1991.

2 While this Court did not decide the legality of the Boulder  
3 Krab sale, NFRC (representing the purchaser of Boulder Krab)  
4 concedes that the sale was blatantly illegal under the  
5 environmental laws that ordinarily govern timber sales. NFRC's  
6 Reply Mem. in Support of Third Motion for Summary Judgment at 4,  
7 11. Rather than wait for the court to rule, the Forest Service  
8 withdrew the sales and made it clear to the court that it had no  
9 intention of proceeding with the sale in that form, and this Court  
10 dismissed the case on that basis.

11 If Section 2001(k) is read to require the release of the  
12 Boulder Krab sale in its original, withdrawn form, it will defy the  
13 basis for the Court's dismissal of the case. Because the sale had  
14 become a nullity, this Court terminated judicial review.

15 While the Forest Service could have offered the Boulder Krab  
16 sale anew after dismissal of Friends of Elk River, it never did so,  
17 presumably because it could not bring the sale into compliance with  
18 applicable environmental laws. Today, this sale cannot lawfully be  
19 offered for sale because it is located in a late successional  
20 reserve and a key watershed that are off limits to logging under  
21 Option 9.

22 A major affront to the doctrine of separation of powers  
23 doctrine would result from a construction of Section 2001(k) (1) to  
24 resurrect a timber sale that was cancelled as a result of court  
25 proceedings and whose demise resulted in a court order terminating  
26 the litigation. The Constitution limits the extent to which  
27 Congress can meddle in the factual determinations that formed the

1 basis of a court's resolution of a case before it. Construing  
2 Section 2001(k) to eradicate past court determinations and  
3 litigation-induced sale cancellations would constitute such an  
4 impermissible legislative interference with judicial functions.

5 CONCLUSION

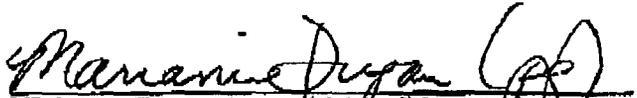
6 For these reasons, and those set forth in plaintiffs'  
7 memorandum in support of their motion for a preliminary injunction  
8 and in the amici opposition to NFRC's third motion for summary  
9 judgment, plaintiffs respectfully ask the Court to issue a  
10 temporary restraining order prohibiting logging, roadbuilding and  
11 other on-the-ground actions on the Boulder Krab timber sale before  
12 this Court rules on plaintiffs' motion for a preliminary  
13 injunction.

14 DATED this 4th day of December, 1995.

15 Respectfully submitted,

16   
17 PATTI A. GOLDMAN (WSB# 24426)  
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19 Sierra Club Legal Defense Fund  
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21 Attorneys for Plaintiffs

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Local Counsel for Plaintiffs

27 518TRO.MEM

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

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NUMBER OF PAGES: 16

DATE: December 11, 1995

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

MESSAGE: Pilchuck Audubon Soc'y v. Glickman, 95-6384

Attached is a Declaration of Jim Rogers.



Summit Mt. McKinley

Angel Adams

# SIERRA CLUB LEGAL DEFENSE FUND, INC.

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December 4, 1995

Clerk of the Court  
U.S. District Court of Oregon  
240 U.S. Courthouse  
211 E. 7th  
Eugene, OR 97401

Re: Pilchuck Audubon Society, et al. v. Dan Glickman, et al.

Dear Clerk:

Enclosed for filing with the Court please find the original and one copy of the following:

- 1. DECLARATION OF JIM ROGERS; and
- 4. CERTIFICATE OF SERVICE.

Please file-stamp and return the extra copy to our office in the enclosed postage-paid envelope.

Thank you for your cooperation.

Very truly yours,

Tina Dickey  
Assistant to Patri Goldberg

cc: All Counsel



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Local Counsel for Plaintiffs

10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE DISTRICT OF OREGON

12 PILCHUCK AUDUBON SOCIETY, OREGON )  
 13 NATURAL RESOURCES COUNCIL, )  
 14 PORTLAND AUDUBON SOCIETY, BLACK )  
 15 HILLS AUDUBON SOCIETY, WESTERN )  
 16 ANCIENT FOREST CAMPAIGN, )  
 17 HEADWATERS, COAST RANGE )  
 18 ASSOCIATION, FRIENDS OF THE ELK )  
 19 RIVER, LEAVENWORTH AUDUBON ADOPT- )  
 20 A-FOREST, NORTH CENTRAL WASHINGTON )  
 21 AUDUBON SOCIETY, and KNUT and ANN )  
 22 AAGAARD, )  
 23 Plaintiffs, )

Civil No. 95-06384-TC

DECLARATION OF JIM ROGERS

v.

19 DAN GLICKMAN, Secretary of )  
 20 Agriculture, BRUCE BABBITT, )  
 21 Secretary of Interior, UNITED )  
 22 STATES FOREST SERVICE, and BUREAU )  
 23 OF LAND MANAGEMENT, )  
 24 Defendants. )

I, Jim Rogers, declare as follows:

25 1. I am a founding member of Friends of Elk River, which  
 26 was founded to protect the fisheries of the Elk River, and I was  
 27

1 also a founding member of its predecessor organization.

2 2. I am a professional forester. In 1964, I earned a B.S.  
3 degree in forestry from Syracuse University and a B.S. from State  
4 University of New York in forest land management. For the past  
5 thirty years, I have worked for the U.S. Forest Service and for  
6 the timber industry. I was a forester for the Forest Service  
7 and timber manager for several mills. I am currently a  
8 consulting forester, working primarily for private landowners  
9 managing their own timber stands. A copy of my resume is  
10 attached as Attachment C.

11 3. I am familiar with the North Fork of the Elk River where  
12 the Elk Fork and Boulder Krab timber sales are located because  
13 one of the companies that I worked for logged timber in that  
14 area. I observed and became concerned about the effects of  
15 clearcut logging in that watershed because the strong winds in  
16 that area result in a lot of timber blowing down and impacting  
17 the fisheries of the North Fork.

18 4. I, along with others, advocated to have Grassy Knob, an  
19 area of the Elk River downstream from the North Fork, designated  
20 as wilderness area. In 1984, it was designated as a wilderness  
21 area. During the late-1980s, Dr. Gordon Reeves, a fisheries  
22 scientist with the Forest Service, headed a fisheries study of  
23 the Elk River watershed. Dr. Reeves found that the North Fork of  
24 the Elk River is unique because it is producing more salmon than  
25 any river of comparable size outside of Alaska, particularly coho  
26 salmon. He recommended keeping the North Fork intact and free of  
27 logging.

DECLARATION OF JIM ROGERS

1 5. In 1988, the Elk River was designated as a National Wild  
2 and Scenic River to protect the fisheries and water quality.

3 6. In 1990, the Forest Service proposed to go forward with  
4 the Elk Fork and Wolkrab timber sales in the North Fork of the  
5 Elk River. The original Wolkrab sale was named by reversing the  
6 name of the mountain at the head of the North Fork -- Barklow  
7 Mountain. The Forest Service then combined the Wolkrab and Bray  
8 Boulder sales and called that combined sale the Boulder Krab  
9 sale.

10 7. Through my work, I have become familiar with the North  
11 Fork of the Elk River. It is a large unbroken and undisturbed  
12 old-growth stand in the Copper Mountain Roadless Area. It is de  
13 facto a pristine wilderness area adjacent to the Grassy Knob  
14 Wilderness Area. Most of the trees are 4-6 feet in diameter and  
15 more than 250 years old, but many of the trees are over 6 feet in  
16 diameter. The trees are very healthy and have the potential to  
17 become majestic giant trees that could live to be more than 1000  
18 years old. In contrast, many other trees in the Elk River have  
19 been damaged by fire and have less potential to continue to age  
20 and grow.

21 8. Friends of Elk River, along with other environmental  
22 organizations, challenged these sales in court.

23 9. The Forest Service's fisheries scientist, Dr Reeves,  
24 believed that these sales would adversely impact the fisheries  
25 and water quality of the Elk River. Because the Wild and Scenic  
26 River Act requires that those qualities be protected, we  
27 challenged the sale in federal court. The Forest Service used a

1 sedimentation model to assess the effects of these sales on the  
2 Elk River, but its own scientists concluded that the model had  
3 been misapplied to justify these sales. This is the reason that  
4 the Forest Service gave for canceling this sale.

5 10. On March 20, 1991, our attorney entered into a  
6 stipulation with the Forest Service through which the agency  
7 stated that they had rejected all bids and that they would not  
8 proceed with these timber sales in the future without new NEPA  
9 review, a new decision notice, and a new auction. The  
10 stipulation is attached as Attachment A. Based expressly on that  
11 stipulation, U.S. District Judge Owen Panner dismissed our  
12 lawsuit without prejudice and ordered the government to pay our  
13 attorneys' fees and costs. The order dismissing the case is  
14 attached as Attachment B.

15 11. In July 1992, a colleague who was then researching  
16 birds and riparian habitat in the North Fork of Elk River for  
17 Oregon State University, told me that she had found egg fragments  
18 that were greenish in color with purple splotches, approximately  
19 1/2 mile from the Boulder Crab timber sale site. I was then  
20 receiving training to locate marbled murrelets under the Pacific  
21 Seabird Group Protocol. I have since been certified as a marbled  
22 murrelet surveyor, and have been a contract and a volunteer  
23 surveyor. Based on my colleague's description, I believed that  
24 what she had found was a marbled murrelet eggshell.

25 12. I went to the site early in the morning two days later  
26 and saw a marbled murrelet fly into the tree at 6:07 a.m.; then I  
27 heard it leave at 6:27 a.m..

DECLARATION OF JIM ROGERS

1 13. Dr. Kim Nelson, one of the authors of the Pacific  
2 Seabird Group Protocol, and some her associates came to the site  
3 at various times over the next few days. One of them climbed an  
4 adjacent tree and observed the nest. They set up a video camera  
5 operated by remote control and obtained footage of the baby bird  
6 being fed by the adult.

7 14. The area where we found the marbled murrelet nest and  
8 the Boulder Krab sale area are in the same contiguous old-growth  
9 stand. Since marbled murrelets use a stand for nesting and show  
10 high fidelity to a stand, I would conclude, based on the Protocol  
11 and the best scientific evidence, that marbled murrelets are  
12 nesting in the Boulder Krab sale area.

13 15. The Forest Service never proceeded with these sales.  
14 Its subsequent actions indicate that it had abandoned all plans  
15 to log these sales.

16 16. These sale areas are located in late successional  
17 reserves and a key watershed designated in President Clinton's  
18 Northwest Forest Plan. Accordingly, they cannot be logged under  
19 current environmental standards.

20 17. Since the Forest Service withdrew the sales, it has  
21 closed and obliterated the road that would have led to the  
22 Boulder Krab sale area.

23 18. A hiking trail in that area -- the old Barklow Mountain  
24 Trail -- had deteriorated over the years. It originally was used  
25 to service fire lookouts in the 1930s and 1940s. It would have  
26 been converted into the principal logging road for the Boulder  
27 Krab sale. In the last two years, the Forest Service has cleared

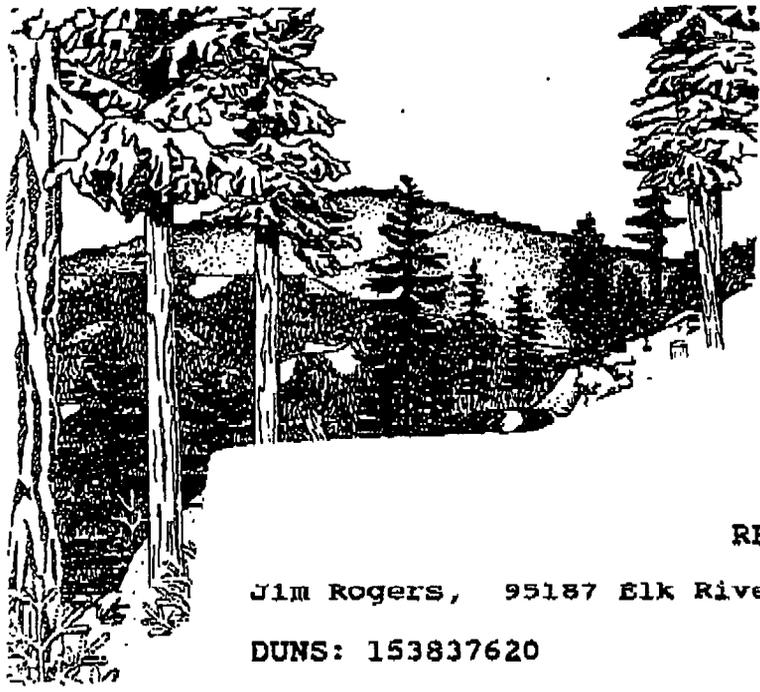
1 obstructions and reconstructed the trail. This is a further  
2 confirmation that they had abandoned all plans to go forward with  
3 the Boulder Krab sale.

4 19. I understand the Forest Service is now planning to  
5 resurrect the Boulder Krab and Elk Fork sales under the new  
6 logging rider. If they log this area, it will clearcut part of  
7 the Copper Mountain Roadless Area. Logging would destroy prime  
8 marbled murrelet habitat, impair the invaluable fisheries, damage  
9 water quality of the Wild and Scenic Elk River, lead to chronic  
10 sedimentation, and create an opening for massive windthrow which  
11 might knock down other old-growth trees. This would be a  
12 tremendous loss to me personally because I use this area  
13 frequently and it is extremely important for ecological and  
14 spiritual reasons.

