

NLWJC- Kagan

Counsel - Box 012 - Folder 001

Timber - Other Litigation: Pilchuck v.  
Glickman [4]

1 Plaintiffs' claim that application of Section  
2 2001(k) (1) to enjoined sales or sales dismissed with judicial  
3 approval impermissibly interferes with judicial powers is  
4 likewise without merit. Their argument has two prongs. First,  
5 plaintiffs claim that application of Section 2001(k) (1) to a sale  
6 enjoined, like the GATORSON, TIP and TIP TOP sales, or withdrawn  
7 under a judicially-approved stipulation, like the BOULDER KRAB,  
8 ELK FORK, FIRST and LAST sales, violates the principle that  
9 "Congress may not prescribe a rule of decision or direct certain  
10 factfindings for a pending case." Amici/Defendant-Intervenors'  
11 Opposition to NFRC's Supplemental Memorandum, at 19-20 (citing  
12 United States v. Klein, 50 U.S. (13 Wall.) 128 (1871); Robertson  
13 v. Seattle Audubon Society, 503 U.S. 429 (1992)). Second, they  
14 rely on the principle that "Congress may not legislatively revise  
15 the final judicial resolution of a case." Amici/Defendant-  
16 Intervenors' Opposition to NFRC's Supplemental Memorandum, at 20  
17 (citing Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995)).

18 Section 2001(k) (1) does not attempt to direct the  
19 outcome of particular litigation pending at the time the  
20 legislation was passed. Robertson v. Seattle Audubon Soc'y.  
21 clearly established that Section 318 of the Department of  
22 Interior and Related Agencies Appropriations Act for Fiscal Year  
23 1990 did not violate the separation of powers, because even  
24 though the statute was obviously intended to resolve the concerns  
25 raised in two cases it specifically named, it "compelled changes"  
26 in the law underlying the lawsuits without directing "findings or  
27 results under old law." Robertson, 503 U.S. at \_\_\_, 112 S. Ct.

1 at 1413. Plaintiffs point to no distinction between Section 318  
2 and Section 2001(k)(1) -- which does not target specific cases --  
3 that would require a different holding here. Rather than  
4 dictating findings under the laws upon which the enjoined or  
5 judicially-withdrawn sales were originally challenged, Section  
6 2001(k)(1), to the extent it otherwise applies, requires the  
7 Forest Service to release the sales on their original terms,  
8 volumes and prices, notwithstanding those laws.

9 Plaintiffs suggest that the Ninth Circuit's recent  
10 decision in Alaska Wilderness Recreation and Tourism Assoc. v.  
11 Morrison, 67 F.3d 723 (9th Cir. 1995), can be applied here to  
12 prevent the application of Section 2001(k)(1) to pending  
13 litigation. In Alaska Wilderness, the Ninth Circuit reaffirmed  
14 that "Congress unquestionably may amend substantive law affecting  
15 a pending case." Alaska Wilderness, 67 F.3d at 733. However,  
16 the court held that the appropriations statute at issue did not  
17 preclude application of NEPA to certain timber sales, in part  
18 because the statute "offered no new statutory basis on which to  
19 analyze the matter at issue." Id. Here, Section 2001(k)(1) does  
20 provide such a basis: it requires the Forest Service to award and  
21 release certain sales on their original terms, "notwithstanding  
22 any other provision of law." Plaintiffs simply ask the court to  
23 ignore this language. However, the court cannot ignore language  
24 in the statute, and whatever restrictions might apply to the  
25  
26  
27  
28

1 phrase "notwithstanding any other provision of law," it is fatal  
2 to plaintiffs' reliance on the Alaska Wilderness decision.<sup>10</sup>

3 Plaut also fails to support plaintiffs' contention that  
4 Section 2001(k)(1) cannot apply to a sale enjoined or dismissed  
5 with judicial approval. Plaut concerned legislation that, unlike  
6 Section 2001(k)(1), directed that "dismissed causes of action . .  
7 . be reinstated." Plaut, 115 S. Ct. at 1451. Further, unlike  
8 the legislation in Plaut, Section 2001(k)(1) does not  
9 "prescribe[] what the law was at an earlier time, when the act  
10 whose effect is controlled by the legislation occurred." Id. at  
11 1456. Instead, where Section 2001(k)(1) applies, it applies  
12 "notwithstanding any other provision of law," and therefore  
13 supersedes the laws on which the withdrawal or injunction of  
14 sales other wise falling under Section 2001(k)(1) were based.<sup>11</sup>

---

16  
17 <sup>10</sup> While defendants continues to believe that Congress  
18 intended Section 2001(k)(1), including the phrase  
19 "notwithstanding any other provision of law," to apply only to  
20 Section 318 sales, this court's September 13 order in NFRC v.  
21 Glickman has expanded application of the provision to all covered  
22 sales within Washington and Oregon.

23 <sup>11</sup> Certain enjoined sales are not required to be released,  
24 but for reasons entirely independent of the separation of powers  
25 issue. For example, the offers of the NITA, SOUTH NITA, COWBOY  
26 and GARDEN sales were all judicially determined to be in  
27 violation of Section 318, which authorized them in the first  
28 place. Defendants contend that these sales are not within the  
scope of Section 2001(k)(1) because they were never legally  
offered, not because of separation of powers concerns. Because  
these sales do not even fall under Section 2001(k)(1), none of  
the provisions of Section 2001(k)(1), including the  
"notwithstanding any other povision of law" language, applies to  
them. Section 2001(k) does not direct the Secretary to "offer"  
sales. Because these sales were not vailidy offered, and became  
null and void upon expiration of section 318, they do not fall  
within the scope of section 2001(k).

1           In short, plaintiffs' separation of powers arguments  
2 cannot overcome the phrase "notwithstanding any other provision  
3 of law" in Section 2001(k)(1). Plaintiffs contend that the  
4 phrase "notwithstanding any other provision of law" cannot have  
5 the effect of undoing injunctions or judicially-approved  
6 withdrawals of sales, because elsewhere in Section 2001, Congress  
7 explicitly stated that the phrase included "a law under the  
8 authority of which any judicial order may be outstanding on or  
9 after the date of enactment of this Act." See Sections  
10 2001(b)(1), 2001(d). Although the absence of this modifying  
11 language in Section 2001(k)(1) is unexplained, interpreting its  
12 absence to exclude all sales dismissed by stipulation prior to  
13 enactment of the statute has no support in the statute or its  
14 legislative history.

15           As mentioned above, the Ninth Circuit has held that the  
16 phrase "notwithstanding any other provision of law" forbids  
17 application of any other contradictory provision in an earlier  
18 statute. See California Nat'l Guard v. Federal Labor Relations  
19 Auth., 697 F.2d at 879. Similarly, the D.C. Circuit has  
20 interpreted the phrase to mean that, with respect to the action  
21 to which the phrase applies, an agency is "unhampered by the  
22 range of other [provisions] that might otherwise constrain [its]  
23 authority." Colorado Nurses Ass'n v. Federal Labor Relations  
24 Auth., 851 F.2d 1486, 1489 (D.C. Cir. 1988). Nothing in Section  
25 2001 or its history suggests that the court should give the  
26 phrase "notwithstanding any other provision of law" a more  
27 limited meaning under the circumstances presented here.

1 Defendants acknowledge that where the phrase  
2 "notwithstanding any other provision of law" is in apparent  
3 conflict with another provision in the same statute, courts have  
4 applied the implied repeal doctrine, which requires courts to  
5 read an implied repeal into a statute only to the minimum extent  
6 necessary. Cf. In re The Glacier Bay, 944 F.2d 577, 581-82 (9th  
7 Cir. 1991) (invoking the implied doctrine to interpret the phrase  
8 "notwithstanding any other provision of law" where the phrase was  
9 unclear in light of another provision of the statute that  
10 referred to "other applicable laws");<sup>12</sup> see also E.P. Paup Co.  
11 v. Director, 999 F.2d 1341, 1348-49 (9th Cir. 1993) (stating that,  
12 in light of the presumption against finding that a federal  
13 statute preempts a state law, "the phrase 'notwithstanding any  
14 other provision of law' is not necessarily preemptive" and  
15 declining to give it preemptive effect where legislative history  
16 revealed an intent not to preempt state law). The unexplained  
17 absence of the explicit inclusion of laws underlying judicial  
18 orders in the phrase "notwithstanding any other provision of law"  
19 in Section 2001(k) (1) does not amount to a conflict that would  
20 require application of the implied repeal doctrine.

21 It is difficult to see how Section 2001(k) (1) could  
22 work if the laws underlying the original challenge to the sales  
23 at issue here were applied to the sales. Specifically, any  
24

---

25 <sup>12</sup> Under the implied repeal doctrine, "where provisions in  
26 the two acts are in irreconcilable conflict, the later act to the  
27 extent of the conflict constitutes an implied repeal of the  
28 earlier." In re The Glacier Bay, 944 F.2d at 581 (quoting  
Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976)).

1 procedural mandates of these other provisions, such as NEPA,<sup>13</sup>  
2 that are designed to inform the agency prior to its decision on  
3 the sale are superfluous or impossible to apply in light of the  
4 limits that Section 2001(k) (1) places on the Forest Service's  
5 timing or ability to change the "originally advertised terms,  
6 volumes, and bid prices." To the extent those other provisions  
7 of law prescribe substantive results at odds with the mandate of  
8 Section 2001(k) (1), the prescription of the original terms,  
9 prices and volumes of earlier sales supersedes those other  
10 provisions as well.

11 The plaintiffs simply cannot rely on the stipulated  
12 dismissals or injunctions in prior lawsuits to avoid Section  
13 2001(k) (1). Those judicial actions arose from challenges to the  
14 very sales challenged in this action -- Section 2001(k) (1) sales.  
15 Thus, the legal bases underlying the dismissed or enjoined cases,  
16 as well as the Forest Service's obligations under the  
17 stipulations or injunctions, have been superseded by Section  
18 2001(k) (1).

#### 19 CONCLUSION

20  
21

---

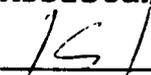
22  
23 <sup>13</sup> In Flint Ridge Development Co. v. Scenic Rivers Assoc.  
24 of Oklahoma, 426 U.S. 776, 791 (1976), the Supreme Court held  
25 that a provision of the Interstate Land Sales Full Disclosure Act  
26 requiring developers' disclosure statements to become effective  
27 within 30 days after filing with the Department of Housing and  
28 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.

1 For the foregoing reasons, the plaintiffs' motion for  
2 preliminary injunction should be granted in part and denied in  
3 part.

