NLWJC- Kagan

Counsel - Box 011 - Folder 012

Timber - Other Litigation: Pilchuck v. Glickman [3]

KRISTINE OLSON OSB#73254
United States Attorney
JAMES L. SUTHERLAND OSB#68160
Assistant United States Attorney
District of Oregon
888 Fifth Avenue, Suite 1000
Portland, Oregon 97204-2024
(503) 727-1000

LOIS J. SCHIFFER
Assistant Attorney General
GEOFFREY GARVER
MICHELLE L. GILBERT
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0481

Counsel for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PILCHUK AUDUBON SOCIETY, et al. Plaintiffs, v. DAN GLICKMAN, et al., Defendants.	Civil No. 95-06384-TC **FEDERAL DEFENDANTS' OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING ORDER**

The defendants oppose plaintiffs' application for a temporary restraining order to prevent the BOULDER KRAB timber sale from going forward under Section 2001(k)(1). The BOULDER KRAB sale is a Section 318 timber sale for which the Forest Service rejected all bids after withdrawing the case in the course of an earlier challenge to the sale. The language and history of Section 2001(k)(1) clearly indicate that the BOULDER KRAB sale falls under its provisions. Plaintiffs arguments to

the contrary cannot withstand scrutiny. Accordingly, the court should deny their motion for TRO.

FACTUAL AND PROCEDURAL BACKGROUND

The BOULDER KRAB sale, initially offered under Section 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (hereinafter "Section 318"), was challenged under NEPA and the Wild and Scenic Rivers Act in an action in 1990 before Judge Panner of the United States District Court for the District of Oregon, Civil No. 90-969-PA. See Complaint for Declaratory Judgment and Injunctive Relief (attached hereto as Attachment A). That action did not allege violations of Section 318. Instead, the complaint involving this sale was dismissed without prejudice on March 25, 1991, on the basis of a stipulation of the parties, in which the Forest Service stated it had rejected all bids for the sale and agreed to perform a new NEPA review for the project, issue a new Decision Notice and hold a new auction if the sales were to proceed in the future. See Order (attached hereto as Attachment B).

Many years later, Congress enacted Section 2001(k)(1) regarding the award and release of sales subject to Section 318. Section 2001(k)(1) provides:

> Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded 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 101-21

> (103 Stat. 745). The return of the bid bond of the high bidder shall not later the responsibility of the Secretary concerned to comply with this paragraph.

Pub. L. 104-19, § 2001(k)(1) (1995). Because the BOULDER KRAB sale was offered pursuant to Section 318 but never challenged under, or found to violate, Section 318,[1] the Forest Service determined that it fell within the scope of Section 2001(k)(1). Accordingly, it was released pursuant to subsection 2001(k)(1) on November 3, 1995.

However, before the sale was released, defendants explained in previous filings in this Court that, because of the prior court proceedings involving the sales, "such sales cannot be released without, at a minimum, alerting the interested parties and relevant court of the potential applicability of section 2001(k) . . . ." NFRC v. Glickman, Civil No. 95-6244, Defendants' Opposition to Plaintiffs' Third Motion for Summary Judgment and in Support of Defendants' Cross Motion for Summary Judgment, at 11 (Sept. 29, 1995). Consistent with that representation, on October 16, 1995, defendants provided notice to the relevant courts and all parties of the agency's intent to commence immediately steps necessary to release the BOULDER KRAB sale, and to release it following expiration of 15 days from the

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[1] In this respect, the BOULDER KRAB and ELK FORK sales are different from the COWBOY, NITA, SOUTH NITA and GARDEN sales, which were enjoined for violating Section 318, the very statute that allowed their existence. The defendants contend that these four other sales do not fall under Section 2001(k)(1), as explained in filings in this court in NFRC v. Glickman. These issues are set for argument on December 12, 1995.

date of the notice.[2] See Notice of Intent to Release Elk Fork and Boulder Krab Timber Sales (October 16, 1995) (attached hereto as Attachment C). After the 15-day notice period expired with no filings in the original action or any other action, the Forest Service considered legal issues resolved with respect to the BOULDER KRAB sale and issued the letter awarding the sale. See Declaration of Jerry Hofer (November 3, 1995) (attached hereto as Attachment D).

Despite having failed to raise any legal issues regarding release of these sales in response to the 15-day Notice of Intent to release the sales, and having waited until the last minute despite undersigned counsel's repeated representations that, following issuance of the award letter, nothing would prevent the sales from being released under Section 2001(k)(1), plaintiffs now seek a TRO to prevent the BOULDER KRAB sale from going forward. Their application for a TRO should be denied.

STANDARD FOR A TEMPORARY RESTRAINING ORDER

In the Ninth Circuit, a temporary restraining order "is appropriate if the moving party demonstrates either (1) a probability of success on the merits and a possibility of irreparable injury, or (2) serious questions going to the merits

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[2] Contrary to the assertion of plaintiffs' counsel in her declaration, the Notice did not state "that the Forest Service would begin taking steps to award and release the sales in these cases upon expiration of 15 days from the date of the notice." Declaration of Patti Goldman at ¶ 4. Rather, it provided immediate notice of the Forest Service's "intent to commence steps to release the Boulder Krab and Elk Fork timber sales . . ., and to award these sales following the expiration of fifteen days from the date of this notice." Notice of Intent to Release Elk Fork and Boulder Krab Timber Sales at 1 (emphasis added).

and the balance of hardships tipping sharply in its favor." Pratt v. Rowland, 65 F.3d 802, 805 (9th Cir. 1995). Under the second of these tests, the moving party must also demonstrate a "fair chance of success on the merits." Senate of the State of Cal. v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992). In cases involving the public interest, the court "must also consider whether the public interest favors the plaintiff." Fund for Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992); see also, Caribbean Marine Services Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988). However, "[i]f the law is entirely against the position of the requesting party," none of the tests for preliminary injunctive relief will permit the issuance of a preliminary injunction. Senate of the State of Cal. v Mosbacher, 968 F.2d at 978. Applying these tests in this case, the plaintiffs' motion for a temporary restraining order should be denied.

Plaintiffs can show neither a probability of success on the merits nor serious questions going to the merits.[3] Rather, the law under Section 2001(k)(1) is entirely against the position of the plaintiffs with respect to the BOULDER KRAB sale. First, Section 2001(k)(1) applies to the BOULDER KRAB sale, despite the Forest Service's rejection of bids for the sale. In contesting this claim, plaintiffs all but ignore the provision in 2001(k)

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[3] "Serious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" Senate of the State of Cal. v. Mosbacher, 968 F.2d at 978 (quoting Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

that "[t]he return of the bid bond of the high bidder shall not alter that responsibility of the Secretary concerned to comply with [Section 2001(k)(1)]." Indeed, the plaintiffs argue that this provision is so oblique that the court, contrary to elementary rules of statutory construction, should simply write the provision out of the statute. Second, plaintiffs' claim that applying Section 2001(k)(1) to the BOULDER KRAB sale would violate the separation of powers has no merit whatever. Congress has clear authority to mandate the release of the BOULDER KRAB sale, even though the Forest Service withdrew the sale with judicial approval and might not have awarded the sale absent Section 2001(k). Because of these fatal flaws in plaintiffs' argument and the additional reasons set forth below, a TRO enjoining the BOULDER KRAB timber sale should not be granted.

ARGUMENT

I. Section 2001(k)(1) Applies to the BOULDER KRAB Sale, Despite the Forest Service's Rejection of Bids for the Sale.

The heart of the plaintiffs' argument is that Section 2001(k)(1) does not apply to the Boulder Krab timber sale because it was no longer "in the timber pipeline" -- i.e., it was not a sale for which an offer was outstanding -- at the time Section 2001(k) was enacted. Plaintiffs contend that because the Forest Service "changed its mind" and decided not to offer the sale such that the high bidder could not compel the sale, the sale does not fall under Section 2001(k)(1). As evidence of the Forest Service's intent to abandon the BOULDER KRAB sale, plaintiffs

point to the obliteration of the road leading to the BOULDER KRAB sale area and reconstruction of a hiking trail that would have been used as a logging road under old plans for the sale. However, neither Section 2001(k)(1) nor its history support plaintiffs' reliance on contract principles to override the clear import of the statute.

A. The language of Section 2001(k)(1) requires its application to the BOULDER KRAB sale.

The defendants agree that Section 2001(k)(1) implicitly excludes timber sale contracts that were cancelled or withdrawn when the 1995 logging rider was enacted,[4] with one exception which the plaintiffs all but ignore. Specifically, Congress provided in Section 2001(k)(1) that "[t]he return of the bid bond

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[4] The defendants will elaborate on this argument in responding to the plaintiffs' motion for preliminary injunction, which involves some sales that, unlike the BOULDER KRAB sale, were cancelled or withdrawn but do not fall under the "return of the bid bond" provision and therefore are not required to be released under Section 2001(k)(1).

In sum, defendants contend that the "return of the bid bond" provision has meaning only if Section 2001(k)(1) is read to generally exclude cancelled or withdrawn sales, except for those covered by the bid bond provision. If cancelled or withdrawn sales are not excluded from the phrase "all timber sale contracts offered or awarded" before enactment of the statute, the "return of the bid bond" provision has no meaning, because Congress would have had no need to include explicitly sales for which the Forest Service or BLM returned the bid bond. Further, the principle *exceptio firmat regulam in casibus non exceptis* -- an exception affirms the rule in cases not excepted, see Black's Law Dictionary 502 (5th ed. 1979) -- supports this interpretation. Congress obviously intended the "return of the bid bond" provision to carve out an exception to a general rule: the implicit and logical exclusion from Section 2001(k)(1) of sales that were withdrawn or cancelled prior to enactment of Section 2001. The legislative history supports this reading. Nonetheless, the court need not resolve this issue until after plaintiffs' motion for preliminary injunction is heard on December 12.

shall not alter the responsibility of the Secretary concerned to comply with this paragraph." Read in context, the "return of the bid bond" provision requires the Forest Service to "act to award, release, and permit to be completed in fiscal years 1995 and 1996" intact timber sales for which the agency concerned rejected all bids and returned the bid bond of a willing high bidder. BOULDER KRAB is such a sale.

The Forest Service has interpreted Section 2001(k)(1) consistent with this reading of the "return of the bid bond" provision. Under Secretary of Agriculture James R. Lyons and Acting BLM Director Mike Dombeck described the sales under 2001(k)(1) as including:

> 1. Sales for which apparent high bidders have been identified, but the sales have not yet been awarded to the high bidder . . .;
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> 2. Sales for which apparent high bidders have been identified and the sale awarded, but where the contract has not yet been executed by the high bidder . . .;
>
> 3. Sales for which the apparent high bidder has been identified, but the bid bond was returned before award of the contract.

Memorandum from James R. Lyons and Mike Dombeck to Jack Ward Thomas and Elaine Zielinski (Aug. 23, 1995)(attached hereto as Attachment E). BOULDER KRAB falls into the third of these categories.

B. The legislative history of Section 2001(k)(1) supports its application to the BOULDER KRAB sale.

Plaintiffs, claiming that the "return of the bid bond" provision is "too thin a reed on which to hang a draconian interpretation" of Section 2001(k)(1), ask the court to ignore

the last sentence of Section 2001(k)(1). However, such a reading fails to give effect to language in the statute, and the court obviously cannot heed that request. See United States v. Lewis, 67 F.3d 225, 229 (9th Cir. 1995). Nonetheless, because the "return of the bid bond" provision may be less than clear, particularly in light of other parts of the statute indicating an intention not to include cancelled or withdrawn sales in Section 2001(k)(1),[5] it is appropriate to examine the legislative history to discern its meaning. Id. at 228-29.

Every reference in the legislative history to the meaning of the "return of the bid bond" provision in Section 2001(k)(1) indicates that Congress was concerned with sales for which the Forest Service or BLM rejected all bids and accordingly returned the bid bond of the high bidder. These are the sales for which a willing purchaser -- the high bidder -- had expectations of being awarded the sale, but environmental or other issues related to the sale impeded award of the sale.[6] Accordingly, the Forest Service or BLM cancelled or withdrew the sale and returned the bid bonds. Defendants agree that Congress did not mean to include under Section 2001(k)(1) sales that were cancelled at the request of the high bidder when the high bidder

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[5] See footnote 4, supra.

[6] Neither this argument, nor Section 2001(k)(1) -- including the "return of the bid bond" provision -- apply at all to sales enjoined for violations of Section 318, the statute that authorized their very existence. Such sales are at issue in motions pending in NFRC v. Glickman that are scheduled for hearing on December 12. Because those sales were effectively found to be void *ab initio*, they were as good as if never offered.

was no longer willing or able to proceed with the sale.[7] However, the BOULDER KRAB sale is not such a sale. Rather, the Forest Service withdrew the BOULDER KRAB sale and rejected all bids for it.

Wherever the effect of rejection of bids and return of the high bidder's bid bond on release of timber sales under Section 2001(k)(1) is discussed in the legislative history, the Forest Service or BLM's affirmative rejection of bids is clearly contemplated. Explaining an early version of Section 2001(k)(1) that included the "return of the bid bond" provision, Rep. Taylor noted that "in some cases the agencies rejected bids well after the auction due to administrative reviews and delays and changing standards." Cong. Rec. at H3233 (Mar. 15, 1995)(remarks of Rep. Taylor). Subsequently, the "return of the bid bond" provision was explained repeatedly to include "all sales offered, awarded, or unawarded, whether or not bids have subsequently been rejected by the offering agency." Cong. Rec. at H5050 (May 16, 1995)(emphasis added); see also Cong. Rec. at H3233 (Mar. 15, 1995)(remarks of Rep. Taylor); Sen. R. 104-17 at 123 (Mar. 24, 1995); Conference Rep. 104-124, at 137 (May 16, 1995).

In claiming that "[n]othing in the legislative history suggests that Congress thought it was resurrecting cancelled

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[7] In NFRC v. Glickman, pending before this court, NFRC has challenged the Forest Service's and BLM's decision not to apply Section 2001(k)(1) to certain sales for which the apparent high bidder declined the award or otherwise demonstrated inability or unwillingness to accept the sale. Because NFRC raised these issues for the first time in a reply brief, defendants have requested the opportunity to file a brief on these issues by December 8 so that they may be heard at the December 12 hearing.

timber sales," Plaintiffs' Memorandum, at 22, the plaintiffs have ignored these clear and uncontradicted statements in the legislative history as they apply to the BOULDER KRAB sale. Nothing under the contract principles regarding offers or willingness to be bound, upon which the plaintiffs so heavily rely, can overshadow Congress's clear intent to allow sales such as the BOULDER KRAB sale to proceed. Thus, any evidence regarding the Forest Service's intent with respect to BOULDER KRAB sale, such as obliteration of roads or conversion of roads to hiking trails, is irrelevant to the application of Section 2001(k)(1) to the BOULDER KRAB sale.