15 Pursuant to 28 U.S.C. § 1746, I declare under penalty of  
16 perjury that the foregoing is true and correct.

17 Dated this 17 day of November, 1995.

18   
19 \_\_\_\_\_  
20 Jim Rogers



**ROGERS & ASSOCIATES**  
*Consulting Foresters*  
*Specializing in Sustainable Forest Practices*  
 95187 Elk River Road  
 Port Orford, Oregon 97465  
 (503) 332-2555

**RESUME**

Jim Rogers, 95187 Elk River Rd., Port Orford, Oregon 97465

DUNS: 153837620

EIN: 93-108-7436

EDUCATION: AAS - Forestry - 1962  
Paul Smith's College  
Paul Smiths, New York

BS - Forest Land Management - 1964  
SUNY College of Forestry  
Syracuse, NY

BS - Forestry - 1964  
Syracuse University  
syracuse, New York

**EXPERIENCE:**

1963-64 Forestry Aid - Kootenai National Forest, Fortine  
Ranger District, Fortine, Montana.  
Duties: Precommercial thinning, fire suppression,  
fire lookout, tree planting, surveying,  
stocking surveys, timber cruising, mapping

1965 Forester Trainee - Weyerhaeuser Timber Company,  
Cosmopolis, Washington  
Duties: Tree planting, choker setting

1965 Engineering Tech. - Olympic National Forest,  
Quinault Ranger District, Quinault, WA  
Duties: construction staking foreman, drafting

1965-68 Forester - Siuslaw National Forest, Hebo Ranger  
District, Hebo, Oregon  
Duties: timber sale layout and appraisal, tree  
planting, land surveying, timber stand  
exams, fire suppression, etc.

## RESUME Page 2

- 1968-69 Forester - Western States Plywood Cooperative,  
Port Orford, OR  
Duties: Timber cruising and appraisal, logging and  
road construction supervision
- 1969 Forester - U.S. Plywood Corp., Gold Beach, OR  
Duties: Timber cruising and appraisal,  
reforestation superintendent
- 1970-74 Timber Manager - Western States Plywood Coop.,  
Port Orford, OR  
Duties: Responsible for all aspects of supplying  
logs for mill including cruising,  
appraisal, purchase, logging contracting  
and supervision, political representation
- 1975 Timber Manager - Pacific Teollisuus, Inc., Gold  
Beach, OR  
Duties: same as above
- 1976-present Consulting Forester for private and government  
clients  
Duties:- timber cruising & appraisal, timber stand  
exams, land surveying, forest management plans,  
wildlife inventory, reforestation, environmental  
consulting, etc.

## Jim Rogers RESUME ... 3

GOVERNMENT CONTRACTS - Value, Description, Location and Contact:

- #1 1983 \$11,000, Timber Cruise, Siskiyou N.F., Chetco R.D., Curt Day (COR) and Tex Martinek (Inspector) phone: (503) 469-2196
- #2 1984 \$800, Timber Stand Exam, Malheur N.F., Long Creek R.D.
- #3 1985 \$4,000, Timber Stand Exam, Tongass N.F., Wrangell R.D. Mary Clemens (COR) phone: (907) 874-2323 and Glen Maguire (CO) phone: (907) 772-3841
- #4 \$3,000, Reforestation Stocking Survey, Siskiyou N.F., Powers R.D. Belva Smith (COR) phone: (503) 439-3011
- #5 \$3,000, Timber Cruise, Klamath N.F., Happy Camp R.D., Al Durazo (COR) phone: (916) 493-2243, Ruby Metcalfe (CO) phone: (916) 842-6131
- #6 1986 \$500 (subcontract) Timber Stand Exam, Siskiyou N.F., Powers R.D.
- #7 \$500 " Reforestation Stocking Survey, Rogue River N.F.
- #8 \$1,700 " Timber Stand Exam, Fremont N.F., Paisley R.D.
- #9 \$3,000, Reforestation Stocking Survey, Siskiyou N.F., Powers R.D. (see #4 above), Duane Rose (CO) phone (503) 479-5301
- #10 \$3,000, Timber Cruise, Klamath N.F., Happy Camp R.D., Tom Maffei (COR) and Rick Claypole (Inspector) phone: (916) 493-2243
- #11 1987 \$8,000, Evaluation Plantations - Tree Measurement, Siskiyou N.F., Chetco R.D., Chuck Sallandar (COR) phone: (503) 469-2196
- #12 \$3,000, Timber Stand Exam, Siskiyou N.F., Powers R.D., Charlie Possee (COR) phone: (503) 439-3011
- #13 \$11,000, Reforestation Stocking Survey, Six Rivers N.F., Gasquet R.D. Dave Hubbard (COR), phone (707) 457-3131 and Herb Savercool (CO) phone: (707) 442-1721 ext.239
- #14 \$6,000, Evaluation Plantations - Tree Measurement (see #11 above)
- #15 1988 \$7,000, Timber Cruise, Mt. Baker-Snoqualmie N.F., Carolyn Sands (CO) phone: (206) 442-1084
- #16 \$1,000 (subcontract) Timber Stand Exam, Winema N.F., Chemult R.D.
- #17 \$7,000, Reforestation Stocking Survey, Klamath N.F., Salmon River R. Brad Burgess (COR) phone: (916) 467-5757
- #18 1989 \$3,500, (subcontract) Timber Stand Exam, Winema N.F., Chemult R.D. Ron Glover (COR), phone (503) 365-2229
- #19 \$9,500, Timber Stand Exam, Idaho Panhandle N.F., Avery R.D. Don Kole (COR), phone (208) 245-4517
- #20 \$6,000 (subcontract) Timber Stand Exam, Wenatchee N.F., Naches R.D. Karen Lindhorst (COR), phone (509) 653-2205

## Jim Rogers RESUME ... 4

- #21 1990 \$3,000 (subcontract) Timber Stand Exam, Winema N.F., Chemult R.D.  
Pete Powers (COR), phone: (503) 365-2229
- #22 \$9,000, Leave Tree Marking, Umpqua N.F., Cottage Grove R.D.  
Kevin Adamski (COR), phone: (503) 942-5591
- #23 \$18,000 (subcontract) Timber Stand Exam, Umpqua N.F.,  
Diamond Lake R.D., Jeff Lewis (COR), phone: (503) 498-2531
- #24 1991 \$8,000 (subcontract) Spotted Owl Surveys, Siskiyou N.F.,  
Powers R.D., Sue Livingston (inspector), phone: (503) 439-3011
- #25 \$8,000, Timber Stand Exam, Okanogan N.F., Tonasket R.D.  
Ken Bonny (COR), phone: (509) 486-2186
- #26 \$13,000, Timber Stand Exam, Umetilla N.F., Walla Walla R.D.,  
Bill Collar (COR) phone: (509) 522-6290
- #27 1992 \$8,000 (subcontract) Spotted Owl Surveys, Siskiyou N.F.,  
Powers R.D., Sue Livingston (inspector), phone (503) 439-3011
- #28 \$18,000, Timber Stand Exam, Okanogan N.F., Winthrop R.D.,  
Blake Hendrick (CO) phone (509) 826-3275
- #29 1993 \$1,000, Marbled Murrelet Surveys, Siskiyou National Forest,  
Powers R.D., Sue Livingston (COR) phone: (503) 439-3011
- #30 \$19,000, Timber Stand Exam, Okanogan N.F., Winthrop R.D.,  
Connie Mehmel (COR) phone (509) 996-2266
- #31 1994 \$4,000, (subcontract) Reforestation Stocking Survey,  
Siskiyou N.F., Powers R.D. Marge Kalb (COR), (503) 439-3011
- #32 1995 \$5,000, Native Grass Seed Collection, Siskiyou N.F.,  
Powers R.D. Dave Shea (inspector) phone: (503) 439-3011

**ELK FORK & BOULDER KRAB TIMBER SALES IN ELK RIVER WATERSHED  
POWERS RANGER DISTRICT - SISKIYOU NATIONAL FOREST**

The Elk Fork and Boulder Krab Timber Sales are located in the Copper Mountain Roadless Area which encompasses the North Fork of Elk River. They include 8.5 million board feet of old-growth timber on 222 acres. The Elk was designated a National Wild & Scenic River in 1988 to protect the Outstandingly Remarkable Values of its Fisheries and Water Quality. When the decision was made to offer these sales on August 30, 1990, renowned Forest Service Fisheries Biologist Dr. Gordon Reeves told the Acting Forest Supervisor, Abel Camarena, that they were likely to harm the extremely valuable fisheries of the North Fork. He had previously testified that the North Fork was "absolutely unique" in that it was producing more salmon per mile (especially Coho) than any other river in the Lower 48 states.

On September 19, 1990, several organizations including the Association of Northwest Steelheaders, filed suit to stop the sales. Dr. Reeves was to be subpoenaed to testify regarding the impacts of these sales on the Elk's fisheries and water quality. The sales were auctioned on September 27, 1990, but not awarded, pending the outcome of the lawsuit. Newly arrived Forest Supervisor Mike Lunn reviewed the case. Realizing that the plaintiffs would prevail, he withdrew the Decision to Prepare the sales on January 11, 1991. The plaintiffs withdrew their lawsuit and were awarded attorney fees by the government.

In July of 1992, a Marbled Murrelet nest was located in the North Fork approximately 1/2 mile from one of the units of the Boulder Krab sale. This was the first nest to be found on the Siskiyou. A video camera was set up in an adjacent tree and documentation was recorded of the juvenile murrelet being fed by the adults.

In 1995 the Forest Service obliterated the road leading to the Boulder Krab sale and reconstructed the old Barklow Mountain trail which would have been the location of the logging road for that sale.

On November 3, 1995, the Powers Ranger District was notified that the Elk Fork and Boulder Krab sales were to be immediately released for logging.

Jim Rogers

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

FAX NUMBER (202) 272-6817, 6815, 5775  
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	Bob Baum	208-3877
	David Gayer	
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman	514-0557
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	Jim Simon	
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NUMBER OF PAGES: 59

DATE: November 21, 1995

FROM: Paula Clinedinst, Paralegal, (202) 272-4698

MESSAGE: Pilchuck v. Glickman, 95-6384

Attached are 1) Plaintiffs' Motion for a PI, 2) Declarations of Patti Goldman and Jim Rogers, and 3) Plaintiffs' Request for Expedition. Attachments are available upon request.

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4 Attorneys for Plaintiffs

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 6 Western Environmental Law Center  
 1216 Lincoln Street  
 7 Eugene, OR 97401  
 (503) 485-2471

8 Local Counsel for Plaintiffs

9  
 10 IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

11  
 12 PILCHUCK AUDUBON SOCIETY, OREGON )  
 NATURAL RESOURCES COUNCIL, )  
 13 PORTLAND AUDUBON SOCIETY, BLACK )  
 HILLS AUDUBON SOCIETY, WESTERN )  
 14 ANCIENT FOREST CAMPAIGN, )  
 HEADWATERS, COAST RANGE )  
 15 ASSOCIATION, FRIENDS OF THE ELK )  
 RIVER, LEAVENWORTH AUDUBON )  
 16 ADOPT-A-FOREST, NORTH CENTRAL )  
 WASHINGTON AUDUBON SOCIETY, KNUT )  
 17 and ANN AAGAARD, ALPINE LAKES )  
 PROTECTION SOCIETY, SEATTLE )  
 18 AUDUBON SOCIETY, MITCHELL SMITH, )  
 and WASHINGTON ENVIRONMENTAL )  
 19 COUNCIL, )

Civ. # 95-06384-TC

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

EXPEDITED CONSIDERATION REQUESTED

December 12, 1995 Hearing

20 Plaintiffs,

21 v.

22 DAN GLICKMAN, Secretary of )  
 Agriculture, BRUCE BABBITT, )  
 23 Secretary of Interior, UNITED )  
 STATES FOREST SERVICE, and )  
 24 BUREAU OF LAND MANAGEMENT, )

25 Defendants.

1 Pursuant to Fed. R. Civ. P. 65, plaintiffs hereby move for a  
2 preliminary injunction prohibiting the award, release, or  
3 completion of cancelled and more than 5-year-old timber sales  
4 under Section 2001(k)(1) of the Fiscal Year 1995 Emergency  
5 Supplemental Appropriations for Disaster Relief and Rescissions  
6 Act, Pub. L. No. 104-19 ("Rescissions Act"). In support of this  
7 motion, plaintiffs are submitting a memorandum of law, two  
8 declarations, and several exhibits.

9 Plaintiffs have filed an unopposed motion to consolidate  
10 this case with Northwest Forest Resources Council v. Glickman,  
11 No. 95-6244-HO (D. Or.). Related motions in that case are  
12 scheduled to be heard on December 12, 1995. In order to ensure  
13 that plaintiffs will be heard on those motions, this case should  
14 be expedited and a hearing held on this motion on that same date.