4  
5 Respectfully submitted this \_\_\_\_ day of December, 1995,

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

9 LOIS J. SCHIFFER  
Assistant Attorney General

10  
11   
12 \_\_\_\_\_  
GEOFFREY GARVER  
MICHELLE L. GILBERT  
13 Trial Attorneys  
U.S. Department of Justice  
14 Environment and Natural Resources  
Division  
15 General Litigation Section  
P.O. Box 663  
Washington, D.C. 20044-0663  
16 (202) 305-0481

17 Attorneys for Defendants

18 Of Counsel:

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

21 KAREN MOURITSEN  
Office of the Solicitor  
22 U.S. Department of the Interior  
Washington, D.C.

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 PRELIMINARY INJUNCTION** 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

1 Mark C. Rutzick, OSB #84336  
 Alison Kean Campbell, OSB #93011  
 2 MARK C. RUTZICK LAW FIRM  
 A Professional Corporation  
 3 500 Pioneer Tower  
 888 S.W. Fifth Avenue  
 4 Portland, Oregon 97204-2089  
 (503) 499-4573  
 5  
 6 Attorneys for Defendant-Intervenor  
 Northwest Forest Resource Council

7  
 8  
 9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE DISTRICT OF OREGON

11 PILCHUCK AUDUBON SOCIETY, OREGON ) Civil No. 95-6384-TC  
 12 NATURAL RESOURCES COUNCIL, PORTLAND )  
 AUDUBON SOCIETY, BLACK HILLS AUDUBON ) NFRC'S MEMORANDUM IN  
 13 SOCIETY, WESTERN ANCIENT FOREST ) OPPOSITION TO  
 CAMPAIGN, HEADWATERS, COAST RANGE ) PLAINTIFFS' MOTION FOR  
 14 ASSOCIATION, FRIENDS OF THE ELK ) PRELIMINARY INJUNCTION  
 RIVER, LEAVENWORTH AUDUBON ADOPT-A- )  
 15 FOREST, NORTH CENTRAL WASHINGTON )  
 AUDUBON SOCIETY, and KNUT and ANN )  
 AAGAARD, )  
 16 Plaintiffs, )  
 17 vs. )  
 18 DAN GLICKMAN, Secretary of )  
 Agriculture, BRUCE BABBITT, )  
 19 Secretary of Interior, UNITED STATES )  
 FOREST SERVICE, and BUREAU OF LAND )  
 20 MANAGEMENT, )  
 21 Defendants, )  
 22 and )  
 23 NORTHWEST FOREST RESOURCE COUNCIL, )  
 24 Defendant-Intervenor. )  
 25  
 26

TABLE OF CONTENTS

Page

1

2

3 INTRODUCTION . . . . . 1

4 STATEMENT OF FACTS . . . . . 2

5 A. Forest Service timber sale contracting procedures . . . . . 2

6 B. Bureau of Land Management timber sale contracting

7 procedures . . . . . 3

8 ARGUMENT . . . . . 3

9 THE DIRECTION IN SECTION 2001(k) (1) TO AWARD AND RELEASE

10 ALL SALES OFFERED OR AWARDED BEFORE JULY 27, 1995 IN

11 THE SECTION 318 GEOGRAPHIC AREA INCLUDES SALES WHERE

12 BIDS WERE PREVIOUSLY REJECTED; PLAINTIFFS HAVE NO

13 LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM . . . . . 3

14 A. Section 2001(k) (1) requires the award and release of

15 sales where bids were previously rejected . . . . . 3

16 1. The plain language of section 2001(k) (1)

17 releases all previously offered sales without

18 excluding sales where bids were rejected . . . . . 4

19 a. "All" means "all." . . . . . 4

20 b. The second sentence of section 2001(k) (1)

21 confirms that sales must be released even

22 if bids were previously rejected. . . . . 5

23 c. The existence of the express (k) (2)

24 exclusion negates the existence of implied

25 exclusions in (k) (1). . . . . 6

26 2. The legislative history of section 2001(k)

confirms that Congress intended to release sales

where bids were previously rejected . . . . . 7

a. The Conference Report. . . . . 7

b. The Senate Report. . . . . 8

c. The author's interpretation. . . . . 8

d. No legislative history contradicts these

statements, and the lack of discussion

Page

i - NFRC'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

**MARK C. RUTZICK LAW FIRM**  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 295-0915

1 about cancelled or withdrawn sales shows  
2 nothing about the meaning of the statute. . . . . 10

3 3. The government admits section 2001(k)(1)  
4 requires the award and release of sales on which  
5 bids were previously rejected . . . . . 11

6 4. Section 2001(k)(1) makes the federal agencies  
7 "willing" to offer the sales regardless of their  
8 previous intentions . . . . . 12

9 5. Plaintiff's separation of powers argument  
10 concerning the Boulder Krab sale, which was  
11 never enjoined by any court, has no chance of  
12 success . . . . . 13

13 B. Plaintiffs' motion concerning sales offered prior to  
14 the enactment of Section 318 is moot since NFRC does  
15 not seek the release of these sales and there is no  
16 likelihood any such sales will be released . . . . . 16

17 CONCLUSION . . . . . 16

**TABLE OF AUTHORITIES**

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

**Page**

**Cases**

*American Bank & Trust Co. v. Dallas County*,  
463 U.S. 855 (1983) . . . . . 11

*American Horse Protection Association v. Watt*,  
694 F.2d 1310 (D.C. Cir. 1982) . . . . . 15

*Boise Cascade Corp. v. U.S.E.P.A.*,  
942 F.2d 1427 (9th Cir. 1991) . . . . . 6

*Chevron U.S.A., Inc. v. Natural Resource  
Defense Council, Inc.*  
467 U.S. 837 (1984) . . . . . 4

*Church of Scientology v. U.S. Department of Justice*,  
612 F.2d 417 (9th Cir. 1979) . . . . . 11

*Commissioner v. Asphalt Products Co., Inc.*,  
482 U.S. 117 (1987) . . . . . 5

*Dept. of Health & Welfare, State of Idaho v. Block*,  
784 F.2d 895 (9th Cir. 1986) . . . . . 7

*Gray v. First Winthrop Corp.*,  
989 F.2d 1564 (9th Cir. 1993) . . . . . 14, 15

*In Re Gerwer*,  
898 F.2d 730 (9th Cir. 1990) . . . . . 6

*INS v. Cardoza-Fonseca*,  
480 U.S. 421 (1987) . . . . . 4

*Keams v. Tempe Technical Institute, Inc.*,  
39 F.3d 222 (9th Cir. 1994) . . . . . 6

*McDonald v. Santa Fe Trail Transp. Co.*,  
427 U.S. 273 (1976) . . . . . 11

*Newport News Shipbuilding and Dry Dock Co. v. EEOC*,  
462 U.S. 669 (1983) . . . . . 10, 11

*NFRC v. Glickman*,  
Civil No. 95-6244-HO (D. Or.) . . . . . 4, 6-9, 16

Page

iii -NFRC'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION

**MARK C. RUTZICK LAW FIRM**  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 295 0915

1 *Pennsylvania v. The Wheeling and Belmont Bridge,*  
2 59 U.S. (18 How.) 421,  
15 L. Ed. 435 (1855) . . . . . 14, 15

3 *Plaut v. Spendthrift Farm, Inc.,*  
4 115 S. Ct. 1447,  
131 L. Ed. 2d 328 (1995) . . . . . 15

5 *Rice v. Rehner,*  
6 463 U.S. 713 (1983) . . . . . 9

7 *Robertson v. Seattle Audubon Society,*  
503 U.S. 429 (1992) . . . . . 13-15

8 *Securities Industry Ass'n v. Connolly,*  
9 883 F.2d 1114 (1st Cir. 1989) . . . . . 5

10 *U.S. v. Newman,*  
982 F.2d 665 (1st Cir. 1992) . . . . . 6

11 *United States v. Culbert,*  
12 435 U.S. 371 (1978) . . . . . 11

13 *United States v. Klein,*  
80 U.S. (13 Wall.) 128,  
14 20 L. Ed. 519 (1871) . . . . . 14

15 *Williamson v. C.I.R.,*  
974 F.2d 1525 (9th Cir. 1992) . . . . . 4

16

17 **Statutes**

18 **Fiscal Year 1995 Emergency Supplemental Appropriations**  
**for Disaster Relief and Rescissions Act,**  
19 **Pub. L. 104-19, 109 Stat. 240 (July 27, 1995) 1-9, 11-16**

20 **Public Law 101-121 (103 Stat. 745),**  
**Section 318 . . . . . 1, 3, 4, 7-9, 13-16**

21

22 **Regulations**

23 36 C.F.R. Part 223 . . . . . 2, 3

24

25 **Legislative History**

26 141 Cong. Rec. H3218 (daily ed. March 15, 1995) . . . . . 9

141 Cong. Rec. H3233 (daily ed. March 15, 1995) . . . . . 10

1	141 Cong. Rec. H5013 (daily ed. May 18, 1995) . . . . .	7
2	141 Cong. Rec. H5050 (daily ed. May 16, 1995) . . . . .	8
3	141 Cong. Rec. H5053 (daily ed. May 16, 1995) . . . . .	7
4	141 Cong. Rec. H5353-54 (daily ed. May 18, 1995) . . . . .	7
5	141 Cong. Rec. S7407 (daily ed. May 25, 1995) . . . . .	7
6	H. Rep. 104-124 (May 16, 1995) . . . . .	7, 8
7	S. Rep. 104-17 (March 24, 1995) . . . . .	8
8		
	<b>Miscellaneous</b>	
9		
10	Timber Sale Procedures Handbook 5450-1, ¶ VII (D) . . . . .	3, 5

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Page

v - NFRC'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION

**MARK C. RUTZICK LAW FIRM**  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 295-0215





1 223.100.

2 If the high bid cannot be accepted, the Forest Service has  
3 two choices: (1) reject all bids or (2) award the sale at the  
4 high bid price to the next highest qualified bidder. Section  
5 223.102. After the offer, the only available choices are award  
6 or rejection of bids.

7 The regulations do not permit an offer of a timber sale to  
8 be "cancelled" or "withdrawn" after an auction. Any failure to  
9 award a sale following auction constitutes rejection of bids.

10 **B. Bureau of Land Management timber sale contracting proce-**  
11 **dures.**

12 The BLM Oregon state office Timber Sale Procedure Handbook  
13 establishes procedures for "the process of conducting a public  
14 offering of forest product." BLM Timber Sale Procedures Handbook  
15 5440-1, ¶ III (Exhibit B). The BLM conducts a sealed bid or oral  
16 auction, and either awards the contract or rejects all bids.  
17 *Id.*, ¶ III (E); 5450-1, ¶ VII (D) (Exhibit C) (agency can offer  
18 and award sale to second high bidder if high bidder does not  
19 accept award).

20 **ARGUMENT**

21 **THE DIRECTION IN SECTION 2001(k)(1) TO AWARD AND**  
22 **RELEASE ALL SALES OFFERED OR AWARDED BEFORE JULY 27,**  
23 **1995 IN THE SECTION 318 GEOGRAPHIC AREA INCLUDES SALES**  
24 **WHERE BIDS WERE PREVIOUSLY REJECTED; PLAINTIFFS HAVE NO**  
25 **LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM.**

26 **A. Section 2001(k)(1) requires the award and release of sales**  
where bids were previously rejected.

Plaintiffs argue that Congress implicitly exempted from  
award and release all sales on which bids were rejected prior to

1 July 27, 1995 or which were otherwise "cancelled" or "withdrawn"  
2 prior to that date due to litigation or for any other reason.  
3 This sweeping exemption would encompass many of the sales already  
4 awarded and released by the defendant Secretaries both voluntari-  
5 ly and in response to this court's October 17 injunction in *NFRC*  
6 *v. Glickman*. This implied exemption does not exist.

- 7 1. **The plain language of section 2001(k)(1) releases all**  
8 **previously offered sales without excluding sales where**  
9 **bids were rejected.**

10 Plaintiffs' argument runs contrary to the express language  
11 of section 2001(k)(1).

12 a. **"All" means "all."**

13 The statute requires the Secretaries to award and release  
14 "all timber sale contracts offered or awarded before [July 27,  
15 1995]" in the section 318 geographic area. "All" means "all."  
16 The statute simply does not contain any exception for contracts  
17 that were offered or awarded before July 27, 1995 where bids were  
18 rejected before that date, or for sales that were "cancelled" or  
19 "withdrawn" before that date.

20 The first rule of statutory interpretation is that a statute  
21 is interpreted and applied according to its plain meaning.  
22 *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*  
23 467 U.S. 837, 843 (1984). Where the plain meaning of statutory  
24 language is clear, no resort to legislative history is required,  
25 unless there is "clearly expressed legislative intention contrary  
26 to the language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-49  
(1987); *Williamson v. C.I.R.*, 974 F.2d 1525, 1531 (9th Cir.

1 1992).

2 There are few words in the English language clearer than  
 3 "all." Cf. *Commissioner v. Asphalt Products Co., Inc.*, 482 U.S.  
 4 117, 120 (1987) ("any" means "any"; no implied exceptions exist);  
 5 *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114, 1118 (1st  
 6 Cir. 1989) ("any contract" means "any contract"; no implied  
 7 exceptions exist). The exemption for bid-rejected sales urged by  
 8 plaintiffs simply does not exist.