Defendants agree with plaintiffs contention that, ordinarily, an offer is no longer live after it is withdrawn. Plaintiffs rely on the Conference Report accompanying Section 318, which states that "sales offered under this section but not awarded and withdrawn after October 1, 1990 under normal Forest Service procedures may not be re-offered in subsequent years under the terms of this section." H.Conf. Rep. No. 101-264, 101st Cong., 1st Sess. 87 (1989). The defendants agree that this language demonstrates that when the Forest Service or BLM withdraw an offer by rejecting all bids, the sale ceases to exist and must ordinarily be re-offered at a new auction to go forward. See Fifth Declaration of Jerry L. Hofer, at ¶ 4 (Nov. 15, 1995)(attached hereto as Attachment F). However, this argument, too, fails to account for the "return of the bid bond" provision in Section 2001(k)(1), which clearly requires release of the BOULDER KRAB sale.

II. The Time Limits in Section 2001(k)(1) Do Not Preclude Application of Section 2001(k)(1) to the BOULDER KRAB Sale.

Plaintiffs contend that Congress could not have intended Section 2001(k)(1) to include sales such as the BOULDER KRAB sale because, absent Section 2001(k)(1), the Forest Service had no intention of proceeding with the sale and therefore took no action to determine whether the presence of marbled murrelets or other species would preclude the sale. Because 45 days is too short to complete a marbled murrelet survey, plaintiffs argue, Congress could not have meant to include the BOULDER KRAB sale.[8] The plaintiffs claim further that interpreting Section 2001(k)(1) to include the BOULDER KRAB sale, which the Forest Service had withdrawn for non-compliance with environmental standards would amount to an anomalous and improper repeal by implication of those standards.

The defendants concede that including in Section 2001(k)(1) sales that otherwise would be excluded from logging for environmental reasons appears somewhat anomalous, when other provisions of Section 2001 authorize the award and release of other, arguably less environmental problematic sales with greater opportunity for judicial review for compliance with environmental standards. See, e.g., Section 2001(d). However, defendants

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[8] Plaintiffs also contend that one unit of the BOULDER KRAB sale is contiguous with a timber stand with known marbled murrelet nesting. The Forest Service has examined the BOULDER KRAB sales area and determined that Unit 1 is within a contiguous stand of marbled murrelet habitat that is known to contain a marbled murrelet site under Section 2001(k)(2). The Forest Service has therefore suspended all purchaser operations on Unit 1 of the BOULDER KRAB timber sale. See Declaration of Lee O. Webb (attached hereto as Attachment H).

continue to maintain that Section 2001(k)(1), which applies "notwithstanding any other provision of law," was intended to apply only to sales that were offered pursuant to and consistent with Section 318, which Congress generally considered to provide some level of environmental protection.

The Ninth Circuit has explained that

> [the phrase "notwithstanding any other provision of law"] clearly forbids, on its face, applicability of any other provision that may contradict the terms of the provision [to which it attaches] in the absence of any subsequent federal statute that might modify or supersede the provision in some way.

California Nat'l Guard v. Federal Labor Relations Auth., 697 F.2d 874, 879 (9th Cir. 1983). Whatever limitations might attach to the phrase "notwithstanding any other provision of law," it appears that by using the phrase, Congress explicitly -- not implicitly -- repealed further application of environmental standards to those sales, even if, as with BOULDER KRAB, they might have fallen short of those standards.

III. Application of Section 2001(k)(1) to the BOULDER KRAB Sale Does Not Violate the Separation of Powers Doctrine.

Plaintiffs raise two separation of powers arguments, both off target. First, plaintiffs argue broadly that Congress has no power to interfere with contracts that the Forest Service decided to forego by resurrecting them. Specifically, plaintiffs make the sweeping claim that "Congress may not ordinarily interfere with or control a federal agency's exercise of delegated contract functions." Plaintiffs' Memorandum at 12. To the extent such a broad principle exists, it has no application whatever to this case. Second, plaintiffs adopt by reference

their argument in NFRC v. Glickman that ordering award and release of timber sales enjoined or withdrawn with judicial approval violates separation of the powers of Congress and the courts.

A. Congress does not impermissibly interfere with a federal contract by applying Section 2001(k)(1) to the Boulder Krab Sale.

The cases plaintiffs cite to support their interference with contracts argument completely miss the mark. Those cases all involve the effect of the actions of an agent of the legislative branch on executive branch functions, including the award of federal contracts. See Hechinger v. Metropolitan Washington Airports Authority, 36 F.3d 97 (D.C. Cir. 1994)(discussing effect of the Board of Review of the Metropolitan Washington Airport Authority, an agent of Congress, on the Airport Authority, an executive agency), cert. denied, 115 S. Ct. 934 (1995); Lear v. Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988)(effect of actions of Comptroller General, an agent of Congress, on award of federal contracts), irrelevant portion withdrawn en banc, 893 F.2d 205 (9th Cir. 1989); Ameron, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979 (3rd Cir. 1986)(actions of Comptroller General), cert. dismissed, 488 U.S. 918 (1988).

The critical issue in those cases was "whether Congress or its agents seeks to control (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process." Lear, 842 F.2d at 1108. For example, both Lear and Ameron challenged the authority of the Comptroller

General, an agent of Congress, to stay the award of federal contracts under certain conditions. The governing principle in all these cases was that "Congress cannot control the execution of its enactments except 'indirectly -- by passing new legislation.'" Id. at 1106 (quoting Bowsher v. Synar, 478 U.S. 714, ___, 106 S. Ct. 3181, 3192 (1986)); see also, Chadha v. INS, 462 U.S. 919, 956-58 (1983).

Here, the legislative action plaintiffs challenge was just what the Ninth Circuit in Lear said was the proper way for Congress to control executive functions -- passage of new legislation. None of the cases plaintiffs cite suggest that Congress, in enacting new legislation, cannot refer to a class of federal contracts in legislating how federal agencies should handle the matter involved in those contracts in the future. Indeed, the cases plaintiffs cite support the opposite conclusion that Section 2001(k)(1) is a proper exercise of legislative power.

B. Application of Section 2001(k)(1) to the BOULDER KRAB Sale does not impermissibly interfere with judicial powers.

Plaintiffs' claim that application of Section 2001(k)(1) to enjoined sales or sales dismissed with judicial approval impermissibly interferes with judicial powers is likewise without merit. Their argument has two prongs. First, plaintiffs claim that application of Section 2001(k)(1) to a sale withdrawn under a judicially-approved stipulation, like BOULDER KRAB, violates the principle that "Congress may not prescribe a rule of decision or direct certain factfindings for a pending

case." Amici/Defendant-Intervenors' Opposition to NFRC's Supplemental Memorandum, at 19-20 (citing United States v. Klein, 50 U.S. (13 Wall.) 128 (1871); Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992)). Second, they rely on the principle that "Congress may not legislatively revise the final judicial resolution of a case." Amici/Defendant-Intervenors' Opposition to NFRC's Supplemental Memorandum, at 20 (citing Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995)).

Section 2001(k)(1) does not attempt to direct the outcome of particular litigation pending at the time the legislation was passed. Robertson v. Seattle Audubon Soc'y. clearly established that Section 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 did not violate the separation of powers, because even though the statute was obviously intended to resolve the concerns raised in two cases it specifically named, it "compelled changes" in the law underlying the lawsuits without directing "findings or results under old law." Robertson, 503 U.S. at ___, 112 S. Ct. at 1413. Plaintiffs point to no distinction between Section 318 and Section 2001(k)(1) -- which does not target specific cases -- that would require a different holding here. Rather than dictating findings under the laws upon which the BOULDER KRAB sale was originally challenged, Section 2001(k)(1) requires the Forest Service to release the sale on its original terms, volumes and prices, notwithstanding those laws.

Plaintiffs suggest that the Ninth Circuit's recent decision in Alaska Wilderness Recreation and Tourism Assoc. v.

Morrison, 67 F.3d 723 (9th Cir. 1995), can be applied here to prevent the application of Section 2001(k)(1) to pending litigation. In Alaska Wilderness, the Ninth Circuit reaffirmed that "Congress unquestionably may amend substantive law affecting a pending case." Alaska Wilderness, 67 F.3d at 733. However, the court held that the appropriations statute at issue did not preclude application of NEPA to certain timber sales, in part because the statute "offered no new statutory basis on which to analyze the matter at issue." Id. Here, Section 2001(k)(1) does provide such a basis: it requires the Forest Service to award and release certain sales on their original terms, "notwithstanding any other provision of law." Plaintiffs simply ask the court to ignore this language. However, the court cannot ignore language in the statute, and whatever restrictions might apply to the phrase "notwithstanding any other provision of law," it is fatal to plaintiffs' reliance on the Alaska Wilderness decision.[9]

Plaut also fails to support plaintiffs' contention that Section 2001(k)(1) does not apply to a sale dismissed with judicial approval. Plaut concerned legislation that, unlike Section 2001(k)(1), directed that "dismissed causes of action . . . be reinstated." Plaut, 115 S. Ct. at 1451. Further, unlike the legislation in Plaut, Section 2001(k)(1) does not "prescribe[] what the law was at an earlier time, when the act

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[9] While defendants continues to believe that Congress intended Section 2001(k)(1), including the phrase "notwithstanding any other provision of law," to apply only to Section 318 sales, this court's September 13 order in NFRC v. Glickman has expanded application of the provision to all covered sales within Washington and Oregon.

whose effect is controlled by the legislation occurred." Id. at 1456. Instead, Section 2001(k)(1) applies "notwithstanding any other provision of law," and therefore supersedes the laws on which the withdrawal of the BOULDER KRAB sale was based.

In short, plaintiffs' separation of powers arguments cannot overcome the phrase "notwithstanding any other provision of law" in Section 2001(k)(1). Plaintiffs contend that the phrase "notwithstanding any other provision of law" cannot have the effect of undoing judicially-approved withdrawals of sales because elsewhere in Section 2001, Congress explicitly stated that the phrase included "a law under the authority of which any judicial order may be outstanding on or after the date of enactment of this Act." See Sections 2001(b)(1), 2001(d). Although the absence of this modifying language in Section 2001(k)(1) is unexplained, interpreting its absence to exclude all sales dismissed by stipulation prior to enactment of the statute has no support in the statute or its legislative history.

As mentioned above, the Ninth Circuit has held that the phrase "notwithstanding any other provision of law" forbids application of any other contradictory provision in an earlier statute. See California Nat'l Guard v. Federal Labor Relations Auth., 697 F.2d at 879. Similarly, the D.C. Circuit has interpreted the phrase to mean that, with respect to the action to which the phrase applies, an agency is "unhampered by the range of other [provisions] that might otherwise constrain [its] authority." Colorado Nurses Ass'n v. Federal Labor Relations Auth., 851 F.2d 1486, 1489 (D.C. Cir. 1988). Nothing in Section

2001 or its history suggests that the court should give the phrase "notwithstanding any other provision of law" a more limited meaning under the circumstances presented here.

Defendants acknowledge that where the phrase "notwithstanding any other provision of law" is in apparent conflict with another provision in the same statute, courts have applied the implied repeal doctrine, which requires courts to read an implied repeal into a statute only to the minimum extent necessary. Cf. In re The Glacier Bay, 944 F.2d 577, 581-82 (9th Cir. 1991)(invoking the implied doctrine to interpret the phrase "notwithstanding any other provision of law" where the phrase was unclear in light of another provision of the statute that referred to "other applicable laws");[10] see also E.P. Paup Co. v. Director, 999 F.2d 1341, 1348-49 (9th Cir. 1993)(stating that, in light of the presumption against finding that a federal statute preempts a state law, "the phrase 'notwithstanding any other provision of law' is not necessarily preemptive" and declining to give it preemptive effect where legislative history revealed an intent not to preempt state law). The unexplained absence of the explicit inclusion of laws underlying judicial orders in the phrase "notwithstanding any other provision of law" in Section 2001(k)(1) does not amount to a conflict that would require application of the implied repeal doctrine.

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[10] Under the implied repeal doctrine, "where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier." In re The Glacier Bay, 944 F.2d at 581 (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976).

It is difficult to see how Section 2001(k)(1) could work if the laws underlying the original challenge to the BOULDER KRAB sale were applied to the sale. Specifically, any procedural mandates of these other provisions, such as NEPA,[11] that are designed to inform the agency prior to its decision on the sale are superfluous or impossible to apply in light of the limits that Section 2001(k)(1) places on the Forest Service's timing or ability to change the "originally advertised terms, volumes, and bid prices." To the extent those other provisions of law prescribe substantive results at odds with the mandate of Section 2001(k)(1), the prescription of the original terms, prices and volumes of earlier sales supersedes those other provisions as well.

The plaintiffs simply cannot rely on the stipulated dismissal of the earlier BOULDER KRAB lawsuit to avoid Section 2001(k)(1). That dismissal arose from an earlier challenge to the very sale challenged in this action -- a Section 2001(k)(1) sale. Thus, the legal bases underlying the dismissed case, as well as the Forest Service's obligations under the stipulation, have been superseded by Section 2001(k)(1).

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[11] In Flint Ridge Development Co. v. Scenic Rivers Assoc. of Oklahoma, 426 U.S. 776, 791 (1976), the Supreme Court held that a provision of the Interstate Land Sales Full Disclosure Act requiring developers' disclosure statements to become effective within 30 days after filing with the Department of Housing and Urban Development conflicted with and overrode the requirement to prepare an EIS under NEPA. Similarly, the mandate in Section 2001(k)(1) to award, release and complete timber sales within 45-days, with no change in terms, precludes application of NEPA procedures.

CONCLUSION

For the foregoing reasons, the plaintiffs' application for a temporary restraining order should be DENIED.

Respectfully submitted this ____ day of December, 1995,

KRISTINE OLSON
United States Attorney
JAMES L. SUTHERLAND
Assistant United States Attorney
District of Oregon

LOIS J. SCHIFFER
Assistant Attorney General

/S/

GEOFFREY GARVER
MICHELLE L. GILBERT
Trial Attorneys
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0481

Attorneys for Defendants

Of Counsel:

JAY McWHIRTER
Office of the General Counsel
U.S. Department of Agriculture
Washington, D.C.