15 It appears that the Forest Service is proceeding with two  
16 timber sales that were cancelled in 1991 in the face of a court  
17 challenge then-pending before this Court. In Friends of Elk  
18 River v. Forest Service, No. 90-969-PA, the Forest Service  
19 entered into a stipulation assuring both the plaintiffs and this  
20 Court that it had rejected all bids and that it would not proceed  
21 with these timber sales in the future without a new NEPA review,  
22 a new decision notice, and a new auction. Based expressly on  
23 that stipulation, U.S. District Judge Owen Panner dismissed the  
24 lawsuit without prejudice and ordered the government to pay the  
25 plaintiffs' attorneys' fees and costs.<sup>1/</sup>

26 \_\_\_\_\_  
27 <sup>1/</sup> The stipulation and order of dismissal have been filed in  
NFRC v. Glickman today as Exhibits 10 and 11 to the opposition  
filed by many of the plaintiffs to NFRC's motion and supplemental

1 The Forest Service previously filed a memorandum with this  
2 Court indicating that it would not proceed with timber sales  
3 enjoined or withdrawn in the course of court proceedings. See  
4 Memorandum from Jack Ward Thomas, Chief of the U.S. Forest  
5 Service, to Regional Foresters (September 27, 1995) (Exhibit 1 to  
6 Declaration of Patti Goldman (Nov. 20, 1995)). Specifically,  
7 this memorandum directs regional foresters not to award these  
8 sales until legal questions concerning whether they are covered  
9 under Section 2001(k)(1) are resolved.

10 These legal questions still have not been resolved. Indeed,  
11 several environmental organizations have been trying to have  
12 these issues decided by a court since the Forest Service issued  
13 this memorandum. However, due principally to the Forest  
14 Service's delays in briefing the issues and its request that the  
15 Western District of Washington stay the motion pending before it,  
16 no court has yet decided whether Section 2001(k) applies to sales  
17 enjoined or withdrawn in court proceedings.

18 Nonetheless, the Forest Service is proceeding with two such  
19 sales -- Elk Fork and Boulder Krab, which were cancelled in 1991.  
20 Since the Forest Service abandoned any intent to proceed with  
21 these sales, it has obliterated the road that would lead to the  
22 Boulder Krab sale and has reconstructed a hiking trail that would  
23 have been converted to a logging road under the old plans for the  
24 sale. Declaration of Jim Rogers ¶¶ 17-18 (Exhibit 3 to Goldman

25 \_\_\_\_\_  
26 filing concerning sales enjoined or withdrawn in court  
27 proceedings. This motion relies on many documents previously  
filed in NFRC v. Glickman. If this Court denies plaintiffs'  
motion to consolidate, we will file duplicates of these documents  
in this case.

1 Declaration). In addition, the sale area is part of a contiguous  
2 old-growth stand where a marbled murrelet nest was found in 1992.  
3 Id. ¶¶ 11-14. Under the best scientific evidence, marbled  
4 murrelets are extremely likely to use the sale area for nesting.  
5 Id. ¶ 14. However, since the sale was cancelled and the Forest  
6 Service had no plans to proceed with it, the agency has not  
7 conducted the surveys that would be required to establish that  
8 marbled murrelets use the area for nesting.

9 Plaintiffs have been trying to obtain an assurance from the  
10 Forest Service that no on-the-ground harm will be done during the  
11 pendency of this motion. To date, however, the Forest Service  
12 has refused to provide such an assurance. If the Forest Service  
13 continues to refuse to ensure that no harm will be done pending  
14 the outcome of this motion, plaintiffs may need to seek emergency  
15 relief from this Court. Plaintiffs will continue to confer with  
16 the Forest Service's attorneys in an attempt to come to an  
17 agreement and avoid seeking the emergency intervention of this  
18 Court.

19 For these reasons and those set forth in the accompanying  
20 memorandum and exhibits, plaintiffs respectfully request that the  
21 Court declare that Section 2001(k) is inapplicable to timber  
22 sales cancelled or withdrawn prior to July 27, 1995, and to sales  
23 offered before Section 318 became effective. This Court should  
24 grant plaintiffs' motion for preliminary injunctive relief and  
25 prohibit the federal defendants from awarding, releasing, or  
26 permitting to be completed timber sale contracts (1) offered  
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before October 23, 1989, or (2) cancelled or withdrawn prior to July 27, 1995.

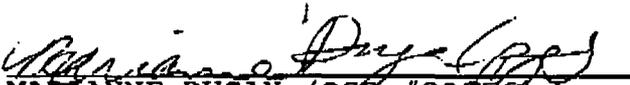
DATED this 20th day of November, 1995.

Respectfully submitted,



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KRISTEN L. BOYLES (WSB# 23806)  
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 19 HILLS AUDUBON SOCIETY, WESTERN )  
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 22 ASSOCIATION, FRIENDS OF THE ELK )  
 23 RIVER, LEAVENWORTH AUDUBON )  
 24 ADOPT-A-FOREST, NORTH CENTRAL )  
 25 WASHINGTON AUDUBON SOCIETY, KNUT )  
 26 and ANN AAGAARD, ALPINE LAKES )  
 27 PROTECTION SOCIETY, SEATTLE )  
 28 AUDUBON SOCIETY, MITCHELL SMITH, )  
 29 and WASHINGTON ENVIRONMENTAL )  
 30 COUNCIL, )

31 Plaintiffs,

32 v.

33 DAN GLICKMAN, Secretary of )  
 34 Agriculture, BRUCE BABBITT, )  
 35 Secretary of Interior, UNITED )  
 36 STATES FOREST SERVICE, and )  
 37 BUREAU OF LAND MANAGEMENT, )

38 Defendants.

Civ. # 95-06384-TC

MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

EXPEDITED CONSIDERATION  
REQUESTED

December 12, 1995 Hearing

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**STATUTES**

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141 Cong. Rec. S4873 (Mar. 30, 1995) . . . . .	4
141 Cong. Rec. H5558 (May 24, 1995) . . . . .	8, 9, 27
H. Rep. No. 104-71, 104th Cong., 1st Sess. (Mar. 8, 1995) . . . . .	5, 6
S. Rep. No. 104-17, 104th Cong. 1st Sess. (Mar. 24, 1995) . . . . .	5, 6
H. Conf. Rep. No. 104-124, 104th Cong., 1st Sess. (May 16, 1995) . . . . .	5, 7, 20, 26

**MISCELLANEOUS**

Fed. R. Civ. P. 65(a)(2) . . . . .	3
U.C.C. § 2-328 . . . . .	15

## INTRODUCTION

1  
2 In this motion, plaintiffs Pilchuck Audubon Society, Oregon  
3 Natural Resources Council, Portland Audubon Society, Black Hills  
4 Audubon Society, Western Ancient Forest Campaign, Headwaters,  
5 Coast Range Association, Friends of the Elk River, Leavenworth  
6 Audubon Adopt-a-Forest, North Central Washington Audubon Society,  
7 Knut and Ann Aagaard, Alpine Lakes Protection Society, Seattle  
8 Audubon Society, Mitchell Smith, and Washington Environmental  
9 Council (collectively referred to as "Pilchuck Audubon")  
10 challenge the release of two categories of timber sales under  
11 Section 2001(k)(1) of the Fiscal Year 1995 Emergency Supplemental  
12 Appropriations for Disaster Relief and Rescissions Act, Pub. L.  
13 No. 104-19 ("Rescissions Act").

14 First, Pilchuck Audubon objects to the Forest Service and  
15 the Bureau of Land Management's ("BLM's") release of timber sales  
16 that had been cancelled or withdrawn prior to July 27, 1995, when  
17 the 1995 logging rider was enacted. A subset of these cancelled  
18 or withdrawn sales were enjoined or withdrawn in court  
19 proceedings. The plaintiff in Northwest Forest Resources Council  
20 v. Glickman, No. 95-6244, is seeking the release of these sales  
21 under Section 2001(k)(1) of the logging rider.

22 Second, Pilchuck Audubon challenges the extension of Section  
23 2001(k)(1) to encompass timber sales offered prior to the  
24 enactment of Section 318, the law specifically referenced in  
25 Section 2001(k)(1) to identify the sales subject to release under  
26 that provision. A subset of these sales were subject to  
27 negotiations under Section 318(f)(1), which resulted in the

1 identification of specific sales that could not be offered under  
2 Section 318, and these sales were never offered subsequent to  
3 Section 318's expiration. Whether these sales must be released  
4 under Section 2001(k)(1) has been raised by Western Timber  
5 Company in its motion to intervene in NFRC v. Glickman, No. 95-  
6 6244-HO (D. Or.).

7 This brief will address these two outstanding issues.  
8 However, the particular jurisdictional and separation of powers  
9 questions arising with respect to timber sales that were enjoined  
10 or withdrawn in prior court proceedings are addressed in the  
11 separate legal brief filed today in NFRC v. Glickman in  
12 opposition to NFRC's motion for further clarification of the  
13 October 17, 1995 order and its supplemental memorandum in support  
14 of its third motion for summary judgment.<sup>1/</sup>

15 Because the Forest Service and BLM have already awarded and  
16 released under Section 2001(k)(1) previously cancelled timber  
17 sales and the timber industry is actively seeking the immediate  
18 release of pre-Section 318 timber sales, Pilchuck Audubon seeks a  
19 preliminary injunction barring the release of such sales.  
20 However, Pilchuck Audubon anticipates that the federal defendants  
21 will fully respond to the outstanding discovery and the issues  
22 presented in this case will be fully briefed by December 12,  
23 1995, when the Court has scheduled argument on related issues in  
24 NFRC v. Glickman. In its motion for expedited consideration,

25  
26 <sup>1/</sup> Pilchuck Audubon's unopposed motion to consolidate these two  
27 cases is pending. If the Court denies this motion, Pilchuck  
Audubon will file pertinent portions of the record in NFRC v.  
Glickman in this case.

1 Pilchuck Audubon asks the Court to hear this motion on December  
2 12, 1995, along with the related motions in NFRC v. Glickman.  
3 Presumably, this motion can then be combined with a hearing on a  
4 permanent injunction pursuant to Fed. R. Civ. P. 65(a)(2).<sup>2'</sup>

5 BACKGROUND

6 I. THE 1995 LOGGING RIDER

7 The logging rider to the 1995 Rescissions Act was heralded  
8 for its salvage provisions which streamline salvage timber sales.  
9 That logging rider also contains two provisions that deal with  
10 healthy old-growth timber sales. One old-growth logging  
11 provision -- Section 2001(d) -- expedites the preparation and  
12 award of timber sales under the President's Northwest Forest  
13 Plan, which governs the western ancient forests in Washington,  
14 Oregon, and Northern California that contain habitat for the  
15 threatened northern spotted owl. This provision leaves the  
16 President's Northwest Forest Plan (also known as Option 9) in  
17 place, and Section 2001(f) specifically retains some judicial  
18 review for sales offered under that plan. Nonetheless, it was  
19 criticized, along with the rider's salvage provisions for

20  
21 2/ In its motion for a preliminary injunction, Pilchuck Audubon  
22 explains that the Forest Service appears to be proceeding with  
23 Elk Fork and Boulder Krab -- two timber sales that were withdrawn  
24 in court proceedings -- before a court has ruled on the  
25 separation of powers and statutory construction issues raised in  
26 the related motion in NFRC v. Glickman and in this motion. The  
27 Forest Service appears to be holding off on other timber sales  
that were enjoined or withdrawn as a result of court proceedings.  
If the Forest Service provides a comparable assurance for the Elk  
Fork and Boulder Krab sales, this entire motion can be heard on  
December 12, 1995. If the Forest Service does not provide such  
an assurance for ELK Fork and Boulder Krab, Pilchuck Audubon may  
need to seek emergency relief from this Court to preserve the  
status quo until the Court can rule on this and related motions.

1 limiting environmental standards and judicial review for timber  
2 sales. See, e.g., 141 Cong. Rec. at 54873 (Mar. 30, 1995) (Sen.  
3 Murray).

4 The other provision -- Section 2001(k) -- is the one at  
5 issue in this case. It mandates the release of certain timber  
6 sales for logging in fiscal years 1995 and 1996. Section  
7 2001(k)(1) defines the sales that are covered by this mandate by  
8 expressly referring to Section 318 of Pub. L. No. 101-121, 103  
9 Stat. 745, a law that governed timber sales offered in certain  
10 Washington and Oregon forests during fiscal year 1990.

11 Section 2001(k)(1) provides in full:

12 Notwithstanding any other provision of law, within 45 days  
13 after the date of the enactment of this Act, the Secretary  
14 concerned shall act to award, release, and permit to be  
15 completed in fiscal years 1995 and 1996, with no change in  
16 originally advertised terms, volumes, and bid prices, all  
17 timber sale contracts offered or awarded before that date in  
any unit of the National Forest System or district of the  
Bureau of Land Management subject to section 318 of Public  
Law 101-121 (103 Stat. 745). The return of the bid bond of  
the high bidder shall not alter the responsibility of the  
Secretary concerned to comply with this paragraph.

18 The only express exception to this mandated release is for sale  
19 units in which threatened or endangered bird species are known to  
20 be nesting. Id. § 2001(k)(2). If a sale cannot be completed in  
21 accordance with the rider's mandate, the purchaser must be  
22 provided an equal volume of timber, of like kind and value,  
23 subject to the original contract terms. Id. § 2001(k)(3).

24 II. SECTION 2001(k)(1)'S LEGISLATIVE HISTORY NEVER  
25 DISCUSSED RESURRECTING CANCELLED TIMBER SALES

26 During the legislative development of Section 2001(k), there  
27 was never any suggestion that it might resurrect cancelled timber  
sales. In keeping with the exception provided for threatened

1 birds' nesting grounds, every mention of Section 2001(k)(1)  
2 described it as a narrow provision designed to release or provide  
3 replacement timber for a category of timber sales that had been  
4 held up by consultations with the Fish and Wildlife Service over  
5 the sales' effects on threatened or endangered species. In every  
6 instance, these sales were identified as timber sales that the  
7 President's Northwest Forest Plan assumed would be logged. The  
8 House Report, the first congressional report dealing with the  
9 logging rider, is illustrative:

10 The harvest of these sales was assumed under the  
11 President's Pacific Northwest Forest Plan, but their  
12 release has been held-up due to subsequent review by  
13 the U.S. Fish and Wildlife Service.