9 **b. The second sentence of section 2001(k)(1) confirms**  
 10 **that sales must be released even if bids were**  
 11 **previously rejected.**

12 Plaintiffs also fail to account for the second sentence of  
 13 section 2001(k)(1): "The return of the bid bond of the high  
 14 bidder shall not alter the responsibility of the Secretary  
 15 concerned to comply with this paragraph." *Id.*

16 This sentence is in fact aimed directly at the issue  
 17 plaintiffs raise here: the only meaning of this sentence is to  
 18 confirm that sales must be released even if bids were previously  
 19 rejected. A bid bond is returned to a high bidder only when bids  
 20 on a sale are rejected. See, e.g., BLM Timber Sale Procedures  
 21 Handbook 5450-1, ¶ VII(C) (Exhibit C) (allowing agency to retain  
 22 high bidder's deposit where high bidder fails to execute con-  
 23 tract). There is no other circumstance in which a bid bond is  
 24 ever returned to a high bidder. Thus, the second sentence of  
 25 (k)(1) has no other meaning except to require that sales where  
 26 bids were rejected, and the bid bond returned to the high bidder,  
 must be awarded and released under the first sentence of the

Page

5 - NFRF'S MEMORANDUM IN OPPOSITION TO  
 PLAINTIFFS' MOTION FOR PRELIMINARY  
 INJUNCTION

**MARK C. RUTZICK LAW FIRM**  
 A Professional Corporation  
 Attorneys at Law  
 500 Pioneer Tower  
 888 S.W. Fifth Avenue  
 Portland, OR 97204-2089  
 (503) 499-4573 • Fax (503) 295-0915

1 subsection.

2 A statute must be interpreted to give significance to all of  
3 its parts:

4 Under accepted canons of statutory interpre-  
5 tation, we must interpret statutes as a  
6 whole, giving effect to each word and making  
every effort not to interpret a provision of  
the same statute inconsistent, meaningless,  
or superfluous.

7  
8 *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427, 1432 (9th Cir.  
9 1991); *NFRC v. Glickman*, Civil No. 95-6244-HO, Order at 6  
10 (September 13, 1995). The court must give effect to the second  
11 sentence of (k)(1) by applying it to sales where bids were  
12 previously rejected.

13 **c. The existence of the express (k)(2) exclusion  
14 negates the existence of implied exclusions in  
(k)(1).**

15 The express exemption in subsection (k)(2) for sale units  
16 where a threatened or endangered bird species is "known to be  
17 nesting" negates the existence of the implied exclusion in (k)(1)  
18 urged by plaintiffs. Under the doctrine of *expressio unius est  
19 exclusio alterius*, "[t]he express enumeration [of an exception]  
20 indicates that other exceptions should not be implied." *In Re  
21 Gerwer*, 898 F.2d 730, 732 (9th Cir. 1990); *Keams v. Tempe  
22 Technical Institute, Inc.*, 39 F.3d 222, 226 (9th Cir. 1994); *U.S.  
23 v. Newman*, 982 F.2d 665, 673 (1st Cir. 1992) ("Under the princi-  
24 ple of *expressio unius est exclusio alterius*, the enumeration of  
25 specific exclusions from the operation of a statute is an  
26 indication that the statute should apply to all cases not

1 specifically excluded"). There is no implied exemption for sales  
2 where bids were rejected.

3 2. **The legislative history of section 2001(k) confirms**  
4 **that Congress intended to release sales where bids were**  
5 **previously rejected.**

6 a. **The Conference Report.**

7 "In the hierarchy of legislative history, a congressional  
8 conference report is universally recognized as the most reliable  
9 evidence of congressional intent because it 'represents the final  
10 statement of the terms agreed to by both houses.' *Dept. of*  
11 *Health & Welfare, State of Idaho v. Block*, 784 F.2d 895, 901 (9th  
12 Cir. 1986)." *NFRC v. Glickman*, September 13 Order at 8.

13 The conference report on the Rescissions Act, H. Rep. 104-  
14 124, was submitted to both houses of Congress by the managers of  
15 the bill, led by Senator Hatfield, chairman of the Senate  
16 Appropriations Committee, and Rep. Livingston, chairman of the  
17 house Appropriations Committee. H. Rep. 104-124, 141 Cong. Rec.  
18 H5053 (daily ed. May 16, 1995). Both houses of Congress approved  
19 the conference report. 141 Cong. Rec. H5013, H5353-54 (daily ed.  
20 May 18, 1995) (House approval); 141 Cong. Rec. S7407 (daily ed.  
21 May 25, 1995) (Senate approval).

22 The conference report expressly confirms the plain reading  
23 of section 2001(k) (1):

24 The bill releases all timber sales which were  
25 offered for sale beginning in fiscal year  
26 1990 to the date of enactment which are  
located in any unit of the National Forest  
System or District of the Bureau of Land  
Management within the geographic area encom-  
passed by Section 318. . . . **Included are**

1 all sales offered, awarded, or unawarded,  
2 whether or not bids have subsequently been  
3 rejected by the offering agency, with no  
4 change in original terms, volumes, or bid  
5 prices. The sales will go forward regardless  
6 of whether the bid bond from the high bidder  
7 has been returned, provided it is resubmitted  
8 before the harvesting begins.

9 Conference Report at 137, reprinted at 141 Cong. Rec. H5050  
10 (daily ed. May 16, 1995) (emphasis added). "All" sales are to be  
11 released "whether or not bids have subsequently been rejected by  
12 the offering agency." "All" means "all."

13 **b. The Senate Report.**

14 The Senate Report on the Rescissions Act, authored by  
15 Senator Hatfield as the chairman of the Senate Appropriations  
16 Committee, also states clearly that the timber sale release  
17 provision applies to all sales in "the region affected by section  
18 318":

19 *Released timber sales.--*The Committee also  
20 includes language to release a group of sales  
21 that have already been sold in the region  
22 affected by section 318 of the Fiscal Year  
23 1990 Interior and Related Agencies Appropria-  
24 tions Act. **Included are all sales offered,  
25 awarded, or unawarded, whether or not bids  
26 have subsequently been rejected by the offer-  
ing agency.**

S. Rep. 104-17 at 123 (March 24, 1995) (emphasis added). Like  
the Conference Report, the Senate Report shows Congress' intent  
that "all" means "all."

**c. The author's interpretation.**

The author and primary sponsor of subsection (k) (1) was Rep.  
Charles Taylor of North Carolina. *NFRC v. Glickman*, Civil No.

1 95-6244-HO, Order at 9 (September 13, 1995). "The Supreme Court  
2 has repeatedly held that the remarks of the sponsor of a bill  
3 'are particularly valuable in determining the meaning of [the  
4 bill]' and provide 'an authoritative guide to the statute's  
5 construction.' *Rice v. Rehner*, 463 U.S. 713, 728 (1983)." *NFRC*  
6 *v. Glickman*, September 13 Order at 9.

7 The section of the original House bill releasing previously  
8 offered or awarded sales (then called "section 307(i)") contains  
9 the identical language ultimately enacted in section 2001(k)(1)  
10 that is at issue in this case. 141 Cong. Rec. H3218 (daily ed.  
11 March 15, 1995). Before the House voted on the bill, Rep. Taylor  
12 offered an explanation of this section on the floor of the House  
13 which confirms its plain meaning:

14 Section (i) of section 307 addresses  
15 another related timber supply problem of an  
emergency nature. . . .

16 Previously-offered timber sales in the  
17 Northwest cannot be operated due to adminis-  
18 trative delays and reviews. . . . Many of  
19 these sales were awarded to purchasers years  
20 ago . . . . Other sales were auctioned years  
ago but never awarded; in some cases the  
agencies rejected bids well after the auction  
due to administrative reviews and delays and  
changing standards. . . .

21 Subsection 307 (i)(1) frees up all these  
22 sales, saving the government over one hundred  
23 million dollars in buyout claims, generating  
24 the \$207.8 million in revenues and immediate-  
25 ly providing substantial amounts of timber  
26 for mills hurt by Federal supply reductions.  
. . . . It directs the award of all unawarded  
sales as originally advertised, whether or  
not bids on a sale previously rejected, and  
it directs the release of these sales and all  
other awarded sales in the affected area so

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

that all the sales can be operated to completion, on their original terms, in fiscal years 1995 and 1996.

141 Cong. Rec. H3233 (daily ed. March 15, 1995) (emphasis added). Like the Conference Report and the Senate Report, Congressman Taylor's floor statement shows that "all" means "all."

**d. No legislative history contradicts these statements, and the lack of discussion about cancelled or withdrawn sales shows nothing about the meaning of the statute.**

Pilchuck's only comment about the legislative history is negative: that Congress never discussed cancelled or withdrawn sales. Yet the Conference Report, Senate Report and Taylor floor statement all discussed rejected-bid sales which, as shown above, is the correct regulatory reference to the sales challenged by Pilchuck. Congress did not discuss "cancelled" or "withdrawn" sales because these are not terms used in the Forest Service and BLM timber sale contracting process.

In any event, silence in the legislative history cannot create a negative inference that overrides the plain language of statutes. The Supreme Court has often rejected the theory that Congress must explicitly state in legislative history every intended effect of statutory language. In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), for example, the court rejected this theory of statutory interpretation concerning a discrimination law:

As petitioner argues, congressional discussion focused on the needs of female members of the work force rather than spouses of male employees. This does not create a

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

"negative inference" limiting the scope of the Act to the specific problem that motivated its enactment.

*Id.* at 679; accord, *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 867 (1983) (plain meaning of statute exempts federal obligations from all state taxes even though only articulated congressional focus was on state income tax); *United States v. Culbert*, 435 U.S. 371, 377 (1978) (despite congressional interest in enacting criminal statute to prevent a single problem, "none of the comments supports the conclusion that Congress did not intend to make punishable all conduct falling within the reach of the statutory language"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 289-91 (1976) (despite primary congressional focus on relief for former slaves, civil rights law applies equally to whites). In *Church of Scientology v. U.S. Department of Justice*, 612 F.2d 417, 427 (9th Cir. 1979), the Ninth Circuit similarly ruled that where legislative history contained no direct evidence of a congressional intent to create an exclusion from the plain language of a statute, the court would not infer such an intent.

3. **The government admits section 2001(k)(1) requires the award and release of sales on which bids were previously rejected.**

The defendant Secretaries have conceded that the rejection of bids on a sale, or the "cancellation" or "withdrawal" of a sale, to use plaintiffs' terminology, does not exclude the sale from award and release under section 2001(k).

On September 27, 1995 the Chief of the Forest Service

Page

11 - NFRC'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

**MARK C. RUTZICK LAW FIRM**  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 295-0915

1 directed the award and release of previously withdrawn timber  
2 sales, on which bids had been rejected, following notification to  
3 the parties that had challenged the sales in litigation. Exhibit  
4 D. The Forest Service awarded two such timber sale contracts -  
5 Elk Fork and Boulder Krab - on November 3, 1995 even though it  
6 had previously withdrawn the two sales and rejected the bids. It  
7 has also announced its intention to award two similarly situated  
8 sales - Last and First - even though it had also withdrawn the  
9 two sales and rejected the bids. Exhibit E.

10 The Forest Service announcements on these sales recognized  
11 that the sales must be awarded and released under section  
12 2001(k)(1) even though bids were previously rejected on these  
13 sales.

14 **4. Section 2001(k)(1) makes the federal agencies "willing"**  
15 **to offer the sales regardless of their previous inten-**  
16 **tions.**

17 Pilchuck also argues that bid-rejected sales cannot be  
18 awarded because the rejection of a bid ("cancellation" or  
19 "withdrawal" to use Pilchuck's terminology) means there is no  
20 willing offeror as a matter of contract law.

21 This argument is meritless as a matter of federal statutory  
22 law. The subjective desires of the Forest Service or BLM to  
23 award the sales is irrelevant under section 2001(k)(1) because  
24 Congress has ordered the agencies to award and release the sales.  
25 Congress has the right to make laws, and the federal agencies  
26 must obey them. Their subjective "willingness" to proceed with  
a sale has no bearing on the interpretation of the statute since

1 Congress has made that decision for them. Indeed, the very  
2 reason Congress had to enact section 2001(k) was that the  
3 agencies had not awarded the outstanding sales. Congress has the  
4 unquestioned right to order these sales released, and that is  
5 exactly what it did.

6 **5. Plaintiff's separation of powers argument concerning**  
7 **the Boulder Krab sale, which was never enjoined by any**  
8 **court, has no chance of success.**

8 Plaintiffs raise an additional argument in support of the  
9 motion for a temporary restraining order on the Boulder Krab  
10 timber sale which they did not raise in their preliminary  
11 injunction motion: they argue that section 2001(k) would violate  
12 the separation of powers doctrine if it releases the Boulder Krab  
13 timber sale.<sup>1</sup> This argument has no chance of success.