CERTIFIED TRUE COPY
Sandie Collins

Gary K. Kahn
REEVES & KAHN
910 Oregon National Building
610 S.W. Alder Street
Portland, Oregon 97205
(503) 227-5144

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRIENDS OF ELK RIVER, OREGON RIVERS COUNCIL, OREGON NATURAL RESOURCES COUNCIL, KALMIOPSIS AUDUBON SOCIETY, ASSOCIATION OF NORTHWEST STEELHEADERS,	Civil No.
Plaintiffs,	
v.	COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
UNITED STATES FOREST SERVICE,	
Defendant,	

I.

PRELIMINARY STATEMENT

1. This is an action for a declaratory judgment and injunctive relief. Plaintiffs challenge the decision of the United States Forest Service (USFS) in approving and offering for sale the Elk Fork and Boulder Krab timber sales on the Siskiyou National Forest in Oregon. Plaintiffs allege that the Forest Service has failed to adequately consider the sales' environmental effects.

2. This action arises under and alleges violations of the National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4321

REEVES & KAHN
ATTORNEYS AT LAW
910 OREGON NATIONAL BUILDING
610 S.W. ALDER STREET
PORTLAND, OREGON 97205-3571
TELEPHONE (503) 227-5144

1 et seq., The Wild and Scenic River Act, 16 U.S.C. Sec. 1271, et
2 seq., the Administrative Procedure Act, 5 U.S.C. Sec. 701 et seq.
3 and Section 318 of the Department of the Interior and Related
4 Agencies Appropriations Act for fiscal year 1990, Pub. L. No.
5 101-121, 103 Stat 701, 745-50 (1989), hereinafter "Section 318."
6 3. Plaintiffs seek declaratory and injunctive relief.
7 4. Plaintiffs also seek an award of costs and
8 attorney fees pursuant to the Equal Access to Justice Act (EAJA),
9 28 U.S.C. section 2412.
10 5. Pursuant to Section 318(g)(1), for forty-five days
11 after the date of filing of this Complaint, the Forest Service
12 may take no action to award the Elk Fork and Boulder Krab timber
13 sales.
14 6. Pursuant to Section 318(g)(1), the court shall
15 render its final decision on this case within 45 days from the
16 date of filing unless the court determines a longer time is
17 necessary to satisfy the requirements of the United States
18 Constitution.
19 II.
20 JURISDICTION
21 7. Jurisdiction over this action is conferred by 28
22 U.S.C. Secs. 1331, 2201 and 2202. Judicial review is provided
23 for by 5 U.S.C. Sec. 701 et seq and Section 318. There is a
24 present and actual controversy between the parties.
25 8. Venue is properly vested in this Court pursuant to
26 28 U.S.C. section 1391(e).

REEVES & KAHN
ATTORNEYS AT LAW
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TELEPHONE [illegible]

III.

PARTIES

9. Plaintiff Friends of Elk river is an unincorporated association with a mailing list of over 700 people. Its members use the Siskiyou National Forest, including the area subject to this litigation, for hunting, fishing, photography, wildlife viewing, family outings and spiritual renewal. The solitude and dominance of natural features and sounds are primary determinants in the high quality recreational experience enjoyed by its members.

10. Plaintiff the Kalmiopsis Audubon Society is a nonprofit Oregon corporation with approximately 125 members. Its members use the Siskiyou National Forest, including the area subject to this litigation, for hunting, fishing, photography, wildlife viewing, family outings and spiritual renewal. The solitude and dominance of natural features and sounds are primary determinants in high the quality recreational experience enjoyed by its members.

11. Plaintiff Oregon Rivers Council, Inc. (ORC) is an a nonprofit Oregon member corporation with more than 51 member groups and 1,500 individual members comprised of conservationists, sportsmen and recreationists. Members of ORC use the Siskiyou National Forest, including the area subject to this litigation for fishing, photography, wildlife viewing, family outings, spiritual renewal and river recreation. ORC is dedicated to successful implementation of the Wild and Scenic

REEVES & KAHN
ATTORNEYS AT LAW
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TELEPHONE [illegible]

River Act. The solitude and dominance of natural features and sounds are primary determinants in the high quality recreational experience enjoyed by the members from that area.

12. Plaintiff Oregon Natural Resources Council is a nonprofit Oregon membership corporation with more than 90 member groups and 2,000 individual members, comprised of conservationists, sportsmen, Native Americans, recreationists, scientists, and educators. Members of ONRC use the Siskiyou National Forest, including the area subject to this litigation, for hunting, fishing, photography, wildlife viewing, family outings, and spiritual renewal. The solitude and dominance of natural features and sounds are primary determinants in the high quality recreational experiences enjoyed by the members in that area.

13. Plaintiff Association of Northwest Steelheaders is a nonprofit Oregon corporation with 30 chapters and 5,147 members. Its members use the Siskiyou National Forest, including the area subject to this litigation, for fishing, photography, wildlife viewing, family outings and river recreation. It has a special interest in maintaining the fish habitat and water quality of the Elk River.

14. Defendant United States Forest Service, part of the United States Department of Agriculture, is the federal agency responsible for the management of the Pacific Northwest Region, including the Winema National Forest.

/ / / /

REEVES & KAHN
ATTORNEYS AT LAW
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TELEPHONE [illegible]

IV.

FACTS

15. Region 6 of the United States Forest Service, the Pacific Northwest Region, includes the National Forests in the states of Oregon and Washington. The Siskiyou National Forest is located within Region 6 in the State of Oregon.

16. The Elk Fork and Boulder Krab timber sales are located in the Siskiyou National Forest.

17. The Elk Fork and Boulder Krab sale areas contain old growth timber and provide habitat for the northern spotted owl. A portion of the sale areas, the Copper Mountain Roadless Area is roadless and undeveloped.

18. The Elk River and the North Fork Elk River, which run through the sale area, have been designated as a component of the Wild and Scenic River System.

19. An Environmental Assessment was prepared for each sale.

20. On August 30, 1990, acting Forest Supervisor Abel Camerena signed a Decision Notice and Finding of No Significant Impact for the Elk Fork/Wolkrab Environmental Assessment, adopting Alternative F as the preferred alternative.

21. On August 13, 1990, Acting Forest Supervisor Abel Camerena signed a Decision Notice and Finding of No Significant Impact for the Bray Boulder timber sale, adopting Alternative 1 as the preferred alternative.

22. Sometime after August 30, 1990, the Wolkrab and

REEVES & KAHN
ATTORNEYS AT LAW
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Boulder Bray timber sales were combined into one sale, the Boulder Krab Sale.

23. The Boulder Krab timber sale will harvest approximately 5.7 million board feet of timber and will construct 1.03 miles of new road.

24. The Elk Fork timber sale will harvest approximately 2.53 million board feet of timber and construct .65 miles of new road.

25. The Defendant has not adequately analyzed the impact of the Elk Fork and Boulder Krab timber sales on the sale areas.

FIRST CLAIM FOR RELIEF

The Elk Fork and Boulder Krab Timber Sales Violate the National Environmental Policy Act and its Implementing Regulations.

26. The Defendant has failed to adequately analyze the environmental consequences of the proposed action on the resources of the previously unroaded and undeveloped portions of the sale area.

27. The Defendant has failed to consider the benefits to solitude, recreation, wildlife and other resources of leaving this area in an unroaded and undeveloped condition.

28. The environmental consequences of the proposed actions are significant, requiring the preparation of an environmental impact statement, which the Defendant has failed to prepare.

29. The Defendant has failed to analyze adequately the

REEVES & KAHN
ATTORNEYS AT LAW
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[illegible]
TELEPHONE [illegible]

impact of these and other timber sales on the resources of the Elk River.

30. The Defendant has failed to disclose the impacts of the proposed actions in a manner such that the public can readily understand them.

31. The Defendant has failed to allow for a 45-day comment period between signing of the Environmental Assessment for each sale and signing the Decision Notice for each sale.

SECOND CLAIM FOR RELIEF

The Elk Fork and Boulder Krab Timber Sales Violate the Wild and Scenic River Act.

32. The proposed action fails to protect and enhance the values which caused the Elk River and North Fork Elk River to be included in the Wild and Scenic River system.

V.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Declare that Defendant has violated NEPA.

2. The Wild and Scenic Rivers Act.

3. Enter an injunction prohibiting defendant from awarding the Elk Fork and Bolder Krab Timber Sales until such time as Defendant complies with the National Environmental Policy Act and the Wild and Scenic Rivers Act.

4. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow Plaintiffs their costs herein, and also

REEVES & KAHN
ATTORNEYS AT LAW
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[illegible]
TELEPHONE (503) 227-[illegible]

grant them and all persons situated such additional and alternative relief as may seem to this court to be just, proper, and equitable.

5. Award Plaintiffs their reasonable attorney fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412(d).

Respectfully submitted,

REEVES & KAHN

Dated: September 19, 1990

Gary K. Kahn

REEVES & KAHN
ATTORNEYS AT LAW
[illegible]
[illegible]
[illegible]
TELEPHONE (503) [illegible]

#511
Boulder Krab/
Elk River

GARY K. KAHN
Reeves, Kahn & Edmr
910 Oregon National Building
610 S.W. Alder
Portland, Oregon 97205
(503) 227-5144
OSB #81481

CHARLES H. TURNER
United States Attorney
District of Oregon
OSB #66127
THOMAS C. LEE
Assistant U.S. Attorney
888 S.W. Fifth Avenue
Suite 1000
Portland, Oregon 97204-2024
(503) 727-1000
OSB #76214

3/28/91

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRIENDS OF ELK RIVER, OREGON RIVERS COUNCIL, OREGON NATURAL RESOURCES COUNCIL, KALMIOPSIS AUDUBON SOCIETY, ASSOCIATION OF NORTHWEST STEELHEADERS, Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant.	CIVIL No. 90-969-PA STIPULATION FOR ORDER OF DISMISSAL Fed. R. Civ. P. 41(a)(2)

The parties to the above-entitled proceeding, through their undersigned attorneys, hereby stipulate as follows:

(1) The Forest Service has rejected all bids that were made upon the previous offers of the Elk Fork and Boulder Krab timber sales. If these timber sales are to proceed in the future, the Forest Service will perform a new NEPA review for these projects, will issue a new Decision Notice, and will hold a new auction accordingly.

ENT BY:
SEP.

(2) The plaintiffs shall be entitled to judgment in the amount of $2,239.50 for their attorneys' fees and $195.01 for their taxable costs in this action.

(3) The plaintiffs' complaint and action herein shall be dismissed without prejudice.

IT IS SO STIPULATED, this 20th day of March, 1991.

CHARLES H. TURNER
United States Attorney

GARY K. KAHN
Of Attorneys for plaintiffs

THOMAS C. LEE
Of Attorneys for defendant

RECEIVED

MAR 20 4 10 PM '91

FILED

MAR 26 2 43 PM '91

CLERK U.S. DISTRICT COURT
DISTRICT OF OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRIENDS OF ELK RIVER, OREGON RIVERS COUNCIL, OREGON NATURAL RESOURCES COUNCIL, KALMIOPSIS AUDUBON SOCIETY, ASSOCIATION OF NORTHWEST STEELHEADERS, Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant.	CIVIL No. 90-969-PA ORDER

On the basis of the Stipulation of the parties filed herein on March 20, 1991, IT IS ORDERED:

(1) Plaintiffs' complaint and action are dismissed without prejudice; and

(2) The Clerk is directed to enter judgment for the plaintiffs for their attorneys' fees, in the amount of $2,233.50, and judgment for their taxable costs, in the amount of $195.01.

DATED this 25 day of March, 1991.

OREN H. PARKER
United States District Judge

Presented by:

GARY K. KAHN
Attorney

THOMAS C. LEE
Asst. U.S. Attorney

KRISTINE OLSON
United States Attorney
888 SW Fifth Avenue
Suite 1000
Portland, OR 97204-2024
(503) 727-1008

LOIS J. SCHIFFER
Assistant Attorney General
ELLEN M. ATHAS
MICHELLE L. GILBERT
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FRIENDS OF ELK RIVER, OREGON RIVERS COUNCIL, OREGON NATURAL RESOURCES COUNCIL, KALMIOPSIS AUDUBON SOCIETY, ASSOCIATION OF NORTHWEST STEELHEADERS, Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant.	Civil No. 90-696-PA NOTICE OF INTENT TO RELEASE ELK FORK AND BOULDER KRAB TIMBER SALES

The United States Forest Service, through and by its counsel, hereby provides notice of their intent to commence steps necessary to release the Elk Fork and Boulder Krab timber sales located on the Siskiyou National Forest in Oregon, and to award these sales following the expiration of fifteen days from the date of this notice. The Elk Fork and Boulder Krab timber sales, previously the subject of litigation in the above-captioned

action, are to be released pursuant to Section 2001 of the newly enacted Rescissions Act of 1995. Pub. L. 104-19 (July 27, 1995).

The Forest Service offered the Elk Fork and Boulder Krab timber sales pursuant to the provisions of Section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990. Pub. L. No. 101-121 (103 Stat. 701)(1989). Plaintiffs Friends of Elk River et al. challenged the release of these sales in this Court. An agreement was reached between the Forest Service and plaintiffs whereby the Forest Service rejected all bids on the Elk Fork and Boulder Krab sales and the parties stipulated to a dismissal without prejudice. This Court accepted the stipulation and ordered the complaint and action dismissed without prejudice. See Stipulation For Order of Dismissal (3/20/91) and Order (3/20/91).

Litigation over various provisions of Section 2001 of the Rescissions Act is currently ongoing in the United States District Court for the District of Oregon. Northwest Forest Resource Council v. Glickman, 95-6244-HO (D. Oregon) (Complaint filed August 9, 1995). As part of that litigation, the Forest Service represented that relevant courts and interested parties would be notified of the intended release of those timber sales under Section 2001 that were the subject of prior litigation in the Western District of Washington or the District of Oregon, and delayed or withdrawn from release due to that court action.[1]

---

[1] On this same day, the Forest Service is providing notice of intent to commence steps necessary to release two (continued...)

See September 27, 1995 Memorandum from Jack Ward Thomas (attached hereto as Exhibit A).

Respectfully submitted this 16th day of October, 1995.