14 H. Rep. No. 104-71, 104th Cong., 1st Sess. 22 (Mar. 8, 1995).

15 The other congressional reports and floor statements describing  
16 Section 2001(k)(1) reiterated this description of the sales  
17 covered by it. S. Rep. No. 104-17, 104th Cong. 1st Sess. 123  
18 (Mar. 24, 1995); H. Conf. Rep. No. 104-124, 104th Cong., 1st  
19 Sess. 137 (May 16, 1995); 141 Cong. Rec. at H3233 (Mar. 15, 1995)  
20 (Rep. Taylor); id. at H5557-58 (May 24, 1995) (Rep. Taylor);  
21 Letter to Members of the Senate Interior Appropriations Subcomm.  
22 from Senator Gorton (Mar. 20, 1995) (Exhibit 1) ("Gorton  
23 Letter"); 141 Cong. Rec. at S4881 (Mar. 30, 1995) (Sen.  
24 Hatfield); id. at S4875 (Sen. Gorton); id. at 4870, 4873 (Sen.  
25 Murray); id. at S10,464-65 (July 21, 1995) (Sen. Gorton).

26 The key controversy over Section 2001(k) concerned whether  
27 there would be an exception to the mandated release to protect  
threatened bird species. The Senate version added subsection  
(k)(2) to create an exception to the mandated release for sale

1 units where any threatened or endangered bird species is "known  
2 to be nesting." Id. Subsection (k)(3) provides for substitute  
3 volume in the event a sale cannot be released for logging under  
4 Section 2001(k). Id. These additional provisions deal directly  
5 with the principal reason why Section 318 sales had been held up  
6 -- Fish and Wildlife Service consultations over the sales'  
7 effects on threatened species.

8 Even more on point, Section 2001(k)(1)'s legislative history  
9 explicitly and repeatedly stressed that Section 2001(k)(1) would  
10 reduce the government's liability for contract cancellations.  
11 Virtually every discussion of Section 2001(k) stated that this  
12 provision was designed to remove government liability for  
13 cancelling old timber sale contracts. The House and Senate  
14 Reports emphasized in identical language that "[r]elease of these  
15 sales will remove tens of million of dollars of liability from  
16 the government for contract cancellation." H. Rep. No. 104-71,  
17 at 22; S. Rep. No. 104-17, at 123. Senator Gorton, the logging  
18 rider's Senate sponsor, echoed this statement verbatim. Gorton  
19 Letter at 1. Representative Taylor, a House sponsor of the  
20 logging rider and the only Representative who even mentioned  
21 Section 2001(k), heralded Section 2001(k) as responding to  
22 another emergency -- government liability for failing to perform  
23 the terms of a contract. Id. at H3231-33 (Mar. 15, 1995).

24 The entire focus throughout the legislative consideration of  
25 Section 2001(k)(1) was on timber sales that were in the pipeline,  
26 but had been delayed because of ongoing environmental reviews.  
27 No one hinted that Section 2001(k) might resurrect timber sales

1 that had been cancelled by the federal agencies. Nor did any  
2 Member of Congress remotely suggest that timber sales that had  
3 been cancelled as a result of a court injunction, a successful  
4 administrative appeal, or an agency realization that the sale  
5 would violate environmental laws would be given new life under  
6 Section 2001(k)(1). To the contrary, since the stated purpose of  
7 Section 2001(k) was to eliminate governmental liability for  
8 cancelling contracts, the entire thrust of the legislative debate  
9 was on timber sales under contract, not on timber sale contracts  
10 or offers that were cancelled long ago.

11 III. THERE IS NO SUPPORT IN SECTION 2001(k)(1)'S LEGISLATIVE  
12 HISTORY FOR APPLYING SECTION 2001(k)(1) TO SALES THAT  
13 PRECEDED SECTION 318

14 The extent to which Section 2001(k)(1) extends to sales  
15 other than those offered under Section 318 has been hotly  
16 contested and is now before the Ninth Circuit on an appeal from  
17 this Court's orders. Regardless of how that appeal is resolved,  
18 nothing in the legislative history supports construing Section  
19 2001(k)(1) to reach sales offered before Section 318's enactment.

20 In its September 13, 1995 decision, this Court relied on  
21 three pieces of legislative history: the Senate Report, the  
22 Conference Report, and the written statement that Representative  
23 Taylor inserted into the Congressional Record. The first -- the  
24 Senate Report -- is silent as to any starting date for Section  
25 2001(k)(1). The Conference Report is quite explicit. It states  
26 that "[t]he bill releases all timber sales which were offered for  
27 sale beginning in fiscal year 1990 to the date of enactment . .  
.. " H. Conf. Rep. No. 104-124, at 137. Representative Taylor's

1 inserted statement likewise describes the sales covered by  
2 Section 2001(k)(1) as those offered under Section 318, in fiscal  
3 year 1991, or more recently. 141 Cong. Rec. H3233 (Mar. 15,  
4 1995).<sup>3/</sup> Neither Representative Taylor nor any other Member of  
5 Congress ever suggested that Section 2001(k)(1) would apply to  
6 any sales that preceded Section 318.

7 IV. IMPLEMENTATION OF SECTION 2001(k)(1)

8 Section 2001(k)(1) has already fueled extensive litigation  
9 to determine its proper scope. For its part, the timber industry  
10 is seeking a broad construction that sweeps up every timber sale  
11 ever offered in Washington and Oregon, even if it had later been  
12 cancelled or even enjoined by a court. The government contends  
13 that Section 2001(k)(1) is limited to Section 318 sales, but it  
14 defines Section 318 sales to include sales that were cancelled,  
15 even in the face of court proceedings. Pilchuck Audubon believes  
16 that Section 2001(k)(1) is limited to Section 318 sales, but that  
17 whatever its geographic scope, it does not apply to cancelled or  
18 withdrawn sales or to sales offered prior to the enactment of  
19 Section 318.

20 Most of these issues have been presented in NFRC v. Glickman  
21 or in cases that have been or are likely to be consolidated with  
22 that case. On September 13, 1995, this Court held in NFRC v.  
23 Glickman that Section 2001(k) applies to all timber sales offered

24  
25 <sup>3/</sup> This statement is contradicted by Representative Taylor's  
26 later floor statement, which indicates that Section 2001(k)(1)  
27 applies only to "section 318 timber [that] . . . has been waiting  
since 1990, over 5 years. And this meets all the environmental  
requirements, . . . it has already been approved to move, but it  
has been held up for over 5 years . . .". 141 Cong. Rec. at  
H5558 (May 24, 1995).

1 in Washington and Oregon and that it is not limited to sales  
2 offered during the time period when Section 318 was in effect.  
3 This Court's October 17, 1995 injunction directs the federal  
4 defendants to award, release, and permit to be completed all  
5 timber sale contracts offered or awarded in Washington or Oregon  
6 forests between October 1, 1990 and July 27, 1995, except for  
7 sale units in which a threatened or endangered bird species is  
8 known to be nesting. Order (Oct. 17, 1995). That injunction is  
9 on appeal in expedited proceedings.

10 On that same day, this Court issued another order requiring  
11 the government to submit biweekly reports describing actions  
12 taken to award and release timber sales offered in Washington and  
13 Oregon prior to the enactment of the logging rider. Order (Oct.  
14 17, 1995). This second order specifically directs the government  
15 to identify timber sales offered before the enactment of Section  
16 318. Id. Recognizing that the Court had not yet decided whether  
17 Section 2001(k)(1) applies to such old sales or to withdrawn or  
18 enjoined sales, the Court expressly retained jurisdiction to  
19 resolve disagreements that might arise over whether particular  
20 sales must be released under Section 2001(k)(1). Id.

21 In their ensuing reports to the Court, the federal  
22 defendants have identified numerous sales that they cancelled or  
23 withdrew prior to the enactment of the logging rider, as well as  
24 timber sales that preceded Section 318's enactment. The agencies  
25 have already awarded and/or released many timber sales, both  
26 Section 318 and non-Section 318 sales, that they had withdrawn or  
27 cancelled before July 27, 1995 -- the new logging rider's

1 effective date.

2 On October 30, 1995, NFRC filed a motion for further  
3 clarification of this Court's October 17, 1995 injunction to  
4 specifically encompass three sales -- the Gatorson sale on the  
5 Colville National Forest and Tip and Tiptop on the Wenatchee  
6 National Forest -- which were enjoined by other federal courts  
7 when the Rescissions Act was enacted. On that same date, NFRC  
8 also filed a supplemental memorandum in support of its third  
9 motion for summary judgment arguing that Section 2001(k)(1) of  
10 the Rescissions Act requires the release of eight Section 318  
11 sales that had been enjoined by courts or withdrawn in the face  
12 of court proceedings -- Cowboy, Nita, South Nita, Last, and First  
13 on the Umpqua National Forest and Garden, Elk Fork, and Boulder  
14 Krab on the Siskiyou National Forest. Pilchuck Audubon is  
15 submitting a separate legal brief explaining why Section  
16 2001(k)(1) should not be construed to compel the release of sales  
17 that were enjoined or withdrawn in court proceedings. This  
18 motion also encompasses those sales because they were withdrawn  
19 prior to the enactment of the new logging rider.

20 On November 7, 1995, Western Timber Company filed a motion  
21 to intervene in NFRC v. Glickman. Western Timber Company seeks  
22 the release under Section 2001(k)(1) of a timber sale that had  
23 been enjoined when Section 318 was passed, was subject to  
24 statutorily mandated negotiations under Section 318, and was not  
25 permitted to be offered under Section 318 as a result of those  
26 negotiations. This motion encompasses that sale and others like  
27 it because they preceded Section 318 and were withdrawn prior to

1 July 27, 1995.

2 Plaintiffs have served discovery on the government seeking  
3 sufficient information about particular timber sales to determine  
4 which of the sales that have either been released or identified  
5 for potential release preceded Section 318 or were withdrawn  
6 prior to July 27, 1995. Plaintiffs' discovery also seeks to  
7 discern the meaning given by the federal agencies to various  
8 terms used in or in connection with Section 2001(k)(1).

9 Plaintiffs have asked that this case be consolidated with  
10 NFRC v. Glickman, and they have filed this motion expeditiously  
11 to enable it to be heard on December 12, 1995, along with the  
12 motions in NFRC v. Glickman dealing specifically with sales that  
13 were enjoined or withdrawn as a result of court proceedings.

14 ARGUMENT

15 The plain meaning of Section 2001(k)(1) does not require the  
16 award and release of previously cancelled timber sales, nor does  
17 it extend back in time before Section 318 was enacted. This  
18 reading is confirmed by the legislative history of the logging  
19 rider, which never envisioned that Section 2001(k)(1) would be  
20 read to resurrect old and cancelled timber sales.

21 I. SECTION 2001(k)(1)'S PLAIN MEANING IS LIMITED TO TIMBER  
22 SALE OFFERS OR AWARDS THAT STILL WERE VIABLE WHEN THE  
1995 LOGGING RIDER BECAME LAW

23 A. Section 2001(k)(1) Depends On Past Federal  
24 Agency Actions, Including Cancellation Of  
Timber Sales.

25 Section 2001(k)(1) is an unusual statute in that it draws  
26 its meaning entirely from the past actions of federal agencies.  
27 It does not independently identify tracts of land to be logged,

1 nor does it specify the environmental constraints or terms under  
2 which section 2001(k)(1) sales may be logged. Instead, Section  
3 2001(k)(1) reaches back into the past to define what timber sale  
4 contracts must go forward today. It defines the timber sale  
5 contracts subject to Section 2001(k)(1) as those offered or  
6 awarded in the past, and it provides that the originally  
7 advertised terms, volumes, and bid prices shall govern those  
8 sales.

9 When the Forest Service and BLM previously decided to  
10 proceed with particular timber sales, they were exercising power  
11 delegated by Congress to negotiate and enter into federal  
12 contracts. Congress may not ordinarily interfere with or control  
13 a federal agency's exercise of delegated contract functions. See  
14 Hechinger v. Metropolitan Washington Airports Authority, 36 F.3d  
15 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995); Lear  
16 Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988),  
17 irrelevant portion withdrawn en banc, 893 F.2d 205 (9th Cir.  
18 1989); Ameron v. Army Corps of Engineers, 809 F.2d 979 (3d Cir.  
19 1986), cert. dismissed, 488 U.S. 918 (1988).

20 Under its delegated authority, the Forest Service and BLM  
21 changed their minds and decided not to offer many of these sales.  
22 When the agencies decided not to offer a particular timber sale,  
23 no offer remained outstanding. A timber company could not compel  
24 the Forest Service or BLM to sell the timber. Region 8 Forest  
25 Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 808  
26 (11th Cir. 1993); Wind River Multiple-Use Advocates v. Espy, 835  
27 F. Supp. 1362, 1369 (D. Wyo. 1993). Moreover, where the agency

1 had cancelled the sale and rescinded offers, the former high  
2 bidder would no longer have any rights to an award, should the  
3 agency decide to go through with the sale. See, e.g., ATL, Inc.  
4 v. United States, 736 F.2d 677, 683 (Fed. Cir. 1984) (bidder has  
5 no right to a government contract).