14 First, plaintiffs' constitutional argument is premised on  
15 the idea that an existing court order bars the release of the  
16 Boulder Krab sale. This threshold premise is incorrect: Boulder  
17 Krab was withdrawn and was never subject to a court order.

18 Plaintiffs' constitutional argument would fail even had  
19 there been a court order regarding Boulder Krab. In challenging  
20 the constitutionality of section 2001(k) Pilchuck presents the  
21 same separation of powers arguments that were rejected by the  
22 Supreme Court regarding section 318. *Robertson v. Seattle*

---

23  
24 <sup>1</sup> Plaintiffs have already raised the same argument in  
25 *Northwest Forest Resource Council v. Glickman*, Civil No. 95-6244-  
26 HO in response to NFRC's third motion for summary judgment. NFRC  
has responded to that argument, and presents here a summary of  
its response.

1 Audubon Society, 503 U.S. 429, 430 (1992). For the same reasons  
2 those arguments failed regarding section 318, they lack merit  
3 here.

4 Like section 318, section 2001(k) provides a temporary  
5 legislative resolution to a portion of the forestry controversy  
6 in the Pacific Northwest. By requiring the immediate award and  
7 release of certain timber sales notwithstanding any other  
8 provision of law, section 2001(k) properly "compelled changes in  
9 law, not findings or results under old law." *Robertson v.*  
10 *Seattle Audubon Society*, 503 U.S. at 430.

11 In section 2001(k) Congress did not direct a particular  
12 decision in a case, while leaving the applicable substantive and  
13 remedial law in place. *Cf. United States v. Klein*, 80 U.S. (13  
14 Wall.) 128, 20 L. Ed. 519 (1871); *Gray v. First Winthrop Corp.*,  
15 989 F.2d 1564, 1568 (9th Cir. 1993). Instead, Congress changed  
16 the applicable substantive law by requiring release of these and  
17 other sales "notwithstanding any other provision of law." This  
18 is precisely what Congress is empowered by the Constitution to  
19 do.

20 The fact that the litigation concerning Boulder Krab is  
21 concluded does not lessen Congress' authority to change the law  
22 and permit what formerly was prohibited. In *Pennsylvania v. The*  
23 *Wheeling and Belmont Bridge*, 59 U.S. (18 How.) 421, 15 L. Ed. 435  
24 (1855), the Supreme Court held that there is no constitutional  
25 bar to Congress changing the underlying substantive law and  
26 thereby removing the basis for a previous order, thus requiring

1 the dissolution of any existing injunction. *Id.*; *Gray v. First*  
2 *Winthrop Corp.*, 989 F.2d at 1569 ("it is of no constitutional  
3 consequence that [the statute] affects, or is even directed at,  
4 a specific judicial ruling so long as that legislation modifies  
5 the law.").

6 The recent case of *Plaut v. Spendthrift Farm, Inc.*, 115 S.  
7 Ct. 1447, 131 L. Ed. 2d 328 (1995), does not change this analy-  
8 sis. There, the Court was faced with legislation that "pre-  
9 scribes what the law was at an earlier time," and retroactively  
10 required courts to reopen closed cases and apply the new law to  
11 those old cases. 131 L. Ed. 2d at 346.

12 In enacting section 2001(k) Congress has not prescribed what  
13 the law was prior to the statute's enactment, nor ordered a court  
14 to set aside a final judgment. Instead, Congress has simply  
15 changed the substantive law, just as it properly did with section  
16 318 in *Robertson*, and as it did in the *Wheeling and Belmont*  
17 *Bridge* case.

18 Courts have a duty to apply and enforce new law enacted by  
19 Congress: "When a change in the law authorizes what had previ-  
20 ously been forbidden it is an abuse of discretion for a court to  
21 refuse to modify an injunction founded on the superseded law."  
22 *American Horse Protection Association v. Watt*, 694 F.2d 1310,  
23 1316 (D.C. Cir. 1982). There is no separation of power defect to  
24 section 2001(k).

25

26

Page

15 - NFRC'S MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION

**MARK C. RUTZICK LAW FIRM**  
A Professional Corporation  
Attorneys at Law  
500 Pioneer Tower  
888 S.W. Fifth Avenue  
Portland, OR 97204-2089  
(503) 499-4573 • Fax (503) 295 0915

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

**B. Plaintiffs' motion concerning sales offered prior to the enactment of Section 318 is moot since NFRC does not seek the release of these sales and there is no likelihood any such sales will be released.**

Plaintiffs also argue that subsection (k)(1) implicitly excludes sales offered before the date section 318 was enacted into law - October 23, 1989. The effect of this implied exclusion would be to bar release of a few timber sales from that era that remain uncompleted or unawarded.

NFRC is not seeking the award or release of sales offered before the beginning of fiscal year 1990.<sup>2</sup> It seems abundantly clear that the defendant Secretaries will not voluntarily release any such sales without a court order. The only pre-1990 sale currently in controversy is Western Timber Co.'s Malt sale, which is at issue in *NFRC v. Glickman*. Plaintiffs can direct their arguments against release of that sale in the context of Western Timber's pending motion. Since NFRC knows of no likelihood that other pre-1990 sales will be released, plaintiffs' broad motion for a preliminary injunction against all such sales is moot and should therefore be denied.

**CONCLUSION**

Plaintiffs' motion for preliminary injunction should be

---

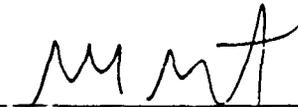
<sup>2</sup> Since NFRC has excluded sales offered prior to fiscal year 1990 from the scope of the *NFRC v. Glickman* case, individual companies represented by NFRC are free to seek award and release of individual sales offered prior to fiscal year 1990, but no company represented by NFRC is currently seeking award or release of a pre-1990 sale, and NFRC is not aware of any company planning to do so.

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

denied. Plaintiffs have no likelihood of success on the merits as to the sales where bids were rejected, and their motion is moot as to pre-1990 sales since no such sales are likely to be awarded or released.

Dated this 5th day of December, 1995.

MARK C. RUTZICK LAW FIRM  
A Professional Corporation

By:  \_\_\_\_\_

Mark C. Rutzick  
Alison Kean Campbell  
Attorneys for Defendant-  
Intervenor Northwest  
Forest Resource Council

value shall be not limited variations estab- for comparison of such may recognize which are not es.

imum stumpage

ervice, shall es- age rates, i.e., s and products. l Forests, or uests. Timber aised value or s, whichever is be sold or cut tracts for less e rates except al of insect-in- or distressed : with contract : providing for d timber and material not ndards of the or any timber osits are to be ion under the s amended (46 6-576b) which he established tes, the mini- creased by the ecessary to the d reforestation a deposit to the tes in timber be set higher num rates for uring adequate

r road construc-

establish stump- ructed roads or eeded by the of the timber timber is ap- ch basis, pur- l construction, nated construc- or other devel- he timber sale uch construc-

tion is accomplished by purchaser, be deducted from stumpage payments made by or due from purchaser under the timber sale contract for other than minimum stumpage rates and required deposits for slash disposal and road maintenance. As used in this section *estimated construction costs* means the total cost of constructing all permanent roads specified in the timber sale contract, estimated as if construction is to be accomplished by an independent contractor who is not the timber purchaser. In determining the purchaser credit amount applicable against timber payments, the estimated construction cost may be reduced for the effect of differences in applicable wage rates.

§ 223.63 Advertised rates.

Timber shall be advertised for sale at its appraised value, or its appraised value plus specified road costs. In either event, the advertised rates shall be not less than minimum stumpage rates, except that sales of insect-infested, diseased, dead, or distressed timber may be sold at less than minimum rates when harvest of such timber is necessary to protect or improve the forest or prevent waste of useable wood fiber.

§ 223.64 Appraisal on a lump-sum value or rate per unit of measure basis.

Timber may be appraised and sold at a lump-sum value or at a rate per unit of measure which rate may be adjusted during the period of the contract and as therein specified in accordance with formulas or other equivalent specifications for the following reasons:

(a) Variations in lumber or other product value indices between the price index base specified in the contract and the price index actually experienced during the cutting of the timber;

(b) Variance between advertised rates and rates redetermined by appraisal at dates specified in the contract;

(c) Variance between redetermined rates and rates appropriate for changes in costs or selling values subsequent to the rate redetermination

which reduce conversion value to less than such redetermined rates; and

(d) Substantial loss of value due to physical deterioration of green timber or other physical damage to the sale area or access to the timber.

§ 223.65 Appraising value of exchange timber.

The value of exchange timber (§ 223.4) will be determined by the appraisal methods in § 223.50 of this section. Where the residual value method is used, prices paid for comparable timber will be considered and the residual value adjusted accordingly.

§ 223.66 Appraising value of timber for right-of-way or other authorized use.

The value of timber required to be cut for the occupancy of a right-of-way or other authorized use of National Forest System land (§ 223.12) for which payment will be made, will be determined by the appraisal methods in § 223.60. Where the residual value method is used, prices paid for comparable timber will be considered and the residual value adjusted accordingly.

ADVERTISEMENT AND BIDS

§ 223.80 When advertisement is required.

Except as otherwise provided in this part each sale in which the appraised value of the timber or other forest products exceeds \$10,000 will be made only after advertisement for a period of 30 days or, if in the opinion of the officer authorizing the sale, the quantity, value or other conditions justify, a longer period; and any sale of smaller appraised value will be advertised or informal bids solicited from potential purchasers if, in the judgment of the officer authorizing the sale, such action is deemed advisable.

§ 223.81 Shorter advertising periods in emergencies.

In emergency situations where prompt removal of timber included in a sale is essential to avoid deterioration or to minimize the likelihood of the spread of insects, the approving officer may authorize shortening the formal advertising period to not less

than 7 days. In other emergency situations, or for timber sold under 36 CFR 223.2 the Regional Forester or Chief may authorize shortening the formal advertising period to not less than 7 days.

[44 FR 73029, Dec. 17, 1979. Redesignated at 49 FR 2761, Jan. 23, 1984]

§ 223.82 Contents of advertisement.

(a) A timber sale advertisement shall include the following information:

(1) The location and estimated quantities of timber or other forest products offered for sale.

(2) The time and place at which sealed bids will be opened in public or at which sealed bids will be opened in public followed by an oral auction.

(3) A provision asserting the agency's right to reject any and all bids.

(4) The place where complete information on the offering may be obtained.

(5) Notice that a prospectus is available to the public and to interested potential bidders.

(b) For each sale outside of the State of Alaska which includes a provision for purchaser credit for construction of permanent roads with a total estimated construction cost exceeding \$20,000, a timber sale advertisement shall also include:

(1) The total estimated construction cost of the permanent roads.

(2) A statement extending to small business concerns qualified for preferential bidding on timber sales, under the Small Business Act, as amended, and the regulations issued thereunder, the option to elect, when submitting a bid, to have all permanent roads constructed by the Forest Service.

(3) Notice that the prospectus referred to in paragraph (a)(5) of this section contains additional information concerning the options to have all permanent roads constructed by the Forest Service.

(c) When timber or other forest products are offered for preferential bidding in accordance with the Small Business Act, as amended, the advertisement shall state that the offering is set-aside for competitive bidding by small business concerns.

[50 FR 32696, Aug. 14, 1985]

§ 223.83 Contents of prospectus.

(a) A timber sale prospectus shall specify, as a minimum:

(1) The minimum acceptable stumpage or other unit prices and the amount or rate of any additional required deposits.

(2) The amount of bid guarantee which must accompany each bid.

(3) The amount of cash deposit or down payment to be made promptly by the successful bidder.

(4) The location and area of the sale, including harvest acreage.

(5) The estimated volumes, quality, size or age class of timber.

(6) A description of special logging requirements for the sale.

(7) The status of marking at time of advertisement.

(8) The method of bidding which will be used.

(9) The contract form to be used.

(10) The estimated deposits for reforestation and stand improvement work.

(11) The contract termination date and normal operating period.

(12) The date and amount of periodic payments which are to be made.

(13) The discount of payment rates for early harvest, if appropriate.