KRISTEN OLSON
United States Attorney
District of Oregon

LOIS J. SCHIFFER
Assistant Attorney General

ELLEN M. ATHAS
MICHELLE L. GILBERT
U. S. Department of Justice
Environment and Natural
Resources Division
General Litigation Section
P.O. Box 663
Washington, DC 20044-0663
(202) 272-8338

Attorneys for Defendants

---

[1](...continued)
additional timber sales, the First and Last timber sales, located on the Umpqua National Forest. This notice will be filed with the United States District Court for the District of Oregon in the action of Northwest Forest Resource Council v. Glickman, 95-6244-HO (D. Or.) and the United States District Court for the Western District of Washington in the action of Seattle Audubon Society v. Thomas, C89-160WD (W.D. Wash.).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 16, 1995, she caused one copy of the foregoing, **NOTICE OF INTENT TO RELEASE ELK FORK AND BOULDER XRAB TIMBER SALES**, to be telefacsimile machine and first class U.S. mail, upon the counsel of record hereinafter named:

GARY K. KAHN
610 S.W. Alder, Suite 910
Portland, OR 97205
Telephone: (503) 227-5144
Fax : (503) 227-2503

LISA A. HOLDEN

Department of Agriculture Service Office P.O. Box 96090
Washington, DC 20090-6090

File Code: 2600 Date: September 27, 1995

Subject: Section 318 Timber Sales
Your Letter of September 13, 1995

To: Regional Forester, Region 6

On September 13, 1995, you provided me with recommendations regarding how we should proceed with Section 318 timber sales in accordance with Section 2001 (k) of Public Law (P.L.) 104-19. I have reviewed your recommendations with counsel and with the Secretary's Office. On the advice of counsel, you are hereby directed to proceed as follows:

1) For the timber sales listed on the enclosed Table 1 (Timber Sales to Release), move to lift the suspensions on all units of these timber sales or award the sales, as appropriate.

2) For the timber sale listed on the enclosed Table 2 (Partial Release Timber Sales), move to award and release the sale units where, based on existing information, threatened or endangered bird species are not known to be nesting. Do not release those sale units where threatened or endangered bird species are known to be nesting, based on existing information, in conformance with Section 2001 (k)(2), P.L. 104-19.

3) Do not award those timber sales listed on Table 3 (Timber Sales Under Injunction or Delayed by Court Action) that are currently enjoined by court order. When the matter of the outstanding injunctions is resolved, we will reassess these timber sales. For those sales listed on Table 3 that are not currently enjoined but are delayed as a result of other court actions, the Department of Justice will begin the 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.

4) For the timber sales listed on the enclosed Table 4 (Timber Sales with T&E Bird Species Known to be Nesting), the data you have provided indicates that threatened or endangered bird species are known to nest in the remaining units on these sales. Do not release or award these sale units in conformance with Section 2001 (k)(2), P.L. 104-19.

EXHIBIT A

As noted in your September 13, 1995 letter, we recognize that you have already acted to award the Ebola Hill and Head timber sales on the Mount Hood and Rogue River National Forests respectively. This letter is intended to resolve the status of only those sales referred to in your September 13, 1995 letter. Timber sales offered pursuant to other authority are presently the subject of litigation and are not affected by this decision.

JACK WARD THOMAS
Chief

Enclosure

Ex.A,

Table 1. Timber Sales to Release

National Forest	Timber Sale
Umpqua National Forest	Sanita
	Jack
	Redlick
	Honeytree
	Gage
Willamette National Forest	Horse Ryare
Olympic National Forest	Garice Cat
	[illegible]
Gifford Pinchot NF	Maldavey

Table 2. Partial Release Timber Sales

National Forest	Timber Sale
Willamette National Forest	Red 90

Table 3. Timber Sales Under Injunction or Delayed By Court Action

National Forest	Timber Sale
Umpqua National Forest	Cowboy
	Rita
	South Rita
	Last
	First
Siskiyou National Forest	Garden
	Boulder Krab
	Elk Peak

Table 4. Timber Sales with TES Bird Species Known to be Nesting

National Forest	Timber Sale
Umpqua National Forest	Abes Wren
Willamette National Forest	Anchovy
Mt. Baker/Snoqualmie NF	Fish Story
	Old Grade
	Indian Buyback
	Stalwart
	Sarge
	Boyd Creek
	Clear Creek
Olympic NF	Canal
	Hot Rod
	Deodar
	Yew Who
	West Boundary
	Wynoochee Res.
	Stevens

Exh

Table 4. Timber Sales with TES Bird Species Known to Be Nesting (continued)

Forest	Timber Sale
Siskiyou National Forest	Sugar Cube
	Wiariver
	Spur Trigger
	Lobster
	Father Oak
	Taylor Ranch
	Toastberry
Siuslaw National Forest	Mr. Rogers
	Prong
	Poland Ridge
	Gordy Bluff
	North Bell
	Square Clare
	Berry Bushel
	Condon Carr.
	Fivemile Plume
	Franklin Ridge
	Indian Rock
	Lower Bailey
	Maria Skyline
	Skywalker
	South Fantom
	Sugar Maple
	Sulphur
	Uncle Condon
	Upper Nutwood
	Summer Bunch
	Green Bale
	Green Apple
	Green Horn
	Randallsalado
	Ryan Wapiti
	Beamer 712
	Canal 606
	Pyramder 183
	Pyramder 717
	Upperten 062
	Wapiti 308
	Wheelock 403

ExA,

KRISTINE OLSON
United States Attorney
888 SW Fifth Avenue
Suite 1000
Portland, OR 97204-2024
503-727-1008
OSB # 73254

LOIS J. SCHIFFER
Assistant Attorney General
WELLS D. BURGESS
MICHELLE L. GILBERT
ANDREA L. BERLOWE
EDWARD BOLING
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 202-272-6217

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, Plaintiff, v. DAN GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of the Interior Defendants.	Civil No. 95-5244-HO THIRD DECLARATION OF JERRY L. HOFER

I, Jerry Hofer, hereby declare the following to be true and correct:

1. I am the section head for Contracts and Contracts Administration for the Pacific Northwest Region of the United States Forest Service. That region covers all of the national forests in Washington and Oregon. I have worked for the Forest Service for 27 years and have held my current position since June 1989. In that position I am responsible for various duties

associated with timber sales contracts, including contract award and administration.

2. I have attached the award letter to Scott Timber Co. for the Boulder Krab Timber Sale on the Siskiyou National Forest. Also attached is the award letter to CLR timber Co. for the Elk Fork Timber Sale also on the Siskiyou National Forest. The award letters were sent by close of business November 3, 1995.

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

Executed at Portland, Oregon on November 3, 1995

Jerry L. Hofer

Jerry L. Hofer

United States Department of Agriculture | Forest Service | Siskiyou National Forest | 200 NE Greenfield Road
PO Box 440
Grants Pass, OR 97526-0242

Reply To: 2450 Sale Contracts and Permits November 3, 1995

Subject: Boulder Krab Timber Sale, Contract No. 074295

To: Scott Timber Co.
P.O. Box 218
Coquille, OR 97423

CERTIFIED MAIL - RETURN RECEIPT REQUESTED Z 137 760 418

Gentlemen:

On July 27, 1995, Public Law 104-19 was enacted. An order issued by the U.S. District Court of Oregon requires us to award the Boulder Krab timber sale pursuant to Public Law 104-19, on the basis that the sale is subject to the provisions of the law. This law directs us to award certain timber sales with no change in originally advertised terms, volumes, or bid prices. Therefore, in accordance with Public Law 104-19, I am proceeding with the award of this sale under its original terms. However, the issue of whether or not this sale is subject to that law is currently in litigation. If a court rules that this sale is not subject to Public Law 104-19, this award and any contract executed as a result of this award, is null and void.

On 9/27/90, you were high bidder on the above designated timber sale. Since you have met all pre-award requirements, the sale is being awarded to you as of the date of this letter.

The enclosed Bill for Collection in the amount of $393,300.00 is for the Down Payment as stated on the bid form and on the prospectus. The Down Payment is calculated as follows: 10% of the advertised value plus 20% of the total bid premium. This must be paid 30 days from the date of this letter. Effective Purchaser Credit may be used for all or part of this payment not to exceed the limit stated in C4.211# (Option 1). Deposit procedures have been established by Timber Sale Accounting. Please mail all timber sale payments to the address shown on the Bill of Collection. Payments will no longer be received at the Forest Supervisor's Office.

Failure to make the down payment at the time the contract is executed and returned constitutes breach of this contract. If the breach is not remedied within the time allowed, this shall act as a repudiation of the contract.

11-2400-24 (10/95)

Enclosed are the following documents for your consideration The contract and performance bond must be executed and returned to this office within 30 days unless additional time is granted for some special reason by the Contracting Officer:

1. Two complete copies of the timber sale contract and the first nine pages of the original contract. The original and duplicate must be executed by the person or persons who are authorized to sign for your company, in accordance with the instructions on the reverse side of contract page 1. The second copy of the contract is for the surety company from whom you secure your bond.

2. Two copies of the performance bond. The original should be signed by the same person or persons who executed the contract and by the surety company representative. In completing the performance bond, please be sure that it has seals affixed and is completed on the back. The bonding company must be one that is currently on the Treasury Department's approved list of acceptable sureties and have a process agent in Oregon. We also require evidence of authority for individuals to sign on behalf of the surety company. Such evidence is contained in the form of a power of attorney or affidavit to the bond which you furnish us. The duplicate copy of the bond is for the surety company.

An Application for Addition to Timber Sale Contract to Blanket Payment Bond is not included at this time. Please contact us or the District Ranger for these forms when you are ready to begin operations.

The original and duplicate of the contract should be returned to this office for approval, also the original of all enclosed bond forms. Following approval, one copy of each document will be furnished for your records.

The enclosed Form R6-2430-61 is for your use in furnishing the required agreement from your Buyer(s). Form FS-2400-46 (Purchaser Certification of Timber Domestically Processed and Exported) is now an annual report due on or before March 1st. If you need additional copies, contact your Forest Service Representative.

Your disposition of timber statement for the previous calendar year (FS-2400-46) is on file. It indicates activities were within limits established by your historical record.

Our records indicate that you will be required to file Form SF-100 in order to comply with contract provision B8.63. If you have not submitted an SF-100 during the current reporting period ending next March 31, please complete SF-100 and submit to the Joint Reporting Committee (EEO-1), P.O. Box 779, Norfolk, VA, 23501. Please instruct any of your subcontractors to complete and submit SF-100 if the subcontract is for $50,000 or more and he/she employs 50 or more persons. Forms may be obtained by calling 804-461-1213.

Subsection B8.63, Nondiscrimination in Employment, is in effect in this contract.

In accordance with the Provision B6.1 of the timber sale contract, Bob Thomas is the Forest Service Representative who is available to receive notices and take action on sale related activities. In his absence the District Ranger in charge of the Powers Ranger District is the Forest Service Representative for actions under this contract.

Please furnish in writing, before operations begin, the name of your representative for this sale.

Please advise the Forest Service Representative in writing (15) days before commencing operations if you plan to operate this sale during 1995. Your annual schedule under B6.31 must be submitted (15) days prior to commencing operations in the subsequent year.

In accordance with C6.3 - Plan of Operation, you have 60 days to furnish the Forest Service an acceptable written general plan of operation. The enclosed Form R6-FS-2400-34 may be used to supply the necessary information to the Forest Service Representative, at the Powers Ranger District. This plan must be approved in writing before operations can begin.

Sincerely,

Brenda Lee Woodard

For: BRENDA L. WOODARD
Contracting Officer

Enclosures: 2 copies of Contract and Pgs. 1-9 of Original Contract
2 copies of Performance Bond
Bill for Collection w/envelope
3 copies R6-2430-61
1 copy R6-FS-2400-34
1 set Equal Employment Information

cc: Powers District Ranger
Zone I

11-2400-24 (10/95)

United States Department of Agriculture | Forest Service | Siskiyou National Forest | 200 NE Greenfield Road PO Box 440 Grants Pass, OR 97526-0242

Reply To: 2450 Sale Contracts and Permits November 3, 1995

Subject: Elk Fork Timber Sale, Contract No. 074303

To: CLR Timber Holdings, Inc.
P.O. Box 670
Brookings, OR 97415

CERTIFIED MAIL - RETURN RECEIPT REQUESTED Z 137 760 419

Gentlemen:

The following wording will be used by the Forest Service and Bureau of Land Management if the stay is lifted and we are ordered to proceed with award of the sales:

On July 27, 1995, Public Law 104-19 was enacted. An order issued by the U.S. District Court of Oregon requires us to award the Elk Fork timber sale pursuant to Public Law 104-19, on the basis that the sale is subject to the provisions of the law. This law directs us to award certain timber sales with no change in originally advertised terms, volumes, or bid prices. Therefore, in accordance with Public Law 104-19, I am proceeding with the award of this sale under its original terms. However, the issue of whether or not this sale is subject to that law is currently in litigation. If a court rules that this sale is not subject to Public Law 104-19, this award and any contract executed as a result of this award, is null and void.

On September 27, 1990, you were high bidder on the above designated timber sale. Since you have met all pre-award requirements, the sale is being awarded to you as of the date of this letter.

The enclosed Bill for Collection in the amount of $147,000.00 is for the Down Payment as stated on the bid form and on the prospectus. The Down Payment is calculated as follows: 10% of the advertised value plus 20% of the total bid premium. This must be paid 30 days from the date of this letter. Effective Purchaser Credit may be used for all or part of this payment not to exceed the limit stated in C4.211# (Option 1). Deposit procedures have been established by Timber Sale Accounting. Please mail all timber sale payments to the address shown on the Bill of Collection. Payments will no longer be received at the Forest Supervisor's Office.

Failure to make the down payment at the time the contract is executed and returned constitutes breach of this contract. If the breach is not remedied within the time allowed, this shall act as a repudiation of the contract.

Enclosed are the following documents for your consideration. The contract and performance bond must be executed and returned to this office within 30 days unless additional time is granted for some special reason by the Contracting Officer:

1. Two complete copies of the timber sale contract and the first nine pages of the original contract. The original and duplicate must be executed by the person or persons who are authorized to sign for your company, in accordance with the instructions on the reverse side of contract page 1. The second copy of the contract is for the surety company from whom you secure your bond.

2. Two copies of the performance bond. The original should be signed by the same person or persons who executed the contract and by the surety company representative. In completing the performance bond, please be sure that it has seals affixed and is completed on the back. The bonding company must be one that is currently on the Treasury Department's approved list of acceptable sureties and have a process agent in Oregon. We also require evidence of authority for individuals to sign on behalf of the surety company. Such evidence is contained in the form of a power of attorney or affidavit to the bond which you furnish us. The duplicate copy of the bond is for the surety company.

An Application for Addition to Timber Sale Contract to Blanket Payment Bond is not included at this time. Please contact us or the District Ranger for these forms when you are ready to begin operations.

The original and duplicate of the contract should be returned to this office for approval, also the original of all enclosed bond forms. Following approval, one copy of each document will be furnished for your records.