6 Congress cannot tread lightly on the authority delegated to  
7 executive branch agencies. Since Section 2001(k)(1) identifies  
8 the timber sales by reference to contract offers made by federal  
9 agencies under their delegated contracting authority, it builds  
10 on the past actions of the agencies undertaken pursuant to that  
11 authority. In the absence of a clear congressional intent to  
12 override those past decisions, Section 2001(k)(1) should be  
13 construed to give credence to an agency's decision to exercise  
14 that delegated authority to cancel a sale. Accordingly, the  
15 phrase "timber sale contracts offered or awarded before that  
16 date" should encompass only those offers that remained  
17 outstanding on the date the 1995 logging rider was enacted.

18 B. Section 2001(k)(1) Applies Only To Timber  
19 Sale Contract Offers Or Awards That Remained  
20 Viable On July 27, 1995.

21 By its plain terms, Section 2001(k)(1) applies only to  
22 timber sale contract offers and awards. Specifically, Section  
23 2001(k) directs the Secretary concerned (of Agriculture for  
24 Forest Service lands or of Interior for BLM lands) "to award,  
25 release, and permit to be completed" previously offered or  
26 awarded timber sale contracts. In other words, Section 2001(k)  
27 directs the Forest Service and BLM to complete the contract award  
and permit performance; it does not compel the agencies to

1 initiate that process, which would need to be done if a previous  
2 offer had been cancelled.

3 Section 2001(k)(1) applies to timber sale contracts  
4 "offered" before the date the logging rider was enacted. The  
5 reach of Section 2001(k)(1), therefore, hinges on the meaning of  
6 the word "offer." Neither Section 2001(k) nor Section 318  
7 defines the term "offer," and the word "offer" is not a term of  
8 art in timber contracting procedures, particularly with respect  
9 to the acts of the government. However, under contract law, the  
10 word "offer" is commonly understood to involve a willingness to  
11 enter into a contract.

12 Under the Restatement of Contracts, an offer "is the  
13 manifestation of willingness to enter into a bargain, so made as  
14 to justify another person in understanding that his assent to  
15 that bargain is invited and will conclude it." Restatement of  
16 Contracts (2d), § 24 (Offer defined). Such manifestation of a  
17 willingness to enter into a bargain is not present if "the person  
18 to whom it is addressed knows or has reason to know that the  
19 person making it does not intend to conclude a bargain until he  
20 has made further manifestation of assent." Id. § 26 (Preliminary  
21 Negotiations).

22 In the timber contracting context, the government does not  
23 manifest a willingness to enter into a contract until after the  
24 advertisement, the auction, and the identification of a high  
25 bidder. An advertisement indicates that the Forest Service is  
26 interested in receiving offers from willing bidders. See  
27 Fenstermacher v. Philadelphia National Bank, 493 F.2d 333, 341

1 (3d Cir. 1974) (advertisements were mere invitations for bids).<sup>4/</sup>  
2 The identification of a high bidder is not synonymous with an  
3 offer (or an acceptance, for that matter) since the agency still  
4 retains the authority to decide not to enter into the contract.  
5 Cf. UCC § 2-328 (an auction with reserve enables auctioneer to  
6 withdraw goods at any time before announcing completion of sale).  
7 The agency may award the contract to the high bidder or it may  
8 reject all bids if it so chooses. 36 C.F.R. § 223.100; 43 C.F.R.  
9 § 5450.1(a). It is at some later stage either at or close to the  
10 actual award of the contract that the agency manifests a  
11 willingness to enter into a bargain. See Sixth Bradley  
12 Declaration ¶¶ 5, 6 (refers to purchaser's offer being accepted  
13 by BLM). If the high bidder accepts the award, a deal has been  
14 struck.

15 The government does not manifest such an intent until it  
16 provides notice of its intent to award a timber sale contract.  
17 As a result, many of the sales that have been released by the  
18 government under Section 2001(k)(1) or that have been identified  
19 for possible release, may, in fact, never have been offered by  
20 the government. The extent to which this is the case will be

21 \_\_\_\_\_  
22 4/ The bids received in response to such an advertisement might  
23 be considered an offer, but from the prospective timber  
24 purchaser, not the government. Cf. Well v. Schoeneweis, 427  
25 N.E.2d 1343, 101 Ill. App. 3d 254 (1981) (bid at auction  
26 constitutes an offer to buy); Outpost Cafe, Inc. v. Fairhaven  
27 Sav. Bank, 322 N.E.2d 183, 3 Mass. App. 1 (1975) (sale is not  
complete until auctioneer accepts highest bid). Indeed, BLM has  
stated that it must take action to "accept" the offers made by  
high bidders. Sixth Declaration of William L. Bradley ¶¶ 5, 6  
(Nov. 1, 1995), in NFERC v. Glickman. Because the term offer is  
not a clear description of the government's actions, the common  
understanding of the term "offer" -- a willingness to enter into  
a contract -- should control.

1 revealed in response to plaintiffs' outstanding discovery.

2 In any event, it is absolutely clear that no offer exists  
3 when the government has cancelled a timber sale. Any previous  
4 offer then becomes a nullity, and if the agency later wants to  
5 pursue that sale, it must start the contract formation process  
6 over with a new advertisement. See Croman Corporation v. United  
7 States, 31 Fed. Cl. 741 (1994). In these circumstances, the  
8 government is unwilling to enter into a bargain, and no one would  
9 be justified in assuming otherwise. See Restatement of Contracts  
10 (2d), § 24 (Offer defined). Particularly where the agency  
11 cancelled the sale because of a court challenge, a successful  
12 administrative appeal, a violation of the applicable forest plan,  
13 or consultations identifying unacceptable adverse effects on  
14 endangered or threatened species, any future reconfiguration of  
15 the sales would be vastly different from those previously planned  
16 and would be subject to a new offer. Oregon Natural Resources  
17 Council v. BLM, 996 F.2d 1226 (table); 23 Env'tl. L. Rep. 21,317  
18 (9th Cir. 1993).

19 As the Forest Service has explained:

20 Typically, if an offered sale is not awarded for any  
21 purpose, the bids are rejected and the "timber sale"  
22 ceases to be an entity. . . . The named timber sale may  
23 be reoffered as is, reconfigured, or abandoned.

24 Fifth Declaration of Jerry L. Hofer ¶ 4 (Nov. 15, 1995), in NFRC  
25 v. Glickman. Similarly, under BLM procedures, "when the award is  
26 not accepted by the high bidder within a reasonable amount of  
27 time, the sale is advertised and reoffered." Sixth Declaration  
of William L. Bradley ¶ 5 (Nov. 1, 1995). This may occur because  
the high bidder no longer wants the contract or because the BLM

1 no longer wants to sell the particular timber sale in its  
2 original form. 43 C.F.R. § 5450.1(a). As time passes, old  
3 timber sales no longer meet agency requirements for timber sale  
4 contracts because, for example, sale markings or the timber  
5 itself has deteriorated, or the forest plan has been amended.  
6 Fifth Hofer Decl. ¶ 8; Declaration of Robert W. Williams ¶ 11  
7 (Oct. 13, 1995) (Locust and Nicholson Salvage I violate forest  
8 plan amendments). In addition, with the passage of time, a  
9 cancelled sale may be reconfigured and sold, in whole or in part,  
10 as another sale. Sixth Bradley Decl. ¶ 7; Sixth Hofer Decl. ¶ 8.  
11 Or the agency may decide never to proceed with the sale because  
12 it, Congress, or the courts have decided to prohibit logging the  
13 particular area as envisioned in the original sale terms.

14 For example, the Forest Service rejected all bids and agreed  
15 not to proceed with the Boulder Krab sale on the Siskiyou  
16 National Forest without making a new decision and holding a new  
17 auction. Settlement Stipulation (Mar. 20, 1991), in Friends of  
18 Elk River v. Forest Service, No. 90-969-PA. After it made this  
19 decision, the area was designated a late successional old-growth  
20 reserve and a key watershed under Option 9 off-limits to logging.  
21 As a result, the Forest Service abandoned all plans to log this  
22 area. The Forest Service closed and obliterated the road that  
23 would have led to the Boulder Krab sale area, and it  
24 reconstructed the old hiking trail that would have been converted into  
25 the principal logging road for the Boulder Krab sale.  
26 Declaration of Jim Rogers (Exhibit 3 to Declaration of Patti  
27 Goldman (Nov. 20, 1995)). The Forest Service's actions

1 unequivocally demonstrate that it is not, and for some time has  
2 not been, willing to offer the Boulder Krab timber sale.

3 Similarly, in 1991, the Forest Service advertised the Blue  
4 Ford timber sale on the Fremont National Forest. The Klamath  
5 Tribe appealed the sale because it threatened to harm the mule  
6 deer herds on which members of the tribe depend for subsistence  
7 hunting. The Forest Service found merit in the appeal and  
8 decided not to proceed with the sale. Forest Service, Blue Ford  
9 Timber Sale: Summary of Events (Exhibit 2). The Forest Service  
10 rejected all bids and cancelled the sale. See also Williams  
11 Declaration ¶ 6 (describing other timber sales cancelled as a  
12 result of administrative appeals). It has never since proposed  
13 going forward with this sale.

14 The Whitt's End timber sale on the BLM's Eugene District met  
15 a similar fate. The Forest Service advertised the sale and  
16 identified a high bidder in 1990. However, the sale became the  
17 subject of Fish and Wildlife consultations concerning its effects  
18 on the northern spotted owl. The Fish and Wildlife Service's  
19 biological opinion concluded that the sale would jeopardize the  
20 owl's survival. Ultimately, the Forest Service terminated the  
21 sale in November 1993 and removed the sale from its active sales  
22 database in April 1994. Letter to Seneca Sawmill Co. from Coast  
23 Range Resource Area (Nov. 15, 1993) (Exhibit 3); Notes to File  
24 (April 5, 1994) (Exhibit 4); see also Williams Declaration ¶¶ 7-8  
25 (describing timber sales cancelled because they would have  
26 unacceptable adverse effects on threatened salmon stocks).

27 Likewise, during the mid-1980s, the Forest Service withdrew

1 the Auger Creek timber sale on the Fremont National Forest  
2 because it had failed to consider the effects of the sale on the  
3 Deadhorse Rim roadless area. When the Forest Service proposed  
4 the sale again in 1989, the Oregon Natural Resources Council and  
5 Portland Audubon Society appealed the sale because it would log  
6 the last remnants of this area's natural ecosystem before the  
7 Forest Service decided whether to preserve this rare, pristine  
8 site as a Research Natural Area. The Forest Service granted the  
9 appeal, cancelled the sale, and convinced this Court and the  
10 Ninth Circuit that a lawsuit challenging the sale had become moot  
11 and that any resurrection of the sale would constitute a new sale  
12 that could only be challenged in a new lawsuit based on a new  
13 administrative record. Oregon Natural Resources Council v.  
14 Grossarth, No. 89-6451-HO (D. Or. Jan. 15, 1991), aff'd, 979 F.2d  
15 1377 (9th Cir. 1992). The Forest Service has since established  
16 an Auger Creek Research Natural Area, which, along with other  
17 current environmental standards, precludes logging the old Auger  
18 Creek timber sales in their original forms.

19 In sum, the Forest Service and BLM cancelled the timber  
20 sales at issue for good reason. Many of the sales were cancelled  
21 because of a court challenge, a successful administrative appeal,  
22 a violation of the applicable forest plan, or consultations  
23 identifying unacceptable adverse effects on endangered or  
24 threatened species. The Forest Service and BLM were unwilling to  
25 enter into the old, cancelled contracts. As a result of the  
26 cancellation, no timber sale contract offers remained outstanding  
27 when the new logging rider was enacted, and Section 2001(k)(1)

1 does not reach these sales.

2 C. Under Section 318, Withdrawn Offers No Longer  
3 Constitutes Offers.

4 Section 318 supports reading the term offered to exclude  
5 timber sales that have been withdrawn. For example, the  
6 conference report to Section 318 made it absolutely clear that  
7 "[s]ales offered under this section but not awarded and withdrawn  
8 after October 1, 1990 under normal Forest Service or BLM  
9 procedures may not be re-offered in subsequent fiscal years under  
10 the terms of this section." H. Conf. Rep. No. 101-264, 101st  
11 Cong., 1st Sess. 87 (1989). Accordingly, if the Forest Service  
12 or BLM wanted to proceed with such a sale, it would have to begin  
13 anew under applicable environmental laws, contracting procedures,  
14 and administrative and judicial review provisions.

15 Similarly, Section 318(f)(1) established a procedure for  
16 permitting advertisement of a group of sales "which had been  
17 prepared for offer in fiscal year 1989 and which contain at least  
18 40 acres of suitable spotted owl habitat." Pursuant to that  
19 provision, the plaintiffs in a then-pending lawsuit reached an  
20 agreement with the Forest Service identifying the particular  
21 sales in this category that would be advertised under Section  
22 318. Under Section 318(f)(2), the sales "not contained in the  
23 agreement authorized by subsection (f)(1) of this section shall  
24 not be offered for sale in fiscal year 1990." The Forest Service  
25 could, however, "offer for sale after fiscal year 1990 any timber  
26 volume which was not sold during fiscal year 1990 pursuant to  
27 subsection (f) of this section." H. Conf. Rep. No. 101-264,  
supra.