(14) The amount of performance bond required.

(15) The road standards for specified roads to be constructed.

(16) The estimated road construction cost and purchaser credit limit.

(17) For deficit sales,

(i) An estimate of insufficient value at advertised rates to permit the purchaser to apply the full amount of purchaser credit.

(ii) The amount of Forest Service funds or materials to be used to offset the deficit.

(18) Status of financial assistance available to small business purchasers.

(19) Notification of preferential award to small business firms and certification requirements for set-aside sales.

(20) Notification of log export and substitution restrictions.

(21) Notification of Equal Employment Opportunity compliance review requirements.

(22) General information concerning the sale, including appropriate information to permit a purchaser to make a warranted purchase.

(b) For each sale outside of the State of Alaska which includes a provision for purchaser credit for construction of permanent roads with a total estimated construction cost exceeding \$20,000, a timber sale advertisement shall also include:

(1) The option to elect, when submitting a bid, to have all permanent roads constructed by the Forest Service.

(2) The date and amount of periodic payments which are to be made.

(3) A statement extending to small business concerns qualified for preferential bidding on timber sales, under the Small Business Act, as amended, and the regulations issued thereunder, the option to elect, when submitting a bid, to have all permanent roads constructed by the Forest Service.

(4) The amount of performance bond required.

(5) The road standards for specified roads to be constructed.

(6) The estimated road construction cost and purchaser credit limit.

(7) For deficit sales,

(i) An estimate of insufficient value at advertised rates to permit the purchaser to apply the full amount of purchaser credit.

(ii) The amount of Forest Service funds or materials to be used to offset the deficit.

(18) Status of financial assistance available to small business purchasers.

(19) Notification of preferential award to small business firms and certification requirements for set-aside sales.

(20) Notification of log export and substitution restrictions.

(21) Notification of Equal Employment Opportunity compliance review requirements.

(22) General information concerning the sale, including appropriate information to permit a purchaser to make a warranted purchase.

(b) For each sale outside of the State of Alaska which includes a provision for purchaser credit for construction of permanent roads with a total estimated construction cost exceeding \$20,000, a timber sale advertisement shall also include:

(1) The option to elect, when submitting a bid, to have all permanent roads constructed by the Forest Service.

(2) The date and amount of periodic payments which are to be made.

(3) A statement extending to small business concerns qualified for preferential bidding on timber sales, under the Small Business Act, as amended, and the regulations issued thereunder, the option to elect, when submitting a bid, to have all permanent roads constructed by the Forest Service.

(4) The amount of performance bond required.

(5) The road standards for specified roads to be constructed.

(6) The estimated road construction cost and purchaser credit limit.

(7) For deficit sales,

(i) An estimate of insufficient value at advertised rates to permit the purchaser to apply the full amount of purchaser credit.

(ii) The amount of Forest Service funds or materials to be used to offset the deficit.

(18) Status of financial assistance available to small business purchasers.

(19) Notification of preferential award to small business firms and certification requirements for set-aside sales.

prospectus.  
The prospectus shall  
include:  
(1) Acceptable stump  
prices and the  
any additional re-

(2) Bid guarantee  
on any bid.  
(3) Amount of cash deposit or  
to be made promptly  
by bidder.  
(4) Location and area of the sale,  
creation.  
(5) Estimated volumes, quality,  
and quantity of timber.  
(6) Description of special logging  
operations on the sale.  
(7) Location of marking at time of

(8) Form of bidding which  
is to be used.  
(9) Amount of deposits for re-  
tention and improvement

(10) Date of termination date  
of bidding period.  
(11) Amount of period-  
ic payments to be made.  
(12) Rate of payment rates  
to be appropriate.  
(13) Record of performance

(14) Standards for specified  
work to be completed.  
(15) Amount of road construction  
credit limit.  
(16) Conditions.  
(17) Amount of insufficient value  
to permit the pur-  
chaser to receive full amount of

(18) Amount of Forest Service  
to be used to offset  
costs.  
(19) Financial assistance  
to business purchasers.  
(20) Amount of preferential  
treatment for business firms and cer-  
tificates for set-aside

(21) Amount of log export and  
importations.  
(22) Amount of Equal Employ-  
ment compliance review

(22) General or special information  
concerning the sale which are deemed  
appropriate to furnish sufficient infor-  
mation to prospective purchasers to  
warrant further investigation.

(b) For each advertisement which  
extends to small concerns the option  
to have all permanent roads construct-  
ed by the Forest Service, the prospec-  
tus shall also include:

(1) The road standards applicable to  
construction of permanent roads or a  
reference to the source of such infor-  
mation.

(2) The date of final completion for  
all permanent roads.

(3) A statement explaining how the  
Forest Service intends to perform road  
construction by force account or con-  
tract, if the high bidder elects Forest  
Service construction.

(4) The maximum period for which  
timber sale contract award will be de-  
layed while the Forest Service seeks a  
satisfactory construction bid. The  
period stated shall not exceed 120 days  
unless the Regional Forester approves  
a longer period.

[50 FR 32696, Aug. 14, 1985]

§ 223.84 Small business bid form provi-  
sions on sales with purchaser road con-  
struction credits.

For each sale described in  
§ 223.82(b), the bid form must include  
provision for a small business concern:

(a) To elect road construction by the  
Forest Service and where such election  
is made;

(b) To certify as to small business  
status, and

(c) To indicate knowledge—

(1) Of the road construction comple-  
tion date,

(2) That the Forest Service expects  
to contract for road construction with  
a third party,

(3) That the timber sale contract  
will not be awarded unless a satisfac-  
tory road construction bid is received  
or, if the Forest Service fails to receive  
such a bid within a maximum period  
stated in the advertisement, the bidder  
agrees to perform road construction,

(4) That the Forest Service may  
extend the maximum award delay  
time by the amount of time needed to  
confirm the bidder's size status or by  
any time in excess of 40 days from

timber sale bid opening needed to  
begin solicitation of construction bids,  
and

(5) That if the Forest Service ex-  
tends the maximum award delay  
period because solicitation of the road  
contract is delayed, the bidder may  
withdraw his bid without penalty.

[42 FR 28252, June 2, 1977. Redesignated at  
49 FR 2761, Jan. 23, 1984. Redesignated and  
amended at 50 FR 32696, Aug. 14, 1985]

§ 223.85 Noncompetitive sale of timber.

Forest officers may sell, within their  
authorization, without further adver-  
tisement, at not less than the ap-  
praised value, any timber previously  
advertised for competitive bids but not  
sold because of lack of acceptable bids  
and any timber on uncut areas includ-  
ed in a contract which has been termi-  
nated by abandonment, cancellation,  
contract period expiration, or other-  
wise if such timber would have been  
cut under the contract. This authority  
shall not be utilized if there is evi-  
dence of competitive interest in the  
timber.

[42 FR 28252, June 2, 1977. Redesignated at  
49 FR 2761, Jan. 23, 1984 and 50 FR 32696,  
Aug. 14, 1985]

§ 223.86 Bid restriction on resale of non-  
completed contract.

(a) Except as otherwise provided in  
this section, no bid will be considered  
in the resale of timber remaining from  
any uncompleted timber sale contract  
from any person, or from an affiliate  
of such person, who failed to complete  
the original contract:

(1) Because of termination for pur-  
chaser's branch or; or

(2) Through failure to cut designat-  
ed timber on portions of the sale area  
by the termination date, unless accept-  
ance of such bid is determined to be in  
the public interest.

(b) The no bid restriction in the pre-  
ceding paragraph:

(1) Shall only apply when 50 percent  
or more of the timber included in the  
resale is timber remaining from the  
uncompleted contract and the resale is  
advertised within 3 years of the date  
the uncompleted contract terminated;

(2) When imposed because of failure  
to cut designated timber on portions



1971, 1972, es of unproc- e lands, trib- listed, which export in cal- d 1973.

information ) of this sec- any location

report show-

unprocessed harvested in in the tribu- timber from , including a ssed timber or otherwise erson and a onship with

unprocessed in the tribu- rted or sold ous calendar

Redesignated at 1 50 FR 32696.

of National ered through tion bidding. ach sale will: competition, eral Govern- than fair c resource, mic stability onomies are onal Forest

ne objectives Management l, and other

participation dders shall bid at least ceptable bid ospectus. No oral auction ss than the

ervice, shall ids or a mix

of bidding methods in areas where he has reasonable belief that collusive bidding may be occurring or where he determines that less than normal competitive bidding is occurring.

(d) Sealed bids shall be used for sales within Federal Sustained Yield Units, except where the policy statement for the Unit restricts purchasers of timber within the Unit from buying National Forest timber outside the Unit and the Chief determines that oral bidding will protect individual communities within the Unit.

(e) The Chief, Forest Service, may authorize departures from the requirements of paragraphs (c) and (d) of this section when he determines that departures are necessary to protect the public interest.

(f) The Chief, Forest Service, may authorize the testing and evaluation of alternative bidding methods for National Forest timber.

[43 FR 21882, May 22, 1978. Redesignated at 49 FR 2761, Jan. 23, 1984. Further redesignated and amended at 50 FR 32696, Aug. 14, 1985]

§ 223.89 Relation to other bidders.

Any bidder or applicant for a sale may be required to furnish a statement of his relation to other bidders or operators, including, if desired by the supervisor or Regional Forester, a certified statement of stockholders or members of the firm, and the holders of bonds, notes or other evidences of indebtedness, so far as known, so that the statement will show the extent of the interest of each in the bidder or applicant.

[44 FR 73029, Dec. 17, 1979. Redesignated at 49 FR 2761, Jan. 23, 1984 and 50 FR 32696, Aug. 14, 1985]

AWARD OF CONTRACTS

§ 223.100 Award to highest bidder.

The sale of advertised timber shall be awarded to the responsible bidder submitting the highest bid that conforms to the conditions of the sale as stated in the prospectus unless:

(a) Determination is made to reject all bids.

(b) Two or more bidders, all of whom meet the requirements, submit equal bids which are the highest bids, in

which case award may be by the drawing of lots. Equal bids from parties having direct or indirect common control or association in logging, processing or marketing may be consolidated to the extent deemed necessary by the awarding officer in order to give to any others who have bid the same amount an equitable opportunity in the drawing of lots.

(c) The highest bidder is notoriously or habitually careless with fire.

(d) Monopoly, injurious to the public welfare, would result from the control of large amounts of public or of public and private timber.

(e) The high bidder has elected Forest Service road construction in response to an advertisement extending such an option, the Forest Service cannot perform the construction and in response to solicitation has not received a satisfactory bid for such construction within the period stated in the prospectus and the high timber sale bidder is unwilling to perform the construction.

[44 FR 73029, Dec. 17, 1979. Redesignated at 49 FR 2761, Jan. 23, 1984, and amended at 50 FR 32696, Aug. 14, 1985; 53 FR 33132, Aug. 30, 1988]

§ 223.101 Determination of purchaser responsibility.

(a) A Contracting Officer shall not award a timber sale contract unless that officer makes an affirmative determination of purchaser responsibility. In the absence of information clearly indicating that the prospective purchaser is responsible, the Contracting Officer shall conclude that the prospective purchaser does not qualify as a responsible purchaser.

(b) To determine a purchaser to be responsible, a Contracting Officer must find that:

(1) The purchaser has adequate financial resources to perform the contract or the ability to obtain them;

(2) The purchaser is able to perform the contract within the contract term taking into consideration all existing commercial and governmental business commitments;

(3) The purchaser has a satisfactory performance record on timber sale contracts. A prospective purchaser

that is or recently has been seriously deficient in contract performance shall be presumed not to be responsible, unless the Contracting Officer determines that the circumstances were beyond the purchaser's control and were not created through improper actions by the purchaser or affiliate, or that the purchaser has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably under a contract is strong evidence that a purchaser is not a responsible contractor. The Contracting Officer shall consider the number of contracts involved and extent of deficiency of each in making this evaluation;

(4) The purchaser has a satisfactory record of integrity and business ethics;

(5) The purchaser has or is able to obtain equipment and supplies suitable for logging the timber and for meeting the resource protection provisions of the contract;

(6) The purchaser is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(c) If the prospective purchaser is a small business concern and the Contracting Officer determines that the purchaser does not qualify as a responsible purchaser on an otherwise acceptable bid, the Contracting Officer shall refer the matter to the Small Business Administration which will decide whether or not to issue a Certificate of Competency.