The enclosed Form R6-2430-61 is for your use in furnishing the required agreement from your Buyer(s). Form FS-2400-46 (Purchaser Certification of Timber Domestically Processed and Exported) is now an annual report due on or before March 1st. If you need additional copies, contact your Forest Service Representative.

Your disposition of timber statement for the previous calendar year (FS-2400-46) is on file. It indicates activities were within limits established by your historical record.

Our records indicate that you will be required to file Form SF-100 in order to comply with contract provision B8.63. If you have not submitted an SF-100 during the current reporting period ending next March 31, please complete SF-100 and submit to the Joint Reporting Committee (EEO-1), P.O. Box 779, Norfolk, VA, 23501. Please instruct any of your subcontractors to complete and submit SF-100 if the subcontract is for $50,000 or more and he/she employs 50 or more persons. Forms may be obtained by calling 804-461-1213.

Subsection B8.63, Nondiscrimination in Employment, is in effect in this contract.

In accordance with the Provision B6.1 of the timber sale contract, Bob Thomas is the Forest Service Representative who is available to receive notices and take action on sale related activities. In his absence the District Ranger in charge of the Powers Ranger District is the Forest Service Representative for actions under this contract.

Please furnish in writing, before operations begin, the name of your representative for this sale.

Please advise the Forest Service Representative in writing (15) days before commencing operations if you plan to operate this sale during 1995. Your annual schedule under B6.31 must be submitted (15) days prior to commencing operations in the subsequent year.

In accordance with C6.3 - Plan of Operation, you have 60 days to furnish the Forest Service an acceptable written general plan of operation. The enclosed Form R6-FS-2400-34 may be used to supply the necessary information to the Forest Service Representative, at the Powers Ranger District. This plan must be approved in writing before operations can begin.

Sincerely,

Bruce Lee Casey

FOR: BRENDA L. WOODARD
Contracting Officer

Enclosures: 2 copies of Contract and Pgs. 1-9 of Original Contract
2 copies of Performance Bond
Bill for Collection w/envelope
3 copies R6-2430-61
1 copy R6-FS-2400-34
1 set Equal Employment Information

cc: Powers District Ranger
Zone I

11-2400-24 (10/95)

U.S. Department of Agriculture
Natural Resources & Environment

U.S. Department of the Interior
Land and Minerals Management

August 23, 1995

MEMORANDUM

TO: Jack Ward Thomas
Chief
Forest Service

Elaine Zielinski
Oregon State Director
Bureau of Land Management

FROM: for James R. Lyons
Under Secretary of Agriculture
Natural Resources and Environment

for Mike Dombeck
Acting Director
Bureau of Land Management

SUBJECT: Additional Direction on Section 2001(k) of the 1995 Rescission Act

Yesterday we issued direction relating to section 318 sales which are affected by section 2001(k)(1) of the 1995 Rescission Act (P.L. 104-19). The purpose of this memorandum is to set forth the administration's interpretation of the other subsections of 2001(k).

As we stated yesterday, "We must read the law in a manner that makes sense of the entire Act, including direction to expeditiously implement the President's Northwest Forest Plan, and in a manner that avoids reading section 2001(k) so expansively as to generate windfall profits at the expense of the public and the environment." In support of these principles, we will act to award, release, and permit to be completed, subject to the exclusionary provisions of 2001(k), all remaining section 318 timber sale contracts which are currently being delayed. Those sales are:

1. Sales for which apparent high bidders have been identified, but the sales have not yet been awarded to the high bidder, except that these sales will contain all previously mutually agreed upon changes to the original terms;

2. Sales for which apparent high bidders have been identified and the sale awarded, but where the contract has not yet been executed by the high bidder, except that these sales will contain all previously mutually agreed upon changes to the original terms;

3. Sales for which the apparent high bidder has been identified, but the bid bond was returned before award of the contract.

Sales which have been awarded and executed will not be modified or altered to the originally advertised terms, volumes, and bid prices.

Section 2001(k)(2) provides that sales subject to section 2001(k)(1) shall not be released or completed "if any threatened or endangered bird species is known to be nesting" within the sale unit. Although the phrase "threatened or endangered bird species" certainly includes northern spotted owls, Congress' primary attention was focused on the impact of the remaining Section 318 sales on the marbled murrelet. This direction will outline the criteria used to determine whether any marbled murrelets are "known to be nesting" within the remaining section 318 sale units that are subject to section 2001(k).

Congress did not define the phrase "any threatened or endangered bird species is known to be nesting." Therefore, the implementing agencies must interpret this phrase in accordance with general principles of law. In interpreting this phrase, we choose to be guided by the best scientific information available. We have consulted with agency experts and they have provided us with the following information. The marbled murrelet is a rapidly-disappearing sea bird that uses old-growth forest areas only for nesting and breeding, or for activities that are in support of nesting and breeding. The remainder of its life is spent on the ocean. Murrelets are believed to have a high nesting site fidelity, that is, adult murrelets return to the same tree stands year after year to nest. Therefore, if a stand of forest that murrelets use for nesting is cut, they probably will not continue to reproduce. Murrelets do not construct typical bird nests (they lay their eggs on broad branches of older trees or in trees with deformations) and they hide from predators during nesting, which makes detection of nesting activity difficult. Indeed, the first marbled murrelet nest was not discovered until 1974, and there are very few identified nests to this day.

The consequence of adopting an interpretation of "known to be nesting" that requires "physical" detection of nesting activity is potentially quite dire for the entire marbled murrelet population and for related conservation efforts, including the President's Forest Plan. The remaining Forest Service Section 318 sales encompass ten to twenty percent of the known nesting sites for the marbled murrelet.

We believe that there is a more rational interpretation of the phrase "known to be nesting" that is based upon the best scientific information available about the murrelets. Because of its highly secretive behavior and lack of typical nesting behavior, our agency experts inform us that actual detection of a nest is not the only, or the exclusive, reliable indicator of nesting. The Pacific Seabird Group -- a group composed of federal, state, private and academic biologists --

developed a reliable scientific protocol for determining the existence of murrelet nesting activities. This protocol is designed to determine more than mere "presence" of murrelets. Surveys based on this protocol provide the best scientifically valid information, available within the 45 days provided by Congress, on whether murrelets are known to be nesting in these units. Based on the protocol's scientific analysis, we conclude that the protocol's criteria should be utilized in evaluating whether Section 318 sales are subject to section 2001(k)(2).

Application of the protocol's criteria to determine whether murrelets are "known to be nesting" in a particular area is the way to provide for meaningful implementation of subsection 2001(k)(2) given the needs of this species. Again, agency experts inform us that murrelets do not "nest" or "reside," that is, nest or breed, in a way that permits of typical nest detection, yet their nesting and breeding behavior is just as critically dependent on availability of nesting habitat as any other species. In order to comply with the directive to withhold sales where the murrelet is nesting, the scientifically valid approach is to utilize the criteria in the protocol. There simply is no other practical or biologically justifiable method for identifying murrelet nesting, or for insuring that our actions will not be likely to jeopardize the continued existence of the murrelet.

We are informed that within the 45 days allowed by Congress, the Forest Service is completing a second year of surveys for murrelets. Sale purchasers are being provided with the survey data sheets and asked for their comments. As an example of how the process has been used on a particular forest, purchasers questioned the validity of 12 of the units in the Siuslaw National Forest. Forest Service biologists reviewed all applicant comments, conducted additional surveys of 4 of the sales and determined that the data was sufficient for another 4 sales. A purchaser hired a surveyor for the remaining 4 sales, which confirmed the Forest Service's findings. Additionally, government agencies are reviewing all survey data, verifying all "questionable" determinations and continue to confirm the strength of all survey determinations.

In subsection 2001(k)(3), Congress included a provision for alternative timber for the remaining Section 318 sales that are not released within the 45-day timeframe specified in Subsection (k)(1). This provision applies to any sale which "for any reason" cannot be released within the 45-day period. This provision is therefore applicable to sales or units of sales that are not released under Subsection (k)(2).

In accordance with the standards and guidelines for the President's Northwest Plan, and within the limits of available personnel and appropriated funds, we will assess the availability of alternative volume.

KRISTINE OLSON
United States Attorney
888 SW Fifth Avenue
Suite 1000
Portland, OR 97204-2024
503-727-1008
OSB # 73254

LOIS J. SCHIFFER
Assistant Attorney General
WELLS D. BURGESS
MICHELLE L. GILBERT
ANDREA L. BERLOWE
EDWARD BOLING
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 202-272-6217

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL, Plaintiff, v. DAN GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of the Interior Defendants.	Civil No. 95-6244-HO FIFTH DECLARATION OF JERRY L. HOFER

I, Jerry L. Hofer, hereby declare the following to be true and correct:

1. I have previously filed declarations in this case putting forth my experience and qualifications with the United States Forest Service.

2. As declared to in the THIRD DECLARATION OF JAY MCWHIRTER,

November 1, 1995, filed in this case, the Forest Service, at my direction, has reviewed its records for information regarding timber sales offered or awarded before FY91.

3. Exhibit 1 identifies 56 timber sale contracts awarded prior to FY 91 but suspended, including the Squeegee Timber Sale on the Olympic National Forest, previously declared to in the THIRD DECLARATION OF JAY MCWHIRTER. These contracts were suspended due to the listing of the marbled murrelet or nesting by northern spotted owls.

4. As to timber sales offered prior to FY91 and not awarded, the Forest Service has no specific policy for maintaining records on timber sales offered, but unawarded. Typically, if an offered sale is not awarded for any purpose, the bids are rejected and the "timber sale" ceases to be an entity. This does not mean that the planning and resource analysis completed to the time of bid rejection is never used again. The named timber sale may be reoffered as is, reconfigured, or abandoned. The records search, therefore, for offered, but unawarded timber sales prior to FY91, cannot be directed to any particular record, file or report.

5. I directed the review of the Forest Service Regional Office files of the Forest Service Form 2400-17, entitled "REPORT OF TIMBER SALES, CONVERTIBLE AND NONCONVERTIBLE PRODUCTS", to determine if the form would reveal the contract status of timber sales offered before FY91. Form 2400-17 is used by the Forest

Service to report each timber sale offered. Required information on this form includes sale name, state, National Forest, Ranger District, legal description, bid date, termination date, tree species, volume, bid rate and bidders, including the identified high bidder, and sale status. This required information is used by the Forest Service as the source of information for other data bases and reports including: timber sale accomplishments reports, bid rates to enter into timber sale contract, and cut and sold volume reports. However, Form 2400-17 has not been used to keep track of offered, but unawarded timber sales.

6. Each of the National Forests in Oregon and Washington reviewed the compiled list of sales from the Form 2400-17 review to confirm the existence, status and condition of the listed sales, as well as to report any additional timber sale offered but unawarded prior to FY91 that staff members could personally recall.

7. The results of the Form 2400-17 search and the National Forests' review are displayed in Exhibit 1. Exhibit 1 identifies 40 timber sales offered, but unawarded prior to FY91, including the Auger Timber Sale on the Fremont National Forest, previously declared to in the THIRD DECLARATION OF JAY MCWHIRTER.

8. Most of the timber sales not previously reported to the Court fail to meet the Forest Service Timber Sale Contract, Division B/BT, Standard Provisions included in each of the offered

timber sale contracts. This failure is due, in large part, to deterioration of painted tree markings and sale boundary posters. Some sales were reconfigured, sold and harvested as reconfigured sales, or the timber has deteriorated beyond the point of being merchantible.

9. As to the search for archived records, referred to in the THIRD DECLARATION OF JAY MCWHIRTER, records are typically referred to as "archived" when they are transmitted to the Federal Record Center in Seattle, Washington and no longer in the custody of the Forest Service. Before making a retrieval request to the Federal Record Center, I reviewed the Records Management Handbook for the Forest Service to determine if archived records would still be in existence for timber sale contracts offered or awarded prior to FY91.

10. The Forest Service Records Management Handbook (FSH 6209.11) establishes a 5 year retention period for records documenting the preparation, advertisement and award of timber sales. Whether retained by the individual National Forest office or archived with the Federal Record Center, records dated prior to October 1, 1990 for the preparation, advertisement and award of timber sales, are beyond the retention period. Thus, I did not request a retrieval of records from the Federal Records Center for records prior to October 1, 1990. Instead, as declared above, I directed the review of the Regional Office files of Form 2400-17. It is only because of the practical business nature of timber sale

accounting procedures, program analysis, and contract payment rate redetermination that Forms 2400-17 have been retained by the Regional Office.

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

Executed at Portland, Oregon, on November 15, 1995.