1 Interestingly, many, if not most, of the sales that were  
2 subject to the negotiations undertaken pursuant Section 318(f)(1)  
3 had been advertised and even auctioned in 1989 before enactment  
4 of Section 318. When an agreed-upon list emerged, the Forest  
5 Service rejected all bids on those sales not selected, thereby  
6 cancelling these sales. No offers remained outstanding. The  
7 high bidders could not in any way bind the government, nor did  
8 the government have any contract liability. No one could have  
9 understood that the government was willing or even permitted to  
10 make an offer for these sales. Instead, if the government ever  
11 chose to pursue these sales, it would have to begin again with a  
12 new decision and advertisement that could, if the government was  
13 willing, lead to a timber sale contract.<sup>5/</sup>

14 D. Section 2001(k)(1)'s Legislative History  
15 Demonstrates that Congress Never Intended It  
16 To Resurrect Cancelled Timber Sales.

17 The new logging rider's legislative history fully supports  
18 such a reading. Throughout the legislative consideration of the  
19 logging rider, congressional reports and Members of Congress  
20 described Section 2001(k) as pertaining to timber sales that were  
21 still in the timber pipeline, but had been held up consultations  
22 over the sales' effects on threatened and endangered species.

---

23 <sup>5/</sup> This construction is also warranted because Section 2001(k)  
24 specifically refers to timber sales subject to Section 318.  
25 "Subject to" generally means governed by. It, therefore, would  
26 exclude from Section 2001(k) those sales that violated Section  
27 318's requirements. Plaintiffs recognize that this Court has  
adopted a contrary interpretation in NFRC v. Glickman, No. 95-  
6244-HO (D. Or. Sept. 13, 1995). Plaintiffs raise this point in  
order to preserve it.

1 In addition, the legislative history repeatedly stresses  
2 that Section 2001(k) will eliminate potential government  
3 liability for cancelling such timber sale contracts. In other  
4 words, it applies to sales that have resulted in contracts where  
5 the government would be exposed to financial obligations in the  
6 event of cancellation.

7 Finally, the legislative history is filled with assurances  
8 that the President's Northwest Forest Plan had assumed that the  
9 sales covered by Section 2001(k)(1) would be logged. This is  
10 expressly not the case for enjoined sales, and the President's  
11 Plan also did not make such an unconditional assumption for many  
12 other sales. Third Bradley Declaration ¶ 5 (Oct. 13, 1995)  
13 (President's Plan assumed certain sales would comply with the  
14 Plan's standards and guidelines and the Endangered Species Act;  
15 when 11 sales fell short of the Endangered Species Act, they were  
16 cancelled). Nothing in the legislative history suggests that  
17 Congress thought it was resurrecting cancelled timber sales or  
18 that it was mandating that the Forest Service go forward with  
19 sales that had been enjoined by the courts.

20 This understanding is underscored in a letter recently sent  
21 by 14 Members of Congress, including the principal sponsors of  
22 the logging rider, defending Section 2001(k). These Members make  
23 it abundantly clear that Section 2001(k) applies only to sales  
24 "that have already been sold and for which the government has  
25 outstanding contract liability." Letter to President Clinton  
26 from 14 Members of Congress at 1 (Nov. 6, 1995) (Exhibit 5). It  
27 does not, in their view, extend to sales for which the government

1 has "already incurred financial liability associated with  
2 cancelling already-sold timber sales." *Id.* This letter, along  
3 with the unbroken explanation for Section 2001(k)(1) in Congress,  
4 confirms that Section 2001(k)'s proper scope does not encompass  
5 cancelled or withdrawn timber sales because no offer was viable  
6 with respect to such sales when the new logging rider was  
7 enacted.

8 E. Reading Section 2001(k) to Resurrect  
9 Cancelled Timber Sales Would Lead to Patently  
10 Absurd Results.

11 Any other reading would lead to absurd results. First, the  
12 absurdity of a broader reading has already been demonstrated by  
13 the government's reports to this Court in NFRC v. Glickman. Some  
14 sales have been cancelled and sold and even logged in a different  
15 form. Sixth Bradley Declaration ¶¶ 7-8. Others cannot be  
16 awarded because the high bidder is out of business. Fourth Hofer  
17 Declaration, Exhibit 1 at 5-6 (Nov. 8, 1995). Still others have  
18 been barred by court orders or settlement stipulations. Williams  
19 Declaration ¶ 5. There is no indication that Congress sought to  
20 create such a morass or that it envisioned precipitating a  
21 separation of powers confrontation over sales withdrawn in the  
22 face of court proceedings.<sup>6/</sup>

23 6/ Section 2001(k)(1) contains a cryptic reference to the  
24 return of a high bidder's bid bond. However, that statement does  
25 not tie the return of the bid bond to any particular  
26 circumstances. Nor is there any indication that Congress  
27 ascribed any particular meaning to this phrase. It is,  
therefore, too obscure and thin a reed on which to hang a  
draconian interpretation that rewrites history, eradicates past  
court orders, and undoes myriad executive branch decisions.

1 Second, the 45-day time frame established for releasing  
2 these sales strongly suggests that Congress did not mean to  
3 include cancelled and enjoined timber sales in the Section  
4 2001(k)(1) mandate. Section 2001(k)(2) creates an exception to  
5 the release of sales mandated in section 2001(k)(1) for sale  
6 units where threatened or endangered bird species are known to be  
7 nesting. This provision makes sense when applied to the Section  
8 318 timber sales that had been held up for consultations over  
9 their effects on threatened marbled murrelets or spotted owls.  
10 Surveys have been underway for some time in these sale areas.  
11 However, the 45-day time frame is completely unworkable for sales  
12 that had been cancelled. For example, the Boulder Krab sale is  
13 in the same old-growth stand as the first marbled murrelet nest  
14 actually observed in Oregon. Rogers Declaration ¶¶ 11-14. It is  
15 extremely likely to be an important nesting area for marbled  
16 murrelets. Id. ¶ 14. However, since the sale was not in the  
17 timber pipeline, adequate surveys have not been undertaken.  
18 Because the marbled murrelet surveys take two years, cancelled  
19 sales, like Boulder Krab, might be released because insufficient  
20 knowledge exists to ascertain whether they are nesting areas.  
21 Ignorance would require release. There is no indication that  
22 Congress had such a harsh result in mind.

23 Third, construing Section 2001(k) to compel logging of all  
24 sales offered in Washington and Oregon without any environmental  
25 standards or judicial review would eradicate the rider's  
26 preservation of Option 9's environmental standards and some  
27 opportunities for judicial review of such sales. See Section

1 2001(d), (f). Many of the cancelled sales, particularly those  
2 implicated by Section 318, are in areas that are now governed by  
3 Option 9. When the President acceded to the revised version of  
4 the logging rider, he emphasized that the rider provides "the  
5 Administration with the flexibility and authority to carry this  
6 program out in a manner that conforms to our existing  
7 environmental laws and standards . . . [and] preserve[s] our  
8 ability to implement the current forest plans and their standards  
9 and to protect other natural resources." Letter to Honorable  
10 Newt Gingrich from President Clinton (June 29, 1995) (Exhibit 6).  
11 Expanding Section 2001(k) to resurrect cancelled timber sales  
12 that could not go forward under Option 9 is totally at odds with  
13 this understanding. It also clashes with the tenet that repeals  
14 by implication are strongly disfavored, particularly in  
15 appropriations riders. Tennessee Valley Authority v. Hill, 437  
16 U.S. 153, 190 (1978).

17 Courts do not interpret statutes to reach such patently  
18 absurd results. Public Citizen v. Department of Justice, 491  
19 U.S. 456 (1989); Church of the Holy Trinity v. United States, 143  
20 U.S. 457 (1892). Even if Section 2001(k)(1) could be read to  
21 resurrect cancelled timber sales, such a reading is strained. It  
22 would collide with both the uniform objectives articulated for  
23 Section 2001(k) and the provision's most logical reading.

24 Because Section 2001(k)(1) directs the Forest Service and  
25 the Bureau of Land Management to go forward with timber sale  
26 contracts offered some time ago, it defines what must be done  
27 entirely by reference to past agency actions. Since the statute

1 itself borrows from the past, it should be read to take the past  
2 as it, in fact, occurred. It, therefore, extends only to offers  
3 that still qualified as offers on July 27, 1995.

4 II. SECTION 2001(k)(1)'S PLAIN MEANING IS LIMITED TO TIMBER  
5 SALES THAT WERE ORIGINALLY OFFERED OR AWARDED AFTER  
6 SECTION 318 WAS ENACTED

7 section 2001(k)(1) defines the sales that must be released  
8 by an express reference to Section 318, a law that became  
9 effective on October 23, 1989. In NFRC v. Glickman, this Court  
10 held that the reference to Section 318 identifies units of forest  
11 that are subject to Section 2001(k). Prior to October 23, 1989,  
12 Section 318 did not exist. Therefore, it defined neither forest  
13 units nor timber sale contracts prior to that time. For this  
14 reason, Section 2001(k)(1) does not, on its face, apply to timber  
15 sale contracts offered or awarded prior to October 23, 1989.

16 Section 2001(k)'s legislative history compels such a  
17 reading. As discussed above, only two statements in the  
18 legislative history allude to the time frame covered by Section  
19 2001(k) and both evince a clear intent not to go back before  
20 1989. First, the Conference Report clearly states that "[t]he  
21 bill releases all timber sales which were offered for sale  
22 beginning in fiscal year 1990 to the date of enactment . . ."  
23 H. Conf. Rep. No. 104-124, at 137. Second, Representative Taylor  
24 at one point described the sales covered by Section 2001(k)(1) as  
25 those offered under Section 318, in fiscal year 1991, or more  
26 recently. 141 Cong. Rec. H3233 (Mar. 15, 1995). While he  
27 subsequently contradicted this statement, his later statement  
supported reading Section 2001(k) to reach only Section 318

1 timber sales, i.e., those offered in fiscal year 1990. 141 Cong.  
2 Rec. at H5558 (May 24, 1995). Nothing in Section 2001(k)'s  
3 legislative history remotely supports reaching further back in  
4 time.

5 Indeed, such a construction would produce particularly  
6 egregious results. First, it may be impossible to identify and  
7 reconstruct timber sales offered more than five years ago.  
8 Indeed, the Forest Service contends that it does not maintain  
9 records of timber sales for more than five years. Fifth Hofer  
10 Decl. ¶ 10.

11 Second, many old sales are in areas that have since been set  
12 aside for National Parks, National Monuments, and statutorily  
13 designated Wilderness Areas. Congress could not possibly have  
14 intended to mandate logging sales in these areas, particularly  
15 given the controversy over the possibility that the rider's  
16 salvage provisions might permit logging in de facto wilderness  
17 areas that had not yet been designated as such by Congress. See,  
18 e.g., 141 Cong. Rec. H3234 (Mar. 15, 1995) (Rep. Williams); id.  
19 at H3235 (Rep. Riggs).

20 Third, many old timber sales may no longer exist. For  
21 example, some may have been logged as part of other sales, and  
22 others may have been covered in ash as a result of the eruption  
23 of Mount St. Helens.

24 Fourth, it is inconceivable that Congress intended to give  
25 away the nation's forests at bargain basement, even depression  
26 era, prices, particularly in budget-cutting legislation.

27 Finally, the resurrection of timber sales that were not

1 permitted to proceed under Section 318(f)(1) directly violates  
2 that very provision. Under Section 318(f)(1), sales that were  
3 not selected for release by the plaintiffs in a pending lawsuit  
4 could not be offered in fiscal year 1990. These sales could  
5 later proceed, i.e., after fiscal year 1990, only if the agency  
6 made a new decision and a new offer. Since that has never  
7 happened for most, if not all, of these sales, the sales cannot  
8 be resurrected under Section 2001(k)(1). To avoid this clash  
9 with Section 318, and the other absurd results that would flow  
10 from a broader reading, Section 2001(k) should be construed to  
11 apply only to timber sales offered after the enactment of Section  
12 318.

### 13 III. A PRELIMINARY INJUNCTION SHOULD ISSUE

14 In the Ninth Circuit, a court must consider three factors in  
15 ruling on a motion for a preliminary injunction: (1)  
16 plaintiffs' likelihood of success on the merits; (2) whether the  
17 balance of irreparable harm favors plaintiff; and (3) whether the  
18 public interest favors issuance of the injunction or restraining  
19 order. Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668,  
20 674 (9th Cir. 1988). In this case the public interest, the  
21 balance of irreparable harm, and plaintiffs' strong likelihood of  
22 success on the merits, all favor issuance of a preliminary  
23 injunction.

#### 24 A. Plaintiffs Are Likely To Succeed On The Merits.

25 Plaintiffs have briefed the merits of their argument in this  
26 memorandum. They have demonstrated that the plain and best  
27 reading of Section 2001(k)(1) makes it applicable only to offers

1 that were initially made after Section 318 was enacted and that  
2 remained outstanding when Section 2001(k) became effective. It,  
3 therefore, does not apply to cancelled sales or to sales  
4 initially offered before Section 318 came into existence.

5 B. The Balance Of Irreparable Harm Favors Plaintiffs.

6 Plaintiffs will suffer real, immediate, and irreparable harm  
7 if no preliminary issues. The old-growth trees that will be cut  
8 cannot be replaced. The loss of valuable habitat for various  
9 species, including many threatened or endangered species, cannot  
10 be reversed. These losses constitute irreparable harm in the  
11 purest sense. See Amoco Production Co. v. Village of Gambell,  
12 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature,  
13 can seldom be adequately remedied by money damages and is often  
14 of long duration, i.e., irreparable.").