(d) Affiliated concerns, as defined in § 223.49(a)(5) of this subpart are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the Contracting Officer shall consider an affiliate's past performance and integrity when they may adversely affect the prospective purchaser's responsibility.

[53 FR 33132, Aug. 30, 1988]

§ 223.102 Procedures when sale is not awarded to highest bidder.

If the highest bid is not accepted and the sale is still deemed desirable, all bids may be rejected and the timber readvertised; or, if the highest bidder cannot meet the requirements under which the timber was advertised

or the withholding of award to him is based on one or more of paragraphs (c), (d), and (e) of § 223.100, award at the highest price bid may be offered to the next highest qualified bidder or to the other qualified bidders in order of their bids until the award is accepted by one or refused by all of the qualified bidders.

(92 Stat. 1301, Pub. L. 95-465)

[44 FR 73029, Dec. 17, 1979. Redesignated at 49 FR 2761, Jan. 23, 1984, and 53 FR 33132, Aug. 30, 1988]

§ 223.103 Award of small business set-aside sales.

If timber is advertised as set aside for competitive bidding by small business concerns, award will be made to the highest bidder who qualifies as a small business concern and who has not been determined by the Small Business Administration to be ineligible for preferential award of set-aside sales. If there are no qualified small business bidders any readvertisement shall be without restriction on the size of bidders.

(92 Stat. 1301, Pub. L. 95-465)

[44 FR 73029, Dec. 17, 1979. Redesignated at 49 FR 2761, Jan. 23, 1984, and 53 FR 33132, Aug. 30, 1988]

CONTRACT ADMINISTRATION

§ 223.110 Delegation to regional forester.

The Chief, Forest Service, after approval of conditions of sale, may authorize Regional Foresters formally to execute timber sale contracts and related papers in sales exceeding the volume which the Regional Forester has been authorized to sell.

§ 223.111 Administration of contracts in designated disaster areas.

This section is to implement the provisions of section 242 (a), (b), and (c) of the Disaster Relief Act of 1970 (84 Stat. 1956) which relate to contracts for the sale of National Forest timber in connection with areas damaged by major disaster as designated by the President pursuant to the Act.

(a) Where an existing contract for the sale of National Forest timber does not provide relief from major physical change not due to purchaser's

negligence p  
struction of  
road or oth  
facility and,  
aster in a  
physical cha  
construction  
connection w  
ty, the Unite  
increased cor  
mined by th  
the estimatec

(1) More th  
1 million boar

(2) More th  
feet for sales  
feet, or

(3) More th  
million board

(b) Where t  
determines th

that restorat  
construction i

cost-sharing  
graph (a) of t

cancellation o  
standing pro

§ 223.116.

(c) The Chic  
thorized to rec

num time to a  
tional Forest

termines that-

(1) The sal  
assist in the c  
of a State dan  
ter,

(2) The sale  
assist in susta  
such area, or

(3) The sale  
sary to salvag  
damaged in suc  
protect undama

(d) Any req  
paragraph (a)

shall be made i  
Supervisor hav  
responsibility for

(Sec. 242 (a), (b),  
U.S.C. 4461)

§ 223.112 Modific

Timber sale co  
fied only when

apply to unexe  
contract and wi

the United State  
be made by the

## H-5440-1 - CONDUCT OF SALES

2. Clerical Assistance. For sealed bid and/or oral auction sales, a designated clerk does the following:

a. Receives bids as they are delivered. Records receipt of bids on partially completed Timber Sale Bid Record. For advance written bids, records date and time of receipt on the bid, and records bids in order received on Timber Sale Bid Record. Records advance written bids received in same mail delivery as being received at the same date and time.

b. Places and maintains all sealed bids and advance written bids under lock and key. Sealed bids must remain unopened until time of sale; advance written bids may be opened and bids recorded prior to sale date. All information about sealed bids and advance written bids must be kept confidential until time of sale. Delivers all bids to Sale Supervisor at the time of sale. When sale is held at a place other than the District Office, the clerk must remain in the office to receive bids up to the closing time for receipt of bids. At closing time, the clerk must take all bids received to the place of the sale and deliver them to the Sale Supervisor.

3. Announcements. For sealed bid sales, the Sale Supervisor should be in the sale room approximately 5 minutes before time scheduled for opening bids and announce that bids are being accepted and that no bids can be honored after the time scheduled for opening. At the time scheduled for opening, the Sale Supervisor should announce that time for receiving sealed bids has expired.

III. Sale Procedures. Sale procedures relate to the process of conducting a public offering of forest product including bidding instructions, rejections of bids, and waiver of minor bid deficiencies.

A. Types of Bidding. Bidding at competitive sales shall be by submission of sealed bids, written bids, oral bids, or a combination of bidding methods, depending on type of sale as specified by the Authorized Manager in the advertisement of the sale.

1. Sealed Bid Sales. In sealed bid sales, the bidder submitting the highest sealed bid, together with the required bid deposit and other required documents shall be declared the high bidder. In the event of a tie in high sealed bids, the high bidder shall be determined by lot from among those who submitted the tie bids.

## H-5440-1 - CONDUCT OF SALES

2. Oral Auction Sales. To participate in oral auction sales, the bidder must submit the required minimum bid deposit and a written bid at not less than the advertised appraised price (on a unit basis per product/species and total price) together with any other required documents specified in the sale notice. The officer conducting the sale will declare an open period prior to oral bidding on each tract, during which bid deposits and written bids may be submitted. Bid deposits and written bids may also be submitted any time prior to the open period declared by the Sale Supervisor. Oral bidding to determine the high bidder will begin from the highest written bid after closure of the submittal period. In the event there is a tie in high written bids, and no oral bidding occurs, the bidder who was the first to submit a bid deposit and written bid shall be declared the high bidder. If the Sale Supervisor conducting the sale cannot determine who made the first submission of high tie written bids, the high bidder shall be determined by lot. The declared high bidder must confirm the oral bid in writing immediately after the sale, but failure to do so shall not relieve the bidder of the purchase obligation.

B. Opening the Sale. The Sale Supervisor calls the sale to order at the time specified in the sale notice, and reads the following announcement:

"This meeting is held pursuant to a sale notice issued by this office on (date of notice) and is conducted under the authority of the laws and regulations as stated on the Instructions to Bidders which was included with the sale notice. Cutting and/or removal of material sold shall be carried out under the authorities stated therein."

For sealed bid sales:

"The time for receiving sealed bids on Tract (name tract(s)) has expired."

For lands west of the 100th Meridian in the contiguous 48 States:

"All timber offered (except \_\_\_\_\_) is restricted from export from the United States in the form of unprocessed timber and is also prohibited from substitution for exported private timber."

## H-5440-1 - CONDUCT OF SALES

For sales that include set-aside tracts:

"For set-aside tracts, the bidder must not have been determined by the Small Business Administration to be ineligible for preferential award of set-aside sales. A self-certification statement must be submitted with the bid which shows that the bidder is qualified as a small business concern as defined by the Small Business Administration in its regulations. The self-certification clause must be dated with today's sale date. Sale award to the high bidder will not be made for a period of five (5) days. During this period, a bidder or other interested party may protest the small business status of the high bidder. If a protest is made, the sale award will be suspended pending determination of the bidder's qualifications by the Small Business Administration. Protests must be submitted in writing."

The Sale Supervisor should announce that:

"The sales were advertised in (Newspapers)."

"Sale notices were sent to all on the mailing list and were also available at the (specify) Office."

"Supplementary information and copies of the proposed sale contract were available for review at the (specify) Office."

"Any or all bids may be rejected and minor deficiencies in the bids or the sale advertisement may be waived when in the Government's interest to do so."

"Prior to the award of any forest product sale, the Bureau of Land Management may require the high bidder to furnish such information as is necessary to determine the ability of the bidder to perform the obligations of the contract. Those bidders who have demonstrated poor performance, including recent contract defaults, may be required to provide additional performance assurances in the form of advance payment and/or an increased performance bond as a condition for award of contract. These extraordinary requirements may be required on a case-by-case basis."

## H-5440-1 - CONDUCT OF SALES

If the sale has been protested, all prospective bidders will be notified in writing with acknowledgement and an announcement made as follows:

"Tract No. \_\_\_\_\_ has been protested. The Bureau of Land Management will proceed with normal bidding on the tract. The award of the sale may be delayed and in the event the protest is sustained, the BLM will reject all bids. Conversely, if the protest is denied, the Contracting Officer may exercise his discretion to give immediate full force and effect to the decision and proceed to award the contract. If this should occur, the protestant has the right to appeal and to petition the Office of Hearings and Appeals to stay the implementation of the decision."

Other pertinent points of the sale notice which the Sale Supervisor thinks should be brought to the attention of the bidders.

C. Bidding Rules. The Sale Supervisor explains the bidding procedures as follows:

1. Sealed Bid Sales. For sealed bid sales, the Sale Supervisor announces:

"Sealed bids will be opened on each tract in the order in which the tracts appeared in the sale notice (if the sale is composed of two or more tracts). Submission of the required bid deposit, a bid for not less than the advertised appraised price on a unit basis per product/species and total price, and other qualifying documents stipulated in the sale notice, are required to qualify for bidding. Bids and bid bonds must be on forms provided by the Bureau of Land Management. In the event of a tie in high sealed bids, the high bidder will be determined by lot from among those who submitted the tie high bids."

## H-5440-1 - CONDUCT OF SALES

2. Oral Auction Sales. For oral bid sales, the Sale Supervisor announces:

"Oral auction will proceed for each tract in the order in which they appeared in the sale notice (if the sale is composed of two or more tracts). Written bids submitted prior to the oral auction sale are considered advance written bids. Submission of the required bid deposit, a written bid for not less than the advertised appraised price on a unit basis per species/product and total price, and other qualifying documents stipulated in the Sale Notice are required to qualify for oral bidding. Written bids, bid bonds, and confirmation of oral bids must be on forms provided by the Bureau of Land Management. Oral bidding begins from the unit prices of the highest written bid. BLM exercises an overcall system in which each bidder assumes the last highest bid and raises from that point. In the event there is a tie in high written bids, and no oral bidding occurs, the bidder who was the first to submit a bid deposit and written bid shall be declared the high bidder. If it cannot be determined who made the first submission of high tie written bids, the high bidder will be determined by lot. The high bidder must confirm the bid, in writing, in room (specify location)."

Additional instructions regarding oral bidding may be announced as follows:

"Unless there are objections, the maximum time interval between bids will be 30 seconds—time will start as soon as the previous bid has been posted. This time limit is set to expedite sale procedure, but extensions will be granted upon request. When 30 seconds have passed after the last bid is posted, without bidding or a request for extension of time, the sale will be closed and no further bidding will be allowed."

"The bidder shall name the firm or individual for whom bidding as each bid is made. The bid must state the species or product being bid and the price. For example, Joe Jones Lumber bids \$85.10 per thousand on the Douglas-fir."

"The minimum acceptable bid increment is \$0.05 per thousand board feet (or other appropriate increment)."

"Bidding on minor species usually has little effect upon the outcome of the sale. Procedure of the sale will be greatly expedited by confining your bidding to the major species (or product)."

## H-5440-1 - CONDUCT OF SALES

"A bidder may request a delay in bidding in order to have a total bid amount calculated."

"A bid once made and accepted by me may not be withdrawn."

"If you have tract questions, please ask them at the time the specific tract in question is offered."

"A recess will be declared at any time the situation warrants."

"Are there any questions on the bidding procedure?"

**D. Conduct of Sale Procedure.**

**1. Sealed Bid Sale. Procedures for conduct of a sealed bid sale are as follows:**

a. The Sale Supervisor announces each tract to be offered by giving tract number or sale name. The Sale Supervisor then opens each sealed bid submitted for that tract and announces the bidder's name, address, and total bid price.

b. As each bid is opened, the Sale Supervisor or an assistant carefully reviews the bid forms, deposit, and other required qualifying documents to be sure they are all in order. As each bid is accepted it is recorded on Form 5440-10, Timber Sale Bid Record (Illustration 8). Each bid must be posted with the use of a blackboard or a projector as it is read by the Sale Supervisor.

c. The total price bid in any sealed bid sale is the figure used in determining the highest bid submitted.

d. In the event of a tie in high sealed bids, the high bidder must then be determined by lot.