Jerry L. Hofer

NOV-15-1995 16:51 USDA FOREST SERVICE, FWB 503 326 7166 P.06

NOV-15-1995 16:51 USDA FOREST SERVICE, FWB 503 326 7166 P.07

Exhibit 1 to the Fifth Declaration of Jerry L. Hofer

Forest Service, Region 6

Timber Sales Offered or Awarded Prior to FY 91

Prepared pursuant to the Court's Order, October 17, 1995, NFRC v. Glickman, Civ. No. 95-6244HO

13-Nov-95 03:29 PM

Forest	Sale Name	Bid Date	Original Volume	High-Bidder	Previously Reported to The Court	Sale Status
FRE	AUGER	09/26/89	11500	Fremont Sawmill	Yes	Not Awarded, ONRC v. Grossarth, Civ. No. 89-6451
GIP	SILVER 7	02/24/89	6700	Pacific Lumber Sales Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	POLAR 2	03/20/89	9300	Stimson Lumber	No	Not Awarded, pursuant to Section 318 (f) (1)
MBS	SIBLEY	03/14/89	4950	Summit Timber	No	Not Awarded, pursuant to Section 318 (f) (1)
	FLASH GORDON	03/09/89	6450	Miller Shingle Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SKOOKUM DOE	09/11/85	15500	Marshal Logging, Inc.	No	Not Awarded, records indicate litigation
	DRY RANGER	08/21/85	23700	Auburn Timber	No	Not Awarded, records indicate litigation
	H. 410 SILV. #2 SSTS	10/19/83	330	Pat Johnson	No	Not Awarded
	FISH STORY	12/12/89	6700	LB&R Logging	Yes	Awarded; Contract Suspended, Marbled Murrelet
	OLD GRADE	08/14/90	9900	Summit Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MEDAN BUYBACK	09/27/90	7190	LB&R Logging	Yes	Awarded; Contract Suspended, Marbled Murrelet
	STALWART	09/18/90	2600	Miller Shingle	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SCRAPS	09/27/90	7550	Miller Shingle	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BOYD CREEK	09/25/90	3750	Hum Shingle	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CLEAR CREEK	08/21/90	3435	Duse Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
MTH	PISTOL RESELL	02/28/89	9900	Vanport Mfg. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	JIGSAW	03/07/89	15100	Vanport Mfg. Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	ROCK BUTTE RESELL	03/21/89	5450	Stevenson Co-Ply, Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	BI	03/21/89	6200	Freres Lumber Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SI	03/21/89	5700	Frank Lbr. Co., Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
OLY	LONER ELK	01/29/89	3360	Last Camp Timber	No	Not Awarded, Spotted Owls
	CAMEL	01/04/90	6050	Mayr Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	NOT BAD	07/02/90	7290	Hoh River Lumber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	DEODAR	09/14/90	9900	Hoh River Lumber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	YOU WHO	09/14/90	12400	MCMC Resources	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WEST BOUNDARY	09/20/90	4300	Mayr Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WYNOCHEE RES.	09/24/90	16960	Mayr Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	STEVENS	09/06/90	5600	Mayr Brothers	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SQUEEGEE	09/15/88	4600	White Star	Yes	Awarded; Suspended, Spotted Owls & Marbled Murrelet
ROR	ESMOND SALVAGE	05/30/84	500	JU Logging	No	Not Awarded
	SMALL TREE	09/28/83	1020	Jeffries Timber Corp.	No	Not Awarded
SIS	REDWOOD SPRINGS T	03/14/89	2720	CLR Timber Holdings, Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	SUGAR CUBE	09/17/90	4830	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WINRIVER	01/06/90	3140	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SPUR TRIGGER	05/22/90	5420	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	LOBSTER	09/06/90	6550	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FATHER OAK	03/28/90	5730	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	TAYLOR RANCH	12/27/89	5350	CLR Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	TOASTBERRY	08/06/90	4010	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GARDEN	09/12/90	4590	Medford Corporation	Yes	Not Awarded, SAS vs. Thomas 89-160WD
SIU	TENMILE 808	03/21/89	6637	Hampton Tree Farms	No	Not Awarded, pursuant to Section 318 (f) (1)
	MAYPOLE	03/08/84	6675	Davidson Industries	No	Not Awarded, Siuslaw Task Force vs. USFS, 83-1153MA
	PANTHER SALVAGE	03/20/84	2205	Ball Wood Products	No	Not Awarded, Siuslaw Task Force vs. USFS, 83-1153MA
	WASSEN RANCH	09/21/82	9284	Bohemia, Inc.	No	Not Awarded, Siuslaw Task Force vs. USFS, 83-1153MA
	FOLAND RIDGE	09/25/90	4400	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	[illegible]	05/29/90	7590	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet

Exhibit 1 to the Fifth Declaration of Jerry L. Hofer

Forest Service, Region 6

Timber Sales Offered or Awarded Prior to FY 91

Prepared pursuant to the Court's Order, October 17, 1995, NFRC v. Glickman, Civ. No. 85-6244HO

15-Nov-95 03:20 PM

Forest	Sale Name	Bid Date	Original Volume	High-Bidder	Previously Reported to The Court	Sale Status
SIU	NORTH BALL	04/11/89	6700	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SQUARE CLARE	05/29/90	10700	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BERRY BUSHEL	07/06/90	5500	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CONCON CARR.	09/11/90	6800	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FIVEMILE FLUME	09/27/90	7500	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FRANKLIN RDGE	09/11/90	9000	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	INDIAN HOOK	09/11/90	15200	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	LOWER BAILEY	09/27/90	3200	Lone Rock Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MARIA SKYLINE	09/20/90	12700	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SKYWALKER	09/04/90	7700	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SOUTH PAXTON	09/20/90	9200	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SUGAR MAPLE	03/08/90	6400	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	SULPHUR	06/07/90	6400	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UNCLE CONDON	09/11/90	12600	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UPPER MCLEOD	09/11/90	5100	Seneca Sawmills	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BENNER BUNCH	12/19/89	10300	Bugaboo Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GRASS HULA	07/31/90	8700	Bugaboo Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GREEN APPLE	07/24/90	10100	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	GREEN HORN	08/21/90	5800	Willamette Industries	Yes	Awarded; Contract Suspended, Marbled Murrelet
	RANDALL SALADO	09/28/90	6500	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	RYAN WAPITI	03/20/90	10700	Freres Lumber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	BEAMER 712	06/26/90	8900	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	CANAL 606	04/03/90	9400	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FORMADER 103	08/14/90	8300	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	FORMADER 717	06/28/90	2400	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	UPPERTEN 002	05/03/90	14485	Boise Cascade	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WAPITI 305	09/20/90	2300	Scott Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
	WHEELOCK 403	06/19/90	6013	Hampton Tree Farms	Yes	Awarded; Contract Suspended, Marbled Murrelet
	MR ROGERS	09/28/90	10000	Seneca Sawmills	Yes	Awarded; Contract Suspended, Marbled Murrelet
	PRONG	08/27/90	4800	Lone Rock Timber	Yes	Awarded; Contract Suspended, Marbled Murrelet
UMP	DONEGAN	03/15/89	14400	Boise Cascade Corp	No	Not Awarded, pursuant to Section 318 (f) (1)
	JUMP	03/15/89	3300	Deer Creek Timber, Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	BVD	03/08/89	19930	Scott Timber Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	ROCK RIDGE	03/08/89	8700	Lone Rock Timber Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	MALT	02/22/89	16400	Western Timber Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	WHISKEY THIN	07/11/84	372	Samuel Riddle	No	Not Awarded, no Cert of Competency at SBA
	ABES WREN	12/27/89	6580	D.R. Johnson Company	Yes	Awarded; Contract Suspended, Spotted Owls
	COWBOY	04/18/90	9400	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	NITA	08/29/90	9300	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	SOUTH NITA	08/29/90	6300	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	LAST	09/12/90	6700	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
	FIRST	09/19/90	5100	Scott Timber	Yes	Not Awarded, SAS vs. Thomas 89-160WD
WIL	DALY WEST	02/22/89	6000	Frank Lumber Co., Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	BUNCHVIEW	02/28/89	16300	Penn Timber, Inc.	No	Not Awarded, pursuant to Section 318 (f) (1)
	METROETTE TBV	02/28/89	5600	Weyerhaeuser Co.	No	Not Awarded, pursuant to Section 318 (f) (1)
	COLD SALVAGE	03/01/89	250	John Ladd Logging	No	Not Awarded
	CUP SALVAGE	03/03/89	490	T. E. Richards	No	Not Awarded
	LATE	08/24/78	11600	TOMCO, Inc.	No	Not Awarded
	ANCHOVY	09/28/90	3400	Thomas Creek	Yes	Awarded; One Unit Suspended, Spotted Owls
CCL	HELEN	[illegible]	[illegible]	Boise Cascade Corp	No	Not Awarded

F-7

GENERAL PLAN OF OPERATION (C6.3)

Sale Name Boulder Krab Contract No. 074295

Purchaser Scott Timber Company Termination Date March 31, 1999

1. ROAD CONSTRUCTION/RECONSTRUCTION OPERATIONS

Road Number	Tentative Start (Month and Year)	Tentative Completion (Month and Year)
3353220	5/96	7/96
3353222	7/96	7/96

2. LOGGING OPERATIONS

Method Logging	Volume to Remove	Tentative Start	Tentative Completion
HELICOPTER	1.1 MM	7/96	8/96
CABLE	4.6 MM	6/96	10/96

3. POST LOGGING REQUIREMENTS

Erosion control will be completed within 30 calendar days after skidding and/or yarding is complete to each landing. Outside the normal operating season it will be kept current. Slash disposal will be completed within _____ calendar days after logging operations are substantially complete to each landing. Road maintenance will be done as needed and within 30 calendar days after use is complete.

4. SPECIAL REQUIREMENTS (C2.321, C5.21, C6.311) will be met as follows:

C2.321 - Prior to Operations if a hazard.
C5.21 - Schedule will be submitted when Schedule of ITEMS have been revised
C6.311 - To be submitted prior to construction.

5. ATTACHMENTS:

Submitted [signature] 11-29-95
Purchaser Representative Date

Approved Robert W. Thomas 11-29-95
Forest Service Representative Date

R6-FS-2400-34 (4/86)

OPERATING SCHEDULE CALENDAR YEAR 1995 (B6.31)

O: Mr. Bob Thomas, Forest Service Representative

This is the Operating Schedule for 1995 required by B6.31 of the following Timber Sale Contract.

TSC.# 074295, Boulder Krab (Sale Name), 11-3-95 Awarded (Sell Date) 9-29-90 Sold

Purchaser Name, Address & Phone: Scott Timber Co.
P.O. Box 218, Coquille, OR. 97423 396-2131

A. PURCHASER PERSONNEL: Vim Churchill (Representative) 396-2131 (Phone #)

~~Logging~~ Cutting Contractor (Optional) Vim Davis 396-3816 (Phone #)

Field Representative(s) (if applicable) Harold Rowe 396-2131 (Phone #)

Fire Foraman _____ Patrolman _____

B. ROAD CONSTRUCTION

Start Staking N/A
Start Construction N/A
Material Delivery Dates N/A

RECONSTRUCTION

Start Staking N/A
Start Reconstruction N/A

Road Oiling Sequence and Dates: N/A

Road Maintenance Schedule N/A

Planned Measures for Erosion Control and proposed Method of Construction (C6.311). N/A

C. PRODUCTION (STARTING)

	Falling (Start)	Yarding (Start)	Hauling (Start)	Erosion Control Complete	Slash Disposal Complete
Unit # 5	12/95	#			
Unit # 4	1/96	#			
Unit #		#			
Unit #		#			
Unit #		#			
Unit #		#			
Unit #		#			
Unit #		#			
Unit #		#			
Unit #		#			

6-2430-33 (4/82)

D. Production Rates

Estimated volume to be cut is 50 MBF/day # Tractor Sides _____
Estimated volume to be cut is 1000 MBF/month # Cable Sides _____
Estimated volume to be cut is 2700 MBF this season
Estimated complete date: Cutting only

E. PAYMENTS
Advance deposits will be by (B4.221):

Yes
Payment Bond "Performance Bond" Cash Purchaser Road Credit

F. Volume of petroleum to be stored on Sale Area: _____ gallons

G. LOG ACCOUNTABILITY

1. Persons authorized to receive Woods Receipts from Forest Service:

2. Persons authorized to issue Woods Receipts in woods (B6.84):

Scaling: Bureau _____ Location(s) _____
Forest Service (If Any) _____ State Brand Registration No. _____

3. Haul Routes by road number (B6.841): _____

Map Attached ? _____

H. SPECIAL SITUATIONS

Cutting Only

Submitted by: [signature] For Scott Timber Co.
Purchaser Representative Company's Name

Date: 11-29-95

Received: [signature] 11/29/95
Forest Service Representative Date

KRISTINE OLSON
United States Attorney
888 S.W. Fifth Avenue
Suite 1000
Portland, OR 97204-2024
503-727-1008
OSB # 73254

LOIS J. SCHIFFER
Assistant Attorney General
MICHELLE L. GILBERT
GEOFFREY GARVER
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 202-272-8338

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PILCHUCK AUDUBON SOCIETY, et. al, Plaintiffs, v. DAN GLICKMAN, in his capacity as Secretary of Agriculture, BRUCE BABBITT, in his capacity as Secretary of the Interior Defendants.	Civil No. 95-06384-TC DECLARATION OF LEE O. WEBB

I, Lee O. Webb, hereby declare the following to be true and correct:

1. I am the Forest Wildlife Biologist for the Siskiyou National Forest, and have held this position for 20 years. As Forest Wildlife Biologist, one of my duties is to coordinate information on marbled murrelet surveys and how the results of those surveys affect timber sales and other forest management activities.

2. In June 1992, a marbled murrelet nest was verified in the vicinity of Copper Mountain on the Powers Ranger District in the North Fork of the Elk River.

3. At approximately 4pm on December 1, 1995, Paul Henson of the United States Fish and Wildlife Service telephoned me. Paul informed me that he had received an unsigned copy of a declaration by Jim Rogers, which stated that a unit of the Boulder Krab Timber Sale was within the same timber stand as the previously discovered July 1992, nest site. The Boulder Krab Timber Sale had recently been awarded to Scott Timber Company under section 2001(k).

4. I informed Paul that, although the Forest had been aware of the nest site since its discovery in 1992, the Forest had not determined whether any unit of the Boulder Krab Timber Sale was within the same stand as the nest site. The Forest had long known that the nest site was not within any unit of the Boulder Krab Timber Sale, but had never analyzed whether any unit of the sale was within the same stand as the nest site. The Forest believed that, after the earlier litigation, the Boulder Krab Timber Sale would not be awarded. Therefore, no analysis had been performed on whether any unit of the timber sale was within the same stand as the nest site.

5. Immediately after talking to Paul Henson, I contacted David Shea, District Wildlife and Botany Technician on the Powers Ranger District. David is familiar with the nest site, and knows its location. I asked David to determine whether the nest site was in the same stand as any units of the Boulder Krab Timber Sale.

6. After examining aerial photographs of the nest site and surrounding area, including the Boulder Krab Timber Sale, early on December 4, David contaced me. He informed me that the nest site was approximately 1/2 mile from the boundary of unit 1 of the Boulder Krab Timber Sale. Based upon his examination of the aerial photographs, as well as his personal knowledge of the site, David informed me that both unit 1 and the nest site were within the same contiguous stand of suitable marbled murrelet habitat.

7. Based on the Pacific Seabird Protocol, the entire stand containing the nest site is classified as occupied. As a result of this determination, consistent with the Forest Service's procedure as to units within stands occupied by marbled murrelets, operations on unit 1 of the Boulder Krab Timber Sale have been suspended. Attached.

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

Executed at Grants Pass, Oregon, on December 5, 1995.

Lee O. Webb

Lee O. Webb

United States Department of Agriculture | Forest Service | Siskiyou National Forest | 200 NE Greenfield Road
PO Box 440
Grants Pass, OR 97526-0242

Reply to: 2450

December 5,1995

Subject: Boulder Krab Timber Sale, Contract #074295

To: Scott Timber Company
P.O. Box 218
Coquille, OR 97423

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

An examination of the stand conditions in the area of Unit 1 was conducted on December 4, 1995. This examination determined that there are contiguous stand conditions between a known marbled murrelet nest site and Unit 1. We are therefore suspending sale operations in this unit.

Operations are suspended under provision C6.25# of this contract.