15 Moreover, because this case presents a question concerning  
16 the scope of Section 2001(k)(1), the Court's resolution of this  
17 motion will establish whether these sales fall within Section  
18 2001(k)(1). A determination in plaintiffs' favor necessarily  
19 should be accompanied by an injunction since there is then no  
20 right to these sales under Section 2001(k)(1) and awarding,  
21 releasing, or logging them is in violation of the law. See  
22 Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1069 (W.D. Wa.  
23 1991) (enforcing government lawfulness invokes a public interest  
24 of the highest order).

25 ///

26 ///

27 ///

CONCLUSION

1  
2 For all of these reasons, plaintiffs respectfully request  
3 that the Court declare that Section 2001(k) is inapplicable to  
4 timber sales cancelled or withdrawn prior to July 27, 1995, and  
5 to sales offered before Section 318 became effective. This Court  
6 should grant plaintiffs' motion for preliminary injunctive relief  
7 and prohibit the federal defendants from awarding, releasing, or  
8 permitting to be completed timber sale contracts (1) offered  
9 before October 23, 1989, or (2) cancelled or withdrawn prior to  
10 July 27, 1995.

11 DATED this 20th day of November, 1995.

12 Respectfully submitted,

13  
14   
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14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE DISTRICT OF OREGON

16 PILCHUCK AUDUBON SOCIETY, OREGON )  
 17 NATURAL RESOURCES COUNCIL, PORTLAND )  
 18 AUDUBON SOCIETY, BLACK HILLS AUDUBON )  
 19 SOCIETY, WESTERN ANCIENT FOREST )  
 20 CAMPAIGN, HEADWATERS, COAST RANGE )  
 21 ASSOCIATION, FRIENDS OF THE ELK RIVER, )  
 22 LEAVENWORTH AUDUBON ADOPT-A-FOREST, )  
 23 NORTH CENTRAL WASHINGTON AUDUBON )  
 24 SOCIETY, KNUT and ANN AAGAARD, ALPINE )  
 25 LAKES PROTECTIVE SOCIETY, SEATTLE )  
 26 AUDUBON SOCIETY, MITCHELL SMITH, and )  
 27 WASHINGTON ENVIRONMENTAL COUNCIL, )

Civ. # 95-06384-TC

DECLARATION OF  
PATTI GOLDMAN

Plaintiffs,

v.

28 DAN GLICKMAN, Secretary of Agriculture, )  
 29 BRUCE BABBITT, Secretary of Interior, )  
 30 UNITED STATES FOREST SERVICE, and )  
 31 BUREAU OF LAND MANAGEMENT, )

Defendants.

I, Patti Goldman, hereby declare as follows:

1. I am lead counsel in this case. I am filing this  
 declaration to inform the Court of reasons why expedition

1 consideration of plaintiffs' motion for preliminary injunction is  
2 necessary.

3 2. By letter dated September 27, 1995, Jack Ward Thomas,  
4 Chief of the U.S. Forest Service, told regional foresters not to  
5 award timber sales that had been enjoined or delayed by court  
6 action. Exhibit 1. This memorandum referred to an attached  
7 table 3 that identified the Cowboy, Nita, South Nita, Last,  
8 First, Garden, Boulder Krab, and Elk Fork timber sales in the  
9 category corresponding to this instruction. This memorandum  
10 elaborated as follows:

11 When the matter of the outstanding injunctions is  
12 resolved, we will reassess these timber sales. For  
13 those sales listed on Table 3 that are not currently  
14 enjoined but are delayed as a result of other court  
15 actions, the Department of Justice will begin the  
16 process of providing notification to the relevant court  
and parties to the litigation of the applicability of  
Section 2001(k) and the Administration's proposal to  
proceed with these sales upon resolution of any  
outstanding issues. Therefore, do not award these  
sales until these legal matters are resolved.

17 Id. (emphasis added). This memorandum was provided to the Court  
18 in NFRC v. Glickman.

19 3. On October 3, 1995, several of the plaintiffs in Seattle  
20 Audubon Society v. Evans, No. 89-160WD, filed a motion to clarify  
21 and enforce the injunctions and court orders issued in that case  
22 in 1990 and 1991. This motion involved the Cowboy, Nita, South  
23 Nita, Garden, First, and Last timber sales. The plaintiffs  
24 initially noted the motion for October 20, 1995 to obtain a  
25 prompt resolution before the Forest Service might decide to go  
26 forward with any of the sales. However, the government sought  
27 extensions of time and did not file its response until October

1 25, 1995.

2 4. While this motion was pending, the Justice Department  
3 notified the courts and parties to Seattle Audubon Society and  
4 Friends of Elk River v. Forest Service, No. 90-969-PA, that the  
5 Forest Service would begin taking steps to award and release the  
6 sales at issue in these cases upon the expiration of 15 days from  
7 the date of the notice.

8 5. The government's delays in responding to the Seattle  
9 Audubon Society motion made it unlikely that Judge Dwyer would  
10 decide that motion before the expiration of the 15-day period.  
11 The Justice Department never indicated that the Forest  
12 Service would proceed with any of the sales at issue in that  
13 case, even the withdrawn sales, before a court ruled on our  
14 motion.

15 6. On October 30, 1995, Northwest Forest Resource Council  
16 ("NFRFC") filed a motion for further clarification of this Court's  
17 October 17, 1995 injunction to specifically encompass three sales  
18 -- the Gatorson sale on the Colville National Forest and Tip and  
19 Tiptop on the Wenatchee National Forest -- which were enjoined by  
20 other federal courts when the Rescissions Act was enacted. On  
21 that same date, NFRFC filed a supplemental memorandum in support  
22 of its third motion for summary judgment arguing that Section  
23 2001(k)(1) of the Rescissions Act requires the release of eight  
24 Section 318 sales that had been enjoined by courts or withdrawn  
25 in the face of court proceedings -- Cowboy, Nita, South Nita,  
26 Last, and First on the Umpqua National Forest and Garden, Elk  
27 Fork, and Boulder Krab on the Siskiyou National Forest. NFRFC

1 asked that these issues be decided on November 7, 1995.

2 7. At a hearing held on November 1, 1995 before Judge  
3 Dwyer, the Justice Department asked Judge Dwyer to stay the  
4 pending motion to clarify and enforce pending the outcome of  
5 proceedings before this Court in NFRC v. Glickman. The industry  
6 intervenors in Seattle Audubon Society asked Judge Dwyer to  
7 transfer the motions to this Court. The key justification for  
8 these motions to stay and transfer was the pendency of these  
9 issues before this Court and the likelihood of a resolution in  
10 the very near future. The industry intervenors expressly  
11 indicated that the issues would be heard on November 7, 1995.  
12 The Justice Department never suggested that the delay in  
13 resolving these issues might allow them to go forward with some  
14 of the sales at issue in NFRC's motion and filings in NFRC v.  
15 Glickman.

16 8. On November 2, 1995, the environmental organizations  
17 participating as amici in NFRC v. Glickman, most of whom are  
18 plaintiffs in Pilchuck Audubon, several of whom sought  
19 enforcement of the orders in Seattle Audubon Society, and one of  
20 whom was a plaintiffs in Friends of Elk River, asked this Court  
21 to refrain from deciding the issues raised in NFRC's October 30,  
22 1995 filings because the parties who obtained the court orders  
23 were not parties in NFRC v. Glickman and they should be given an  
24 opportunity to be heard. This filing also informed both the  
25 Court and the parties that we had recently been asked to  
26 represent some of the organizations that previously had  
27 challenged the Elk Fork and Boulder Krab timber sales on the

1 Siskiyou National Forest. Our filing stated that we were in the  
2 process of collecting the pertinent court records and deciding  
3 how to represent these organizations as full parties in  
4 proceedings that would determine the fate of these sales. We  
5 also explained that we could not assess our options within the  
6 expedited schedule proposed by NFRFC.

7 9. The federal defendants also asked the Court for  
8 additional time in which to respond to the significant issues  
9 raised in NFRFC's October 30, 1995 filings, should the Court  
10 decide to reach them. The Justice Department never told this  
11 Court that it might proceed with some of the sales in the  
12 interim.

13 10. On November 3, 1995, Judge Dwyer accepted the  
14 government's suggestion and stayed the motion to clarify and  
15 enforce in the Seattle Audubon case pending the outcome of  
16 related proceedings before this Court. However, Judge Dwyer  
17 indicated that any party could place the motion on the Court's  
18 calendar with one week's notice. On that same day, I called  
19 Michelle Gilbert, a Justice Department attorney, and asked the  
20 Forest Service to delay awarding Elk Fork and Boulder Krab until  
21 resolution of these issues by the courts. She called me back and  
22 told me that the Forest Service had prepared award letters and  
23 still planned to send them out. I understood from her statement  
24 that the letters had not yet gone out, but that neither she nor  
25 the Forest Service would ensure that they not go out.

26 11. On November 3, 1995, the Forest Service sent letters to  
27 the high bidders on the Elk Fork and Boulder Krab Sales. These

1 letters inform the high bidders that "the issue of whether or not  
2 this sale is subject to that law is currently in litigation. If  
3 a court rules that this sale is not subject to Public Law 104-19,  
4 this award and any contract executed as a result of this award,  
5 is null and void." Exhibits 12 and 13 to Opposition to NFRC's  
6 Supplemental Memorandum in Support of Its Third Motion for  
7 Summary Judgment and NFRC'S Motion for Further Clarification, in  
8 NFRC v. Glickman.

9 12. On November 6, 1995, I was retained by Friends of Elk  
10 River to seek to preserve the results obtained in the prior  
11 litigation. On that same day, I sent a letter to Ellen Athas,  
12 Michelle Gilbert, and Wells Burgess, asking the Forest Service to  
13 refrain from awarding or releasing timber sales that were  
14 previously enjoined or withdrawn in the face of court challenges.  
15 Exhibit 2. I pointed out that "[w]eighty constitutional and  
16 statutory construction issues await judicial determination. To  
17 award and release these sales before the courts decide those  
18 issues would risk creating property rights and allowing old-  
19 growth standard to be cut before it is clear that Congress  
20 intended that result or that the Constitution permits it." Id.  
21 I have received no response to my letter.

22 13. On November 7, 1995, I filed the complaint in this case  
23 on behalf of Friends of Elk River, Oregon Natural Resources  
24 Council, and others challenging the award or release of cancelled  
25 and withdrawn timber sales and of timber sales originally offered  
26 prior to the enactment of Section 318. Pilchuck Audubon Society  
27 v. Glickman, No. 95-6384-TC (filed Nov. 7, 1995).

1 14. At a court hearing in NFRC v. Glickman that same day, I  
2 asked Justice Department Attorney Michelle Gilbert to ensure that  
3 no on-the-ground harm would occur before the fate of Elk Fork and  
4 Boulder Krab could be determined by the courts.

5 15. I have since discussed this matter with Jeff Garver,  
6 the Justice Department lawyer representing the federal defendants  
7 in Pilchuck Audubon. He has assured me that the Forest Service  
8 will not proceed with the Last and First timber sales, but he has  
9 refused to give me any comparable assurance with respect to Elk  
10 Fork and Boulder Krab. Instead, he has told me that a meeting  
11 concerning Boulder Krab is scheduled this week, and that the  
12 operating plan can be filed after that. Although it may take a  
13 few days to process the paperwork, he has told me that nothing  
14 will prevent the high bidder from beginning to build roads and  
15 cut trees at that time.

16 16. I have repeatedly asked Justice Department lawyers to  
17 ensure that no on-the-ground actions will take place until the  
18 courts rule on these sales. There is no basis for treating the  
19 Elk Fork and Boulder Krab sales differently from the First and  
20 Last sales. Yet the Forest Service has agreed to take no further  
21 action on First and Last. Had the Justice Department informed  
22 Judge Dwyer that some sales in the case before him would proceed  
23 in the absence of a court ruling, he might well have decided the  
24 issue weeks ago. To avoid this outcome by delaying the First and  
25 Last sales while proceeding with Elk Fork and Boulder Krab is  
26 disingenuous at best.

27 17. Attached hereto as Exhibit 3 is the Declaration of Jim

1 Rogers. Jim Rogers has reviewed his declaration. However, due  
2 to a death in his family, he has been unable to sign it. I will  
3 file the executed declaration once we receive it.

4 Pursuant to 28 U.S.C. § 1746, I declare under penalty of  
5 perjury that the foregoing is true and correct.

6 Executed this 20th day of November, 1995.

7   
8 Patti Goldman  
Patti Goldman

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10 518PAG.DEC

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8 MARIANNE DUGAN (OSB #93256)  
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 10 1216 Lincoln Street  
 11 Eugene, OR 97401  
 12 (503) 485-2471

13 Local Counsel for Plaintiffs

14 IN THE UNITED STATES DISTRICT COURT  
 15 FOR THE DISTRICT OF OREGON

16 PILCHUCK AUDUBON SOCIETY, OREGON )  
 17 NATURAL RESOURCES COUNCIL, )  
 18 PORTLAND AUDUBON SOCIETY, BLACK )  
 19 HILLS AUDUBON SOCIETY, WESTERN )  
 20 ANCIENT FOREST CAMPAIGN, )  
 21 HEADWATERS, COAST RANGE )  
 22 ASSOCIATION, FRIENDS OF THE ELK )  
 23 RIVER, LEAVENWORTH AUDUBON ADOPT- )  
 24 A-FOREST, NORTH CENTRAL WASHINGTON )  
 25 AUDUBON SOCIETY, and KNUT and ANN )  
 26 AAGAARD, )  
 27 Plaintiffs, )

Civil No. 95-06384-TC

DECLARATION OF JIM ROGERS

28 v. )  
 29 )  
 30 DAN GLICKMAN, Secretary of )  
 31 Agriculture, BRUCE BABBITT, )  
 32 Secretary of Interior, UNITED )  
 33 STATES FOREST SERVICE, and BUREAU )  
 34 OF LAND MANAGEMENT, )  
 35 )  
 36 Defendants. )

37 I, Jim Rogers, declare as follows:

38 1. I am a founding member of Friends of Elk River, which  
 39 was founded to protect the fisheries of the Elk River, and I was

1 also a founding member of its predecessor organization.