## H-5440-1 - CONDUCT OF SALES

e. If a high bid is received in which there is an error in multiplication, addition, placing a decimal, transposed figures, or if a bidder--due to misunderstanding, confusion of tracts or other reasons--records a bid totally different than would have been the case for a fully informed bidder, the Sale Supervisor must nevertheless assume that the total price listed on the bid form was the amount the bidder intended to specify. The high bidder then has the following alternatives available:

(1) The bidder can enter into the contract on the basis of the total price actually bid; or

(2) The bidder can forfeit the bid deposit in the amount specified in the sale notice and void the bid commitment; or

(3) The bidder can present evidence in an attempt to show that the amount bid was in error. If the bidder satisfactorily proves that an unintentional error was made and the error is of the type for which the General Accounting Office allows relief, the bidder may be entitled to a refund of the bid deposit. It should be emphasized that a contract cannot be awarded on the basis of an adjustment in the total price bid. Whenever such a situation arises, the Authorized Manager must retain all bid deposits and forward all the bids and a report to the State Director. The State Director will advise the Authorized Manager whether the bid and bid deposit can be returned to the high bidder who made the error and who is willing to forfeit the opportunity to enter into a contract for the total price actually bid, but is unwilling to forfeit the bid deposit. Such a bidder can be given no more than 30 days after being declared high bidder to present his case for relief.

f. If the bidder who made the error elects to enter into the contract on the basis of the actual total price bid, adjustments may have to be made in the unit prices for administrative and reappraisal purposes. The correct unit price to be used in the contract can be determined by dividing the total consideration bid by the estimated quantity if only one item is involved. If two or more items are involved and the error occurred in computing the value of only one, then that unit price should be adjusted. If the error is not attributable to the calculation of the value of any certain item, the following procedure should be followed in determining appropriate unit prices:

## H-5440-1 - CONDUCT OF SALES

- (1) Determine products of estimated volume times appraised prices.
  - (2) Divide each product by the total appraised value to determine the decimal fraction the appraised value of each item is of the total appraised value.
  - (3) Multiply decimal fractions times total price bid.
  - (4) Divide each product in step (3) above by the estimated volume of each item. The result is the contract unit price for each item.
  - (5) Should this procedure indicate a contract price for one item that is lower than the appraised price, the appraised price for that item should prevail and the prices of the remaining items should be adjusted by the above procedure until no contract price is less than the appraised price.
- g. After evaluating all bids for a specific tract consistent with this section, the Sale Supervisor announces the high bidder for that tract.
- h. After the high bidder is announced, the Sale Supervisor:
- (1) Retains the original of Form 5440-9, Deposit and Bid, from all bidders.
  - (2) Retains bid deposit and other qualifying documents from high bidder.
  - (3) Returns second copy of Form 5440-9, Deposit and Bid, to all bidders.
  - (4) Returns bid deposits and other qualifying documents to all unsuccessful bidders. (See Subsection IV.A.)

## H-5440-1 - CONDUCT OF SALES

2. Oral Auction Sale. Procedures for conducting an oral auction sale are as follows:

a. To open the qualifying period for each tract, the Sale Supervisor first announces the tract to be offered by tract number and sale name (if applicable). The Sale Supervisor may then describe the sale in general terms; i.e., location, volume, product, appraised value, special or unusual contract requirements, and the stipulated bid deposit requirements. The Sale Supervisor must then post all advance written bids in the order received. After this, the Sale Supervisor announces "Written bids, deposits, (and other qualifying documents) will now be received on this tract." The Sale Supervisor must post all bids in the order received.

b. As each written bid is received, the Sale Supervisor or an assistant must carefully review the bid forms, deposits, and any other qualifying documents, to be sure they are in order. Each written bid must be recorded, in the order received, on the Timber Sale Bid Record, Form 5440-10 (Illustration 8).

c. The total price bid on a written bid is the figure used to determine the highest written bid submitted. Oral bidding must begin from the unit price, by product or species, of the highest written bid submitted. It is imperative that oral bidding begin from accurate bid data. The high written bid must be checked with a calculator. If the sum of the unit prices by item times the volume by item fails to match the total amount bid, the Sale Supervisor should give the bidder an opportunity to adjust the unit prices to produce the total amount bid. The adjusted unit prices are then posted from which oral bidding can commence. The adjusted unit prices must equal or exceed the appraised unit prices. Under no circumstances can the total bid price be adjusted. If the bidder is not present to correct an error of this nature, then bidding must take place on a total consideration basis with minimum acceptable increments established by the Sale Supervisor. After the bidding is over, the unit prices are determined pursuant to instructions under Subsection III.D.1.f.

d. After reviewing and posting the written bids, the Sale Supervisor announces, "Are there any other bidders?" After waiting a reasonable time, the Sale Supervisor closes the qualifying period by announcing, "The qualifying period for receiving bids on tract No. \_\_\_\_ is closed. I will now receive oral bids." (For examples of "overcall" bidding, see Illustrations 9 and 10.)

e. The Sale Supervisor announces when only 10 seconds remain for oral bidding. At expiration of the period of time allowed between bids, the Sale Supervisor announces the high bidder and the total bid price (or high bid unit prices when bidding is limited to single species).

## H-5440-1 - CONDUCT OF SALES

f. During oral bidding, the Sale Supervisor or an assistant, records bidder's name and amount of bid on Timber Sale Bid Record, Form 5440-10 (Illustration 8, Page 2).

g. The assistant computes or checks the calculation of the highest bid and next highest bid, as necessary.

h. If no oral bidding occurs and there is a tie in high written bids, the bidder who was the first to submit a bid deposit and written bid must be declared the high bidder. If the Sale Supervisor cannot determine who made the first submission of high, tie written bids, the high bidder must be determined by lot from the high, tie bidders.

i. If there is an error in the high written bid not adjusted pursuant to Subsection III.D.2.c., and no oral bidding occurs, the Sale Supervisor must proceed according to the instructions under Subsection III.D.1.e. and Subsection III.D.1.f.

j. After the high bidder is announced, the Sale Supervisor:

(1) Completes the "Oral Bid Made" section of the Bid Schedule on Form 5440-9, Deposit and Bid, from the high bidder and ensures high bidder confirms the oral bid on the form (Illustration 11).

(2) Retains bid deposit and other qualifying documents from high bidder.

(3) Returns written bids, bid deposits, and other qualifying documents to all unsuccessful bidders. (See Subsection IV.A.)

E. Rejection of Bids. The Sale Supervisor is authorized to reject any or all bids during a sale when it is in the interest of the Government to do so. During regular sales, a bid should be rejected in the following situations:

1. Bid Deposit. The bid deposit submitted is less than the required amount.

2. Bid Price. The total bid price does not equal or exceed the advertised total appraised price.

3. Qualifying Documents - Set-Asides. Bidder for a small business set-aside sale fails to submit a properly completed Self Certification Clause, Form 5430-1, to qualify for bidding (Illustration 7).

## H-5440-1 - CONDUCT OF SALES

4. Sales Involving Resale of Timber. In the resale of timber remaining from an uncompleted timber sale contract, no bid will be considered from any person, or from an affiliate of such person, who failed to complete the original contract because of cancellation for purchaser's breach or who failed to complete payment of the total purchase price and any related charges by the expiration date. As used herein, "person" means an individual, partnership, corporation, or association; and "affiliate" means a person who controls or is controlled by another person. These provisions apply only when 50 percent or more of the timber included in the resale is timber remaining from the uncompleted contract.

F. Waiver of Minor Deficiencies. The Sale Supervisor is authorized to waive minor deficiencies in the bids or sale advertisement when it is in the interest of the Government to do so.

1. Irregularity in Bid Submission. In the event a situation should occur wherein advance written bids or sealed bids are submitted to qualify for bidding but the required bid deposit or other qualifying documents are missing, the Sale Supervisor may permit the deficiency to be remedied prior to posting or announcing the sealed bids and prior to receiving any oral bids. The reasons for, and the circumstances surrounding, any failure to meet qualifying requirements should be recorded and the award of contract must be delayed until the matter has been reviewed with the State Director.

2. Irregularity in Bidding. In the event an irregularity in bidding occurs and there is some question as to which bidder will be considered the high bidder, all sealed or written bids, deposits, and other qualifying documents will be retained by the Sale Supervisor until the matter is reviewed by the State Director and a final decision reached.

3. Irregularity in Advertisement. Where there is a minor change or error in the sale advertisement, prospectus or sale notice, the Sale Supervisor will announce the change or correction. All bidders for that tract must acknowledge that they are aware of the change or correction prior to bidding.

## H-5440-1 - CONDUCT OF SALES

G. Closing the Sale. When all tracts have been offered, the Sale Supervisor announces that the sale is closed as to all tracts for which a high bidder has been announced. The Sale Supervisor also advises as to the date of the next scheduled sale.

1. No Bid Sale. Tracts for which no bids were received on the sale date may be kept open for receipt of bids for a period not to exceed 90 days in accordance with special rules of advertising set forth in H-5430-1, Advertisement and the instructions set forth in H-5440-1, Conduct of Sales, Section V.

2. High Bidder Not Announced. A tract for which a high bidder is not announced because of irregularities in bidding shall remain open until the high bidder is determined or all bids are rejected. No additional bids will be received on these tracts.

IV. Post-Sale Actions. Post-sale actions describe reporting actions taken by the Authorized Manager or Sale Supervisor following declaration of the high bidder for advertised sales.

A. Bid Deposits. Following the Sale Supervisor's declaration of the high bidder for advertised sales and confirmation of the high bid, the collection officer, who assists with the sale, processes bid deposits received.

1. Deposit of High Bidder. The bid deposit is retained pending acceptance of the high bid and award of contract by the Contracting Officer. Except for corporate surety, ILC, and Assignment of Surety bid bonds, such deposits may subsequently be applied to the purchase price of the contract.

2. Deposit of Other Bidder(s). The bid deposit is normally returned to all unsuccessful bidders after the high bid is declared. Deposits may be returned directly to the bidder after the sale, or by mail (Illustration 12). When a bid deposit in the form of cash, money order, bank draft, credit card, cashier's check, certified check, irrevocable letter of credit or assignment of surety is returned personally on the day of the sale, the bidder must sign for receipt of the deposit on the Timber Sale Bid Record, Form 5440-10. Return of a corporate surety bid bond must be duly recorded by the collection officer on the same bid record form. For collection and handling procedures regarding bid deposits, refer to Manual Section 1372.

## H-5450-1 - AWARD OF CONTRACT

V. Methods of Payment. The regulations and contract forms governing the sale of forest products provide for two basic ways to pay for forest products purchased: cash payments and installment payments. Cash payment is required in certain circumstances. Installment payments are permitted in certain circumstances. Rules governing each method are set out below.

A. Cash Payment. Cash payment means payment of the full amount of the contract purchase price prior to or at the time the Authorized Officer signs the contract. Cash payment is mandatory for all sales under \$500.00 in value; for all sales of minor forest products; for all sales of minor forest products made in the field by authorized and bonded field personnel; and for all sales of right-of-way timber to a permittee under 43CFR Group 2800. Cash payment may be required for sales over \$500 at the discretion of the Authorized Officer. As a general rule, contracts written on the following contract forms require advance cash payment:

1. Form 5450-1, Contract for Cash Sale of Vegetative Resources.
2. Form 5450-5, Vegetative or Mineral Material Negotiated Cash Sale Contract (\$1,000 or less).
3. Form 5450-10, Christmas Tree Tag.

B. Installment Payments. Contracts written on Form 5450-3, Contract for the Sale of Timber - Lump Sum Sale permit payment by installments when the total purchase price is over \$500. While acceptance of installment payments on a contract is discretionary with the Authorized Officer, for all practical purposes, all sales over \$500 written on Form 5450-3 will provide for payment by installments. (Note: Advance payment (cash) is required for all sales of right-of-way timber to a permittee under 43 CFR Group 2800.)