Brenda L. Woodard

BRENDA L. WOODARD
Contracting Officer

cc: Powers RD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 5, 1995, he caused one copy of the foregoing **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER** with attached exhibits to be served by facsimile and by federal express upon the counsel of record hereinafter named:

PATTI A. GOLDMAN
ADAM J. BERGER
KRISTEN L. BOYLES
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
Fax : (206) 343-1526

MARK RUTZICK
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
Telephone: (503) 499-4572
Fax : (503) 295-0915

Geoffrey Garver

KRISTINE OLSON OSB#73254
United States Attorney
JAMES L. SUTHERLAND OSB#68160
Assistant United States Attorney
District of Oregon
888 Fifth Avenue, Suite 1000
Portland, Oregon 97204-2024
(503) 727-1000

LOIS J. SCHIFFER
Assistant Attorney General
GEOFFREY GARVER
MICHELLE L. GILBERT
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0481

Counsel for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PILCHUK AUDUBON SOCIETY, et al. Plaintiffs, v. DAN GLICKMAN, et al., Defendants.	Civil No. 95-06384-TC **FEDERAL DEFENDANTS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION**

The defendants hereby respond to plaintiffs' motion for a preliminary injunction. Plaintiffs seek to enjoin the award or release of "cancelled and more than 5-year-old" timber sales under Section 2001(k)(1) of the Fiscal Year 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. no. 104-19 (July 27, 1995).

Defendants agree with plaintiffs' claim that Section 2001(k)(1) of the 1995 Rescissions Act does not apply to timber

sales offered or awarded prior enactment of Section 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (hereinafter "Section 318") on October 23, 1989. Defendants also agree that, with one narrow exception, Section 2001(k)(1) does not apply to timber sales that were cancelled or withdrawn prior to enactment of the Rescissions Act on July 27, 1995. Section 2001(k)(1) clearly covers cancelled or withdrawn timber sales that were awarded or for which that the Forest Service or the Bureau of Land Management had rejected all bids prior to enactment of Section 2001(k)(1). With respect to any such sales, plaintiffs' motion should be denied. However, Section 2001(k)(1) clearly excludes all other timber sales that were cancelled or withdrawn at the time Section 2001(k)(1) was enacted, including sales withdrawn or cancelled (1) after a court ruled that they violated Section 318, (2) at the request of the apparent high bidder, (3) because the apparent high bidder was no longer willing or able to proceed with the sale. With respect to those sales, plaintiffs' motion should be granted.

Accordingly, the court should partially grant and partially deny plaintiffs' preliminary injunction motion.

FACTUAL BACKGROUND

In July 1995, Congress enacted Section 2001(k)(1) regarding the award and release of sales subject to Section 318. Section 2001(k)(1) provides:

> Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes,

> and bid prices, all timber sale contracts offered or awarded 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 101-21 (103 Stat. 745). The return of the bid bond of the high bidder shall not later the responsibility of the Secretary concerned to comply with this paragraph.

Pub. L. 104-19, § 2001(k)(1) (1995).

Plaintiffs seek a declaration that Section 2001(k)(1) does not apply to sales cnacelled or withdrawn prior to July 27, 1995, and to sales offered before enactment of Section 318, and an injunction prohibiting award or release of such sales. The focus of plaintiffs' preliminary injunction motion is on two sales -- the BOULDER KRAB and ELK FORK sales -- that the Forest Service had previously withdrawn as a result of litigation and then released pursuant to Section 2001(k)(1). On December 4, plaintiffs applied for a temporary restraining order stopping operation of the BOULDER KRAB sale pending the December 12 hearing on their preliminary injunction motion. Defendants' position with respect to the BOULDER KRAB and ELK FORK sales is set forth in Defendants' Opposition to Application for TRO.

Neither the Forest Service nor the BLM has released any other sales that are the subject of plaintiffs' complaint, and they will not do so prior to the December 12 hearing. See Memorandum in Support of Motion for Preliminary Injunction, at 2-3. Thus, with respect to sales other than BOULDER KRAB and ELK FORK,[1] plaintiffs have no basis for claiming threat of

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[1] Although the ELK FORK sale was awarded on November 3, 1995, operation of the sale will not commence prior to December 12.

irreparable harm prior to resolution of matters to be heard on December 12. Nonetheless, plaintiffs appear to have requested that the court consolidate their motion for a preliminary injunction with a hearing on the merits of their entire complaint when their motion is heard on December 12. Accordingly, the defendants will address the full merits of plaintiffs' complaint.

In addition to the BOULDER KRAB and ELK FORK sales, the sales at issue here may be divided into additional categories. The category including the BOULDER KRAB and ELK FORK sales includes sales that were withdrawn with judicial approval in the course of prior litigation, and for which the Forest Service or BLM rejected all bids and returned the high bidders' bond. The second category includes sales that were withdrawn or cancelled either at the request of the apparent high bidder or because the apparent high bidder was no longer willing or able to proceed with the sale. The third category includes sales that were withdrawn or cancelled after a court ruled that they violated Section 318.[2]

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[2] Issues relating to several of these sales, particularly enjoined sales and sales dismissed with judicial approval are scheduled for hearing on December 12 in NFRC v. Glickman. In addition, the plaintiffs in NFRC v. Glickman recently raised for the first time in that case, in a reply, issues relating to sales that were withdrawn or cancelled either at the request of the apparent high bidder or because the apparent high bidder was no longer willing or able to proceed with the sale. See NFRC v. Glickman, Civil No. 95-6244-HO, NFRC's Reply Memorandum in Support of Third Motion for Summary Judgment and in Support of Motion for Further Clarification or Enforcement of the Court's October 17 Injunction (Nov. 28, 1995). Defendants' request to file a response to NFRC's newly raised issues by December 8 is pending before this court.

Aside from the withdrawn or cancelled sales are sales that were offered or awarded before October 23, 1989, the date Section 318 was enacted. The defendants maintain that Section 2001(1)(k) applies to none of these sales.[3]

STANDARD FOR A PRELIMINARY INJUNCTION

In the Ninth Circuit, a preliminary injunction "is appropriate if the moving party demonstrates either (1) a probability of success on the merits and a possibility of irreparable injury, or (2) serious questions going to the merits and the balance of hardships tipping sharply in its favor." Pratt v. Rowland, 65 F.3d 802, 805 (9th Cir. 1995). Under the second of these tests, the moving party must also demonstrate a "fair chance of success on the merits." Senate of the State of Cal. v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992). In cases involving the public interest, the court "must also consider whether the public interest favors the plaintiff." Fund for Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992); see also, Caribbean Marine Services Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988). However, "[i]f the law is entirely against the position of the requesting party," none of the tests for preliminary injunctive relief will permit the issuance of a preliminary injunction. Senate of the State of Cal. v Mosbacher, 968 F.2d at 978.

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[3] The issue whether pre-Section 318 sales fall under Section 2001(k)(1) is raised also by intervenor-applicant Western Timber Co.'s Motion to Clarify in NFRC v. Glickman.

Defendants agree with the plaintiffs that Section 2001(k)(1) does not apply to pre-Section 318 sales and, generally, to sales that were withdrawn or cancelled prior to enactment of Section 2001. First, applying Section 2001(k)(1) to pre-Section 318 sales leads to absurd results, and the legislative history makes clear that Congress did not intend the statute to apply to such sales. Second, giving the greatest possible effect to all of the language of Section 2001, construed as a whole and supported by its legislative history, requires interpreting Section 2001(k)(1) generally to exclude sales that were withdrawn or cancelled prior to its enactment. However, the last sentence of Section 2001(k)(1), which applies to cancelled or withdrawn sales for which the Forest Service or BLM rejected all bids and returned the bid bond of the high bidder, contains a clear exception to the general exclusion of cancelled or withdrawn sales.

With respect to cancelled or withdrawn sales for which the Forest Service or BLM rejected all bids and returned the bid bond of the high bidder, plaintiffs can show neither a probability of success on the merits nor serious questions going to the merits.[4] Rather, the law under Section 2001(k)(1) is entirely against the position of the plaintiffs with respect to such sales. First, Section 2001(k)(1) applies to these sales,

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[4] "Serious questions are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" Senate of the State of Cal. v. Mosbacher, 968 F.2d at 978 (quoting Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

despite the Forest Service's rejection of bids for the sales. In contesting this claim, plaintiffs all but ignore the provision in 2001(k) that "[t]he return of the bid bond of the high bidder shall not alter that responsibility of the Secretary concerned to comply with [Section 2001(k)(1)]." Indeed, the plaintiffs argue that this provision is so oblique that the court, contrary to elementary rules of statutory construction, should simply write the provision out of the statute. Second, plaintiffs' claim that applying Section 2001(k)(1) to withdrawn or cancelled sales would violate the separation of powers has no merit whatever. Congress has clear authority to mandate the release of cancelled or withdrawn sales under Section 2001(k)(1), even if the federal agencies withdrew the sale with judicial approval or as a result of an injunction and might not have awarded the sale absent Section 2001(k).

ARGUMENT

I. Section 2001(k)(1) Does Not Apply to Pre-Section 318 Sales

Plaintiffs contend that the plain meaning of Section 2001(k)(1) limits its scope to timber sales that were originally offered or awarded after Section 318 was enacted. For the following reasons, defendants generally agree with this claim.

Issues related to the geographic scope of Section 2001(k)(1) are currently pending in the Ninth Circuit in the appeal of this court's Septmber 13, 1995 decision in NFRC v. Glickman, Civil No. 95-6244-HO. Specifically at issue in that case is whether Congress, by making Section 2001(k)(1) applicable to "all timber sale contracts offered or awarded before

[enactment of Section 2001] 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)," intended to include under Section 2001(k)(1) all sales in any Forest Service or BLM unit in Washington and Oregon where Section 318 was applied, or specifically those timber sale contracts offered under Section 318.

In NFRC v. Glickman, defendants contend that Section 2001(k)(1) applies only to sales offered under Section 318 of Public Law 101-121 (103 Stat. 745), which only includes sales offered between October 23, 1989 and September 30, 1990. In part, defendants argued that

> [l]imiting the phrase "subject to section 318" to the antecedent description of national forest and BLM lands, and adopting [a] definition of "subject" as solely a geographic description, would lead to the absurd result of applying subsection 2001(k) to every timber sale offered prior to the date of enactment, including timber sales offered prior to section 318, in all of Washington and Oregon.

See NFRC v. Glickman, Civil No. 95-6244-HO, Defendants' Memorandum in Support of Motion for Summary Judgment, at 14 (D. Or. Aug. 25, 1995).

Defendants' arguments as to the geographic scope of Section 2001(k)(1) in NFRC v. Glickman apply as well to the issue here regarding the temporal scope of Section 2001(k)(1). If Section 2001(k)(1) applies only to timber sale contracts actually offered pursuant to Section 318 in fiscal year 1990, then it does not apply to pre-Section 318 sales. Thus, defendants incorporate

here all the reasons presented in support its motion for summary judgment in NFRC v. Glickman.

However, even under this court's ruling rejecting defendants' reading of the geographic scope of Section 2001(k)(1), Section 2001(k)(1) should not be read to apply to pre-Section 318 sales -- an absurd result, as defendants have previously argued. Could Congress possibly have intended the Forest Service and BLM to sell sales going back to the beginning of time at their original prices, volumes and contract terms? Not only would many of those prices, volumes and terms make no sense, they would in many cases be impossible to determine because records regarding the sales would not necessarily be retained under the agencies' routine recordkeeping procedures. See Fifth Declaration of Jerry Hofer, at ¶ 10 (attached as Attachment F to Defendants' Opposition to Application for TRO) routine Forest Service procedures, most records are retained for no more than five years). To avoid this absurd result, the court should examine the legislative history, which is crystal clear as to the non-applicability of Section 2001(k) to pre-Section 318 sales. Nothing in the legislative history gives any indication that Congress intended Section 2001(k) to apply to pre-Section 318 sales.

II. Section 2001(k)(1) Excludes Cancelled or Withdrawn Sales, Except Where the Forest Service or BLM Rejected All Bids and Returned the High Bidder's Bid Bond.

The heart of the plaintiffs' argument regarding withdrawn or cancelled sales is that Section 2001(k)(1) does not apply to timber sales that were no longer "in the timber

pipeline" -- i.e., sales for which an offer was no longer outstanding -- at the time Section 2001(k) was enacted. Thus, if prior to July 27, 1995, the Forest Service or BLM "changed their minds" and decided not to offer a sale such that the high bidder could not compel the sale, then according to the plaintiffs the sale does not fall under Section 2001(k)(1).

Defendants agree that, with one narrow exception, Section 2001(k)(1) does not apply to timber sales that were cancelled or withdrawn prior to enactment of the Rescissions Act on July 27, 1995. Section 2001(k)(1) clearly covers cancelled or withdrawn timber sales that were awarded or for which that the Forest Service or the Bureau of Land Management had rejected all bids prior to enactment of Section 2001(k)(1). However, Section 2001(k)(1) clearly excludes all other timber sales that were cancelled or withdrawn at the time Section 2001(k)(1) was enacted, including sales withdrawn or cancelled (1) after a court ruled that they violated Section 318, (2) at the request of the apparent high bidder, (3) because the apparent high bidder was no longer willing or able to proceed with the sale.

A. The language of Section 2001 supports defendants' interpretation as to cancelled or withdrawn sales.

The defendants agree that Section 2001(k)(1) implicitly excludes timber sale contracts that were cancelled or withdrawn when the 1995 logging rider was enacted, with one exception which the plaintiffs all but ignore. The exclusion from Section 2001(k)(1) from sales that were withdrawn or cancelled, except as narrowly provided, comports with a reading of the statute as a

whole. In particular, in Section 2001(k)(1), Congress directs the Forest Service and BLM to "act to award, release, and permit to be completed" the specified "offered or awarded" sales. This language differs from the language used in Section 2001(b)(1) -- "the Secretary concerned shall prepare, advertise, offer, and award contracts . . . for salvage timber sales" --- and in Section 2001(d) -- "the Secretary concerned shall expeditiously prepare, offer, and award [Option 9] timber sale contracts." This distinction can only mean that in Section 2001(k)(1), Congress expected generally that the covered sales were already prepared and offered, and were awaiting award to willing high bidders. Thus, cancelled or withdrawn sales, for which new auctions would be required, were not generally included under Section 2001(k)(1).

In language that the plaintiffs attempt to read out of the statute, Congress included one exception to the implicit general exclusion from Section 2001(k)(1) of withdrawn or cancelled sales. Specifically, Congress provided in Section 2001(k)(1) that "[t]he return of the bid bond shall not alter the responsibility of the Secretary concerned to comply with this paragraph." Read in context, the "return of the bid bond" provision requires the Forest Service and BLM to "act to award, release, and permit to be completed in fiscal years 1995 and 1996" intact timber sales for which the agency concerned rejected all bids and returned the bid bond of the high bidder. However, by including the "return of the bid bond" provision, Congress also implicitly affirmed the exclusion from Section 2001(k)(1) of

all withdrawn or cancelled sales that do not fit under that provision.