2 2. I am a professional forester. In 1964, I earned a B.S.  
3 degree in forestry from Syracuse University and a B.S. from State  
4 University of New York in forest land management. For the past  
5 thirty years, I have worked for the U.S. Forest Service and for  
6 the timber industry. I was a forester for the Forest Service  
7 and timber manager for several mills. I am currently a  
8 consulting forester, working primarily for private landowners  
9 managing their own timber stands. A copy of my resume is  
10 attached as Attachment C.

11 3. I am familiar with the North Fork of the Elk River where  
12 the Elk Fork and Boulder Krab timber sales are located because  
13 one of the companies that I worked for logged timber in that  
14 area. I observed and became concerned about the effects of  
15 clearcut logging in that watershed because the strong winds in  
16 that area result in a lot of timber blowing down and impacting  
17 the fisheries of the North Fork.

18 4. I, along with others, advocated to have Grassy Knob, an  
19 area of the Elk River downstream from the North Fork, designated  
20 as wilderness area. In 1984, it was designated as a wilderness  
21 area. During the late-1980s, Dr. Gordon Reeves, a fisheries  
22 scientist with the Forest Service, headed a fisheries study of  
23 the Elk River watershed. Dr. Reeves found that the North Fork of  
24 the Elk River is unique because it is producing more salmon than  
25 any river of comparable size outside of Alaska, particularly coho  
26 salmon. He recommended keeping the North Fork intact and free of  
27 logging.

1 5. In 1988, the Elk River was designated as a National Wild  
2 and Scenic River to protect the fisheries and water quality.

3 6. In 1990, the Forest Service proposed to go forward with  
4 the Elk Fork and Wolkrab timber sales in the North Fork of the  
5 Elk River. The original Wolkrab sale was named by reversing the  
6 name of the mountain at the head of the North Fork -- Barklow  
7 Mountain. The Forest Service then combined the Wolkrab and Bray  
8 Boulder sales and called that combined sale the Boulder Krab  
9 sale.

10 7. Through my work, I have become familiar with the North  
11 Fork of the Elk River. It is a large unbroken and undisturbed  
12 old-growth stand in the Copper Mountain Roadless Area. It is de  
13 facto a pristine wilderness area adjacent to the Grassy Knob  
14 Wilderness Area. Most of the trees are 4-6 feet in diameter and  
15 more than 250 years old, but many of the trees are over 6 feet in  
16 diameter. The trees are very healthy and have the potential to  
17 become majestic giant trees that could live to be more than 1000  
18 years old. In contrast, many other trees in the Elk River have  
19 been damaged by fire and have less potential to continue to age  
20 and grow.

21 8. Friends of Elk River, along with other environmental  
22 organizations, challenged these sales in court.

23 9. The Forest Service's fisheries scientist, Dr Reeves,  
24 believed that these sales would adversely impact the fisheries  
25 and water quality of the Elk River. Because the Wild and Scenic  
26 River Act requires that those qualities be protected, we  
27 challenged the sale in federal court. The Forest Service used a

1 sedimentation model to assess the effects of these sales on the  
2 Elk River, but its own scientists concluded that the model had  
3 been misapplied to justify these sales. This is the reason that  
4 the Forest Service gave for canceling this sale.

5 10. On March 20, 1991, our attorney entered into a  
6 stipulation with the Forest Service through which the agency  
7 stated that they had rejected all bids and that they would not  
8 proceed with these timber sales in the future without new NEPA  
9 review, a new decision notice, and a new auction. The  
10 stipulation is attached as Attachment A. Based expressly on that  
11 stipulation, U.S. District Judge Owen Panner dismissed our  
12 lawsuit without prejudice and ordered the government to pay our  
13 attorneys' fees and costs. The order dismissing the case is  
14 attached as Attachment B.

15 11. In July 1992, a colleague who was then researching  
16 birds and riparian habitat in the North Fork of Elk River for  
17 Oregon State University, told me that she had found egg fragments  
18 that were greenish in color with purple splotches, approximately  
19 1/2 mile from the Boulder Krab timber sale site. I was then  
20 receiving training to locate marbled murrelets under the Pacific  
21 Seabird Group Protocol. I have since been certified as a marbled  
22 murrelet surveyor, and have been a contract and a volunteer  
23 surveyor. Based on my colleague's description, I believed that  
24 what she had found was a marbled murrelet eggshell.

25 12. I went to the site early in the morning two days later  
26 and saw a marbled murrelet fly into the tree at 6:07 a.m.; then I  
27 heard it leave at 6:27 a.m..

1 13. Dr. Kim Nelson, one of the authors of the Pacific  
2 Seabird Group Protocol, and some her associates came to the site  
3 at various times over the next few days. One of them climbed an  
4 adjacent tree and observed the nest. They set up a video camera  
5 operated by remote control and obtained footage of the baby bird  
6 being fed by the adult.

7 14. The area where we found the marbled murrelet nest and  
8 the Boulder Krab sale area are in the same contiguous old-growth  
9 stand. Since marbled murrelets use a stand for nesting and show  
10 high fidelity to a stand, I would conclude, based on the Protocol  
11 and the best scientific evidence, that marbled murrelets are  
12 nesting in the Boulder Krab sale area.

13 15. The Forest Service never proceeded with these sales.  
14 Its subsequent actions indicate that it had abandoned all plans  
15 to log these sales.

16 16. These sale areas are located in late successional  
17 reserves and a key watershed designated in President Clinton's  
18 Northwest Forest Plan. Accordingly, they cannot be logged under  
19 current environmental standards.

20 17. Since the Forest Service withdrew the sales, it has  
21 closed and obliterated the road that would have led to the  
22 Boulder Krab sale area.

23 18. A hiking trail in that area -- the old Barklow Mountain  
24 Trail -- had deteriorated over the years. It originally was used  
25 to service fire lookouts in the 1930s and 1940s. It would have  
26 been converted into the principal logging road for the Boulder  
27 Krab sale. In the last two years, the Forest Service has cleared

1 obstructions and reconstructed the trail. This is a further  
2 confirmation that they had abandoned all plans to go forward with  
3 the Boulder Krab sale.

4 19. I understand the Forest Service is now planning to  
5 resurrect the Boulder Krab and Elk Fork sales under the new  
6 logging rider. If they log this area, it will clearcut part of  
7 the Copper Mountain Roadless Area. Logging would destroy prime  
8 marbled murrelet habitat, impair the invaluable fisheries, damage  
9 water quality of the Wild and Scenic Elk River, lead to chronic  
10 sedimentation, and create an opening for massive windthrow which  
11 might knock down other old-growth trees. This would be a  
12 tremendous loss to me personally because I use this area  
13 frequently and it is extremely important for ecological and  
14 spiritual reasons.

15 Pursuant to 28 U.S.C. § 1746, I declare under penalty of  
16 perjury that the foregoing is true and correct.

17 Dated this \_\_\_ day of November, 1995.

18  
19 Jim Rogers  
20  
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26  
27

1 PATTI A. GOLDMAN (WSB# 24426)  
 KRISTEN L. BOYLES (WSB# 23806)  
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8 Local Counsel for Plaintiffs

9  
 10 IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

11  
 12 PILCHUCK AUDUBON SOCIETY, OREGON )  
 NATURAL RESOURCES COUNCIL, PORTLAND )  
 13 AUDUBON SOCIETY, BLACK HILLS AUDUBON )  
 SOCIETY, WESTERN ANCIENT FOREST )  
 14 CAMPAIGN, HEADWATERS, COAST RANGE )  
 ASSOCIATION, FRIENDS OF THE ELK RIVER, )  
 15 LEAVENWORTH AUDUBON ADOPT-A-FOREST, )  
 NORTH CENTRAL WASHINGTON AUDUBON )  
 16 SOCIETY, KNUT and ANN AAGAARD, ALPINE )  
 LAKES PROTECTION SOCIETY, SEATTLE )  
 17 AUDUBON SOCIETY, MITCHELL SMITH, and )  
 WASHINGTON ENVIRONMENTAL COUNCIL, )

Civ. # 95-06384-TC

18 Plaintiffs,

19 v.

20 DAN GLICKMAN, Secretary of Agriculture, )  
 21 BRUCE BABBITT, Secretary of Interior, )  
 UNITED STATES FOREST SERVICE, and )  
 22 BUREAU OF LAND MANAGEMENT, )

23 Defendants.

24 I am a citizen of the United States and a resident of the  
 25 State of Washington. I am over 18 years of age and not a party  
 26 to this action. My business address is 705 Second Avenue, Suite  
 27 203, Seattle, Washington 98104.

1 On November 20, 1995, I served a true and correct copy of  
 2 PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION, MEMORANDUM IN  
 3 SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION, DECLARATION OF  
 4 PATTI GOLDMAN, and PLAINTIFFS' REQUEST FOR EXPEDITION by Airborne  
 5 Express Overnight, addressed as follows:

6 James L. Sutherland  
 7 Assistant United States Attorney  
 8 701 High St.  
 9 Eugene, OR 97401

10 Geoffrey Garver  
 11 Michelle Gilbert  
 12 Dept. of Justice  
 13 Environment & Natural Resources Division  
 14 General Litigation Section  
 15 601 Pennsylvania Ave. NW, 8th Floor  
 16 Washington, DC 20044

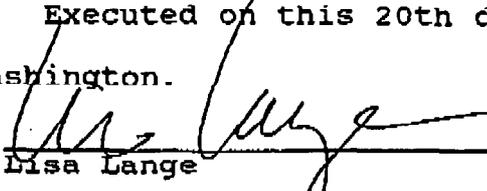
17 Mark Rutzick  
 18 500 Pioneer Tower  
 19 888 SW Fifth Ave.  
 20 Portland, OR 97204-2089

21 and by mail on the following persons:

22 Scott Horngren  
 23 Haglund & Kirtley  
 24 1800 One Main Place  
 25 101 SW Main  
 26 Portland, OR 97204

27 Patricia M. Dost  
 Kirk Johansen  
 Schwabe, Williamson & Wyatt  
 Suites 1600-1800, Pacwest Center  
 1211 SW Fifth Ave.  
 Portland, OR 97204-3795

I, Lisa Lange, declare under penalty of perjury that the  
 foregoing is true and correct. Executed on this 20th day of  
 November, 1995, at Seattle, Washington.

  
 \_\_\_\_\_  
 Lisa Lange

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7 Attorneys for Plaintiffs

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12 (503) 485-2471

13 Local Counsel for Plaintiffs

14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE DISTRICT OF OREGON

16 PILCHUCK AUDUBON SOCIETY, OREGON )  
17 NATURAL RESOURCES COUNCIL, PORTLAND )  
18 AUDUBON SOCIETY, BLACK HILLS AUDUBON )  
19 SOCIETY, WESTERN ANCIENT FOREST )  
20 CAMPAIGN, HEADWATERS, COAST RANGE )  
21 ASSOCIATION, FRIENDS OF THE ELK RIVER, )  
22 LEAVENWORTH AUDUBON ADOPT-A-FOREST, )  
23 NORTH CENTRAL WASHINGTON AUDUBON )  
24 SOCIETY, KNUT and ANN AAGAARD, ALPINE )  
25 LAKES PROTECTION SOCIETY, SEATTLE )  
26 AUDUBON SOCIETY, MITCHELL SMITH, and )  
27 WASHINGTON ENVIRONMENTAL COUNCIL, )

Civ. # 95-06384-TC  
PLAINTIFFS' REQUEST  
FOR EXPEDITION  
December 12, 1995  
Hearing Requested

Plaintiffs,

v.

DAN GLICKMAN, Secretary of Agriculture,  
BRUCE BABBITT, Secretary of Interior,  
UNITED STATES FOREST SERVICE, and  
BUREAU OF LAND MANAGEMENT,

Defendants.

Pursuant to Fed. R. Civ. P. 65, plaintiffs have moved for a preliminary injunction prohibiting the award, release, or completion of cancelled and more than 5-year-old timber sales

1 under Section 2001(k)(1) of the Fiscal Year 1995 Emergency  
 2 Supplemental Appropriations for Disaster Relief and Rescissions  
 3 Act, Pub. L. No. 104-19 ("Rescissions Act"). On November 7,  
 4 1995, plaintiffs filed an unopposed motion to consolidate this  
 5 case with Northwest Forest Resources Council v. Glickman, No. 95-  
 6 6244-HO (D. Or.). Related motions in that case are scheduled to  
 7 be heard on December 12, 1995. In order to ensure that  
 8 plaintiffs will be heard on those motions, this case should be  
 9 expedited and a hearing held on this motion on that same date.

10 DATED this 20th day of November, 1995.

11 Respectfully submitted,

12 

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 14 KRISTEN L. BOYLES (WSB# 23806)  
 15 Sierra Club Legal Defense Fund  
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24 518EXPED.MOT