The "return of the bid bond" provision has meaning only if Section 2001(k)(1) is read to generally exclude cancelled or withdrawn sales, except for those covered by the provision. If cancelled or withdrawn sales are not excluded from the phrase "all timber sale contracts offered or awarded" before enactment of the statute, the "return of the bid bond" provision has no meaning, because Congress would have had no need to include explicitly sales for which the Forest Service or BLM returned the bid bond. Further, the principle *exceptio firmat regulam in casibus non exceptis* -- an exception affirms the rule in cases not excepted, see Black's Law Dictionary 502 (5th ed. 1979) -- supports this interpretation. Congress obviously intended the "return of the bid bond" provision to carve out a sole exception to a general rule: the implicit and logical exclusion from Section 2001(k)(1) of sales that were withdrawn or cancelled prior to enactment of Section 2001.

The plaintiffs in NFRC v. Glickman contend that when Congress applied Section 2001(k)(1) to "all" timber sale contracts offered or awarded under the prescriptions of the paragraph, it really meant all sales. The only exception, the NFRC plaintiffs (defendant-intervenors here) contend, is for sales falling under Section 2001(k)(2). Further, the NFRC plaintiffs continue, because Congress included an explicit exception in Section 2001(k)(2), it necessarily rejected all implicit exceptions.

In making this argument, the NFRC plaintiffs confuse an exception from a statute with an exclusion. While Section 2001(k)(2) applies to sales that fall under Section 2001(k)(1), and therefore creates an exception to the requirements of Section 2001(k)(1), withdrawn or cancelled sales do not fall under Section 2001(k)(1) in the first place. This distinction is more than semantic. Because withdrawn or cancelled sales, except those for which BLM or the Forest Service rejected all bids and returned the high bidder's bid bond, were excluded from Section 2001(k)(1), they do not trigger the replacement timber provision in Section 2001(k)(3).

Thus, the NFRC plaintiffs' *expressio unius est exclusio alterius* argument does not apply to withdrawn or cancelled sales excluded from Section 2001(k)(1). Indeed, that principle -- an explicit exception excludes all other exceptions -- applied to the "return of the bid bond" provision further compels the conclusion that the provision provides the only exception to the exclusion of "dead" sales from Section 2001(k)(1).[5]

B. The legislative history of Section 2001(k)(1) supports defendants' interpretation regrading withdrawn or cancelled sales.

Plaintiffs, claiming that the "return of the bid bond" provision is "too thin a reed on which to hang a draconian

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[5] This interpretation does not deprive the phrase "all timber sale contracts offered or awarded before [enactment]" of meaning. It merely gives "all timber contracts" a present tense construction, such that it refers only to "timber sale contracts" that were actually viable at the time Section 2001 was enacted, with the exception of sales to which the "return of the bid bond" provision applies.

interpretation" of Section 2001(k)(1), ask the court to ignore the last sentence of Section 2001(k)(1). However, such a reading fails to give effect to language in the statute, and the court obviously cannot heed that request. See United States v. Lewis, 67 F.3d 225, 229 (9th Cir. 1995). Nonetheless, because the "return of the bid bond" provision may be less than clear, particularly in light of other parts of the statute indicating an intention not to include cancelled or withdrawn sales in Section 2001(k)(1), it is appropriate to examine the legislative history to discern its meaning. Id. at 228-29.

Every reference in the legislative history to the meaning of the "return of the bid bond" provision in Section 2001(k)(1) indicates that Congress was concerned only with sales for which the Forest Service or BLM rejected all bids and accordingly returned the bid bond of the high bidder. These are the sales for which a willing purchaser -- the high bidder -- had expectations of being awarded the sale, but environmental or other issues related to the sale impeded award of the sale.[6] Accordingly, the Forest Service or BLM cancelled or withdrew the sale and returned the bid bonds. Defendants agree that Congress did not mean to include under Section 2001(k)(1) sales that were

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[6] Neither this argument, nor Section 2001(k)(1) -- including the "return of the bid bond" provision -- apply at all to sales enjoined for violations of Section 318, the statute that authorized their very existence. Such sales, which include the NITA, SOUTH NITA, GARDEN and COWBOY sales, are at issue in motions pending in NFRC v. Glickman that are scheduled for hearing on December 12. To the extent they are considered cancelled sales, defendants agree that they are excluded from Section 2001(k)(1). Because those sales were effectively found to be void *ab initio*, they were as good as if never offered.

cancelled at the request of the high bidder when the high bidder was no longer willing or able to proceed with the sale.[7]

First, wherever the effect of rejection of bids and return of the high bidder's bid bond on release of timber sales under Section 2001(k)(1) is discussed in the legislative history, only the Forest Service or BLM's affirmative rejection of bids is contemplated. Explaining an early version of Section 2001(k)(1) that included the "return of the bid bond" provision, Rep. Taylor noted that "in some cases the agencies rejected bids well after the auction due to administrative reviews and delays and changing standards." Cong. Rec. at H3233 (Mar. 15, 1995)(remarks of Rep. Taylor). Subsequently, the "return of the bid bond" provision was explained repeatedly to include "all sales offered, awarded, or unawarded, whether or not bids have subsequently been rejected by the offering agency." Cong. Rec. at H5050 (May 16, 1995)(emphasis added); see also Cong. Rec. at H3233 (Mar. 15, 1995)(remarks of Rep. Taylor); Sen. R. 104-17 at 123 (Mar. 24, 1995); Conference Rep. 104-124, at 137 (May 16, 1995). The very use of the term "rejected" demonstrates that Congress intended to include sales that the Forest Service or BLM did not want to go forward, not sales that the high bidder, for its own reasons, decided not to pursue.

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[7] In NFRC v. Glickman, pending before this court, NFRC has challenged the Forest Service's and BLM's decision not to apply Section 2001(k)(1) to certain sales for which the apparent high bidder declined the award or otherwise demonstrated inability or unwillingness to accept the sale. Because NFRC raised these issues for the first time in a reply brief, defendants have requested the opportunity to file a brief on these issues by December 8 so that they may be heard at the December 12 hearing.

Second, the legislative history illustrates Congress's paramount concern with avoiding governmental liability for failure to proceed with binding timber sales. Because the government would face liability only for awarded contracts that the government repudiated, Congress clearly did not intend Section 2001(k)(1) to apply to sales that were cancelled at the purchaser's request. Concern over the government's potential liability is reflected early on in development of the statute. Referring to unreleased Section 318 sales, the House Report on H.R. 1159 notes that "[r]elease of these sales will remove tens of millions of dollars of liability from the government for contract cancellation." H. Rep. 104-71, at 15 (Mar. 8, 1995). See also Cong. Rec. at H3233 (Mar. 15, 1995)(releasing these sales will "sav[e] the government over one hundred million dollars in buyout claims"). This concern was shared in the Senate and remained a concern throughout development of the legislation, as reflected by the remarks of the legislation's key sponsor in the Senate. See Sen. R. 104-17 at 123 (Mar. 24, 1995)("Release of these sales will remove tens of millions of dollars of liability from the government for contract cancellation."); Cong. Rec. at S10465 (July 21, 1995)(same)(remarks of Sen. Gorton).

In claiming that "[n]othing in the legislative history suggests that Congress thought it was resurrecting cancelled timber sales," Plaintiffs' Memorandum, at 22, the plaintiffs ignore the clear and uncontradicted statements in the legislative history that create an exception to that general rule. Nothing

under the contract principles regarding offers or willingness to be bound, upon which the plaintiffs so heavily rely, can overshadow Congress clear intent to allow to proceed sales that were withdrawn or cancelled after the Forest Service or BLM rejected all bids and returned the high bidder's bond. Thus, any evidence regarding the Forest Service's intent with respect to sales such as the BOULDER KRAB sale,[8] is irrelevant to the application of Section 2001(k)(1) to those sales.

Defendants agree with plaintiffs contention that, ordinarily, an offer is no longer live after it is withdrawn. Plaintiffs rely on the Conference Report accompanying Section 318, which states that "sales offered under this section but not awarded and withdrawn after October 1, 1990 under normal Forest Service procedures may not be re-offered in subsequent years under the terms of this section." H.Conf. Rep. No. 101-264, 101st Cong., 1st Sess. 87 (1989). The defendants agree that this language demonstrates that when the Forest Service or BLM withdraw an offer by rejecting all bids, the sale ceases to exist and must ordinarily be re-offered at a new auction to go forward. See Fifth Declaration of Jerry L. Hofer, at ¶ 4 (Nov. 15, 1995)(attached hereto as Attachment F). However, this argument,

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[8] Plaintiffs contend that the "Forest Service abandoned any intent to proceed with" the BOULDER KRAB sale, as evidenced by obliteration of the road leading to the BOULDER KRAB sale area and reconstructing hiking trail that would have been used as a logging road under old plans for the sale. Defendants Opposition to Application for TRO provides specific arguments demonstrating why the BOULDER KRAB sale falls within the "return of the bid bond" exception. These arguments apply as well to the ELK FORK sale.

too, fails to account for the "return of the bid bond" provision in Section 2001(k)(1), which clearly requires release of sales such as the BOULDER KRAB sale.

II. The Time Limits in Section 2001(k)(1) Do Not Preclude Application of Section 2001(k)(1) to Sales Such as the BOULDER KRAB Sale.

Plaintiffs contend that Congress could not have intended Section 2001(k)(1) to include withdrawn or cancelled sales such as the BOULDER KRAB sale where, absent Section 2001(k)(1), the Forest Service had no intention of proceeding with the sale and therefore took no action to determine whether the presence of marbled murrelets or other species would preclude the sale. Because 45 days is too short to complete a marbled murrelet survey, plaintiffs argue, Congress could not have meant to include sales such as the BOULDER KRAB sale.[9] The plaintiffs claim further that interpreting Section 2001(k)(1) to include sales such as the BOULDER KRAB sale, which the Forest Service had withdrawn for non-compliance with environmental standards, would amount to an anomalous and improper repeal by implication of those standards.

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[9] Plaintiffs also contend that one unit of the BOULDER KRAB sale is contiguous with a timber stand with known marbled murrelet nesting. The Forest Service has examined the BOULDER KRAB sales area and determined that Unit 1 is within a contiguous stand of marbled murrelet habitat that is known to contain a marbled murrelet site under Section 2001(k)(2). The Forest Service has therefore suspended all purchaser operations on Unit 1 of the BOULDER KRAB timber sale. See Declaration of Lee O. Webb (attached to Defendants' Opposition to Application for TRO as Attachment H).

The defendants concede that including in Section 2001(k)(1) sales that otherwise would be excluded from logging for environmental reasons appears somewhat anomalous, when other provisions of Section 2001 authorize the award and release of other, arguably less environmental problematic sales with greater opportunity for judicial review for compliance with environmental standards. See, e.g., Section 2001(d). However, defendants continue to maintain that Section 2001(k)(1), which applies "notwithstanding any other provision of law," was intended to apply only to sales that were offered pursuant to and consistent with Section 318, which Congress generally considered to provide some level of environmental protection.

The Ninth Circuit has explained that

> [the phrase "notwithstanding any other provision of law"] clearly forbids, on its face, applicability of any other provision that may contradict the terms of the provision [to which it attaches] in the absence of any subsequent federal statute that might modify or supersede the provision in some way.

California Nat'l Guard v. Federal Labor Relations Auth., 697 F.2d 874, 879 (9th Cir. 1983). Whatever limitations might attach to the phrase "notwithstanding any other provision of law," it appears that by using the phrase, Congress explicitly -- not implicitly -- repealed further application of environmental standards to those sales, even if, as with BOULDER KRAB, they might have fallen short of those standards.

III. Application of Section 2001(k)(1) to Cancelled or Withdrawn Sales Does Not Violate the Separation of Powers Doctrine.

Plaintiffs raise two separation of powers arguments, both off target. First, plaintiffs argue broadly that Congress

has no power to interfere with contracts that the Forest Service decided to forego by requiring them to go forward. Specifically, plaintiffs make the sweeping claim that "Congress may not ordinarily interfere with or control a federal agency's exercise of delegated contract functions." Plaintiffs' Memorandum at 12. To the extent such a broad principle exists, it has no application whatever to this case. Second, plaintiffs adopt by reference their argument in NFRC v. Glickman that ordering award and release of timber sales enjoined or withdrawn with judicial approval violates separation of the powers of Congress and the courts. This separation of powers argument also has no merit.

A. Congress does not impermissibly interfere with a federal contract by applying Section 2001(k)(1) to the Boulder Krab Sale.

The cases plaintiffs cite to support their interference with contracts argument completely miss the mark. Those cases all involve the effect of the actions of an agent of the legislative branch on executive branch functions, including the award of federal contracts. See Hechinger v. Metropolitan Washington Airports Authority, 36 F.3d 97 (D.C. Cir. 1994)(discussing effect of the Board of Review of the Metropolitan Washington Airport Authority, an agent of Congress, on the Airport Authority, an executive agency), cert. denied, 115 S. Ct. 934 (1995); Lear v. Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988)(effect of actions of Comptroller General, an agent of Congress, on award of federal contracts), irrelevant portion withdrawn en banc, 893 F.2d 205 (9th Cir. 1989); Ameron, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979 (3rd Cir.

1986)(actions of Comptroller General), cert. dismissed, 488 U.S. 918 (1988).

The critical issue in those cases was "whether Congress or its agents seeks to control (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process." Lear, 842 F.2d at 1108. For example, both Lear and Ameron challenged the authority of the Comptroller General, an agent of Congress, to stay the award of federal contracts under certain conditions. The governing principle in all these cases was that "Congress cannot control the execution of its enactments except 'indirectly -- by passing new legislation.'" Id. at 1106 (quoting Bowsher v. Synar, 478 U.S. 714, ___, 106 S. Ct. 3181, 3192 (1986)); see also, Chadha v. INS, 462 U.S. 919, 956-58 (1983).

Here, the legislative action plaintiffs challenge was just what the Ninth Circuit in Lear said was the proper way for Congress to control executive functions -- passage of new legislation. None of the cases plaintiffs cite suggest that Congress, in enacting new legislation, cannot refer to a class of federal contracts in legislating how federal agencies should handle the matter involved in those contracts in the future. Indeed, the cases plaintiffs cite support the opposite conclusion that Section 2001(k)(1) is a proper exercise of legislative power.

B. Application of Section 2001(k)(1) to the BOULDER KRAB Sale does not impermissibly interfere with judicial powers.