1. Computation of Amount of Installment. For sales under \$500,000, the minimum installment shall not be less than 10 percent of the total purchase price. For sales of \$500,000 or more, installment payments shall be \$50,000. The computation process follows:

<u>Total Purchase Price</u>	<u>Amount of Installment</u>
\$500 to \$9,000	10% of total purchase price rounded to next highest \$100.
\$9,001 to \$499,999	10% of total purchase price rounded to next highest \$1,000.
\$500,000 and over	\$50,000

The amount of the installment payment is entered on the contract form prior to award of contract. Installment contracts automatically require payment in advance of timber cutting or removal unless the Purchaser makes prior arrangements to increase the performance bond or files a payment bond to permit cutting or removal in advance of payment.

Exhibit C  
Page 1 of 8

## H-5450-1 - AWARD OF CONTRACT

2. Options. Timber sold on an installment payment basis may be paid for under the following installment payment options:

a. Payment in Advance of Cutting.

(1) A deposit equal to one-half of an installment shall be paid prior to or at the time the Authorized Officer signs the contract. This deposit shall be applied to the final payment under the contract.

(2) The first installment shall be paid prior to the cutting or removal of material sold.

(3) Each subsequent installment shall be due and payable without advance notice when the value of the material cut or removed equals the sum of all payments, not including the deposit; provided however, that in the case of all contracts with a 3-year term the purchaser shall be required by the second anniversary date to either:

(a) Pay no less than 40 percent of the total purchase price, or,

(b) Complete road construction required under the terms of the contract the value of which when combined with installment payments made is equal to no less than 40 percent of the total purchase price. For the purpose of this computation, value of road construction completed will be based on BLM appraisal allowances.

(4) Payment in full of the total purchase price must be made prior to the expiration of time for cutting and removal set forth in the contract.

b. Payment in Advance of Skidding, Yarding or Removal.

(1) A deposit equal to one-half of an installment shall be paid prior to or at the time the Authorized Officer signs the contract. This deposit shall be applied to the final payment under the contract.

(2) Delayed payment of installments shall be allowed if the Purchaser increases the minimum performance bond required under the terms of the contract by an amount equal to one or more installment payments. Form 5460-3. Increase or Decrease Rider is used to document this increase. (See Illustration 30.) Cutting in advance of payment shall be permitted to a value level equal to the value of the increase in the performance bond. Cutting in advance of payment is not permitted until the Authorized Officer approves, in writing, the increased bond.

(3) The first installment payment is due and payable before any timber is skidded or yarded to a loading point or removed from the contract area. Subsequent installment payments are due and payable without notice when the sale value of timber skidded or yarded to a loading point or removed equals the sum of all payments not including the deposit, provided however, that in the case of all contracts with a 3-year term the purchaser shall be required by the second anniversary date to either:

## H-5450-1 - AWARD OF CONTRACT

(a) Pay no less than 40 percent of the total purchase price, or

(b) Complete road construction required under the terms of the contract the value of which when combined with installment payments made is equal to no less than 40 percent of the total purchase price. For the purpose of this computation, value of road construction completed will be based on BLM appraisal allowances.

(4) The Purchaser may elect to use or discontinue use of the increased performance bond procedure at any time during the term of the contract, provided that the contract is in good standing.

(5) Payment in full of total purchase price must be made prior to expiration of time for cutting and removal set forth in the contract.

c. Payment After Cutting and Removal.

(1) A deposit equal to one-half of an installment shall be paid prior to or at the time the Authorized Officer signs the contract. This deposit shall be held to satisfy the final payment under the contract.

(2) Payment of installments for timber which has been cut and/or removed shall be allowed if the Purchaser secures a payment bond in an amount equal to one or more installment payments. Cutting and/or removal is permitted up to a value level equal to the value of the payment bond. The Purchaser should be encouraged to file a bond of sufficient penal amount to cover the equivalent of two months anticipated cutting and removal to avoid contract violation situations. Cutting and/or removal in advance of payment is not permitted until the Authorized Officer approves, in writing, the payment bond. The following types of payment bonds are acceptable:

(a) Payment Bond for Single Contract (Form 5450-11)  
(See Illustration 31.)

(b) Blanket Payment Bond (Form 5450-20). (See Illustration 32.)

(c) Deposit of Negotiable Securities of the United States - Payment Bond (Form 5450-15). (See Illustration 33.)

(d) Cash Payment Bond (Form 5450-21) supported by Irrevocable Letter of Credit-Payment Bond. (See Illustrations 34 and 35.)

→ (e) Cash Payment Bond (Form 5450-21) supported by an Assignment of Surety for Payment Bond. (See Illustrations 36 and 37.) ←

(3) The Purchaser shall be billed monthly for the timber skidded or yarded to a loading point or removed from the contract area. Payment is due within 15 days of the billing date shown on the billing form. Subsequent payments are due on a monthly basis as timber is skidded or yarded to a loading point or removed from the contract area.

## H-5450-1 - AWARD OF CONTRACT

(4) In the case of contracts with a 3-year term the purchaser shall be required by the second anniversary date to either:

(a) Pay no less than 40 percent of the total purchase price, or

(b) Complete road construction required under the terms of the contract the value of which is equal to no less than 40 percent of the total purchase price. For the purpose of this computation, value of road construction completed will be based on BLM appraisal allowances.

(5) The Purchaser may reduce the amount of the payment bond to a value equal to the amount of "cut" timber for which payment has not been received when operations cease for a period of 60 days or more. Before operations resume under this option, the bond must be increased to an amount equal to one or more installments as per V.B.2.c.(2). The Purchaser may elect to use or discontinue use of the payment bond procedure at any time during the term of the contract, provided that the contract is in good standing.

(6) Payment in full of the total purchase price must be made prior to expiration of time for cutting and removal set forth in the contract.

d. Combinations of Methods. Combinations of methods described in Paragraph V.B.2.b. and Paragraph V.B.2.c., are permitted providing proper bonding has been secured by the Purchaser and approved by the Authorized Officer. A single blanket payment bond may be allocated to two or more contracts with the same Purchaser in the same district upon approval of the Authorized Officer.

C. Application of Bid Deposits.

1. Cash Deposit. When the bid deposit is submitted in the form of cash, money order or cashier's check, the entire bid deposit will be retained until such time that the contract is approved by the Authorized Officer and applied toward payment requirements of the contract. If, after approval of the contract, the Purchaser so requests, any amount of the bid deposit in excess of one-half of an installment may be refunded to the Purchaser.

2. Bid Bond or Cash Bid Bond. When a corporate surety bid bond or cash bid bond (with irrevocable letter of credit or Assignment of Surety) has been used by a Purchaser to qualify for bidding, the bond will be retained by the Authorized Officer until all requirements for contract approval have been met. When the contract has been approved these documents are to be returned to the Purchaser, in case of a corporate surety bid bond, and to the issuing bank, in the case of an ILC or an Assignment of Surety.

## H-5450-1 - AWARD OF CONTRACT

VI. Letter of Award. The letter of award is the formal notice to the high bidder of award of contract together with clear instructions for executing the contract, the performance bonds, and any other appropriate documents. The letter of award is oftentimes referred to as the "first letter".

A. Preparation of Letter. The letter of award is prepared for the signature of the Authorized Officer after a determination has been made that the high bidder is qualified and responsible. The letter notifies the bidder of bid acceptance and sets forth payment options, proposed disposition of the bid deposit, and instructions for completing and return of the contract and bond forms. (See Illustration 38.)

1. Payment Options. The letter of award must contain instructions for payment of the contract amount. (See Section V for specific instructions on payments.)

2. Performance Bonds. The letter of award must contain instructions for completion of a performance bond, when required. (See Section IV for instructions on performance bonds.)

3. Trespass Warning. The letter of award must advise that the award of the contract does not authorize the Purchaser to initiate operations on the contract area and that any timber cutting prior to approval of the contract constitutes timber trespass.

4. Award Date. The date of the letter of award is the date on which an offer made by the high bidder is accepted by the Government and it becomes the date the contract is made and entered into. The date of the letter of award and the date included in the preamble of the contract must be the same. This date is not entered into the TSIS.

B. Time Limit for Returning Signed Contract. The Purchaser shall be allowed 30 days to sign and return the contract together with the required performance bond and other requested documents. One 30-day extension of this time period may be permitted upon written request if filed with the Authorized Officer within the original 30-day period. (See Subsection VII.B.) A tickler file should be established to remind the Authorized Officer of the 30-day period for return of the executed contract, performance bond, and other documents. As a matter of courtesy, the high bidder should be contacted when 25 days have elapsed to notify that the executed contract and bond have not been received. Contact may be by phone and documented by letter. (See Illustration 39.)

C. Set-Aside Sales. The Authorized Officer must wait five days from the sale date before awarding the contract to the high bidder. If no protests are received, proceed with award; if, however a protest on the size standard of the high bidder is received, proceed as described in Subsection III.B.

## H-5450-1 - AWARD OF CONTRACT

VII. Execution of Contract. Execution of the contract is concerned with the actions of the successful bidder or prospective purchaser to complete return a timber sale or other vegetative contract preparatory to approval by the Authorized Officer. Principal actions by the high bidder or prospective purchaser include signing the contract, making required payments or deposits and, if required, submitting a performance bond.

A. Authorized Officer Review. Principal review action of the Authorized Officer is to determine that all documents submitted by the high bidder or prospective purchasers are complete, in proper order and that any required payment or deposit is made.

1. Contract. All copies of the contract should be reviewed to make sure that all copies are complete and that all copies have been signed. The signature on the contract should be checked against the Operator's Rating Record to assure proper signature. For corporations, the signing officer must be identified by title, the signature certified by the corporation secretary or assistant secretary, and the corporate seal affixed.

2. Performance Bond. Because the performance bond may be one of four different types, the items to review differ with bond type.

a. Corporate Surety Bond. Corporate surety bonds are written on Standard Form 25, Performance Bond. (See Illustration 21.) The Authorized Officer must verify the following:

(1) That all entries on the form have been made in accordance with the instructions set forth on the reverse side of the form;

(2) That a power of attorney accompanies the bond when the bond is signed by an agent or attorney-in-fact for the surety; and

(3) That the penal sum of the bond is for the correct amount.

b. Individual Surety Bond. Individual surety bonds are written on Standard Form 25, Performance Bond. In addition, the individual surety bond must be supported by Standard Form 28, Affidavit of Individual Surety, (see Illustration 49), from two or more individual sureties. The Authorized Officer must verify the following:

(1) That all entries on the bond form have been made in accordance with the instructions set forth on the reverse side of the form;

(2) That Affidavits of Individual Surety from each of the individual sureties have been properly completed in accordance with the instructions on the form; and

(3) That the penal sum of the bond is for the correct amount.

## H-5450-1 - AWARD OF CONTRACT

c. Cash Bond. Cash bonds are written on Form 1822-4, Cash Bond. (See Illustrations 23, 24, 25 & 28.) The Authorized Officer must verify the following:

(1) That all entries have been properly made in accordance with instructions for use of the form,

(2) That the penal sum of the bond is for the correct amount, and

(3) That the cash deposit received is for the correct amount and properly accounted for.

(4) If an irrevocable letter of credit (ILC) or an Assignment of Surety is used in lieu of a cash deposit, the Authorized Officer must verify the following:

(a) That the instrument conforms to the format and that no conflicting information has been added;

(b) That all parties to the instrument have been properly identified;

(c) That the amount of the penal sum is correctly stated,

(d) That the contract to which the instrument applies is properly identified; and

(e) That the instrument is signed by an authorized officer of the issuing bank.

d. Negotiable Securities of the United States. The deposit of negotiable securities of the United States as a performance bond is documented on Bureau Form 5430-13, Deposit of Negotiable Securities of the United States. (See Illustration 29). The Authorized Officer must verify the following:

(1) That all entries have been properly made in accordance with instructions for use of the form.

(2) That the penal sum of the bond is for the correct amount.

(3) That the cash or market value (rather than face value) of the securities deposited equal or exceed the penal sum of the bond.

(4) That the deposited securities are properly accounted for.

## H-5450-1 - AWARD OF CONTRACT

3. Payments. Payment requirements differ with the type of sale i.e., cash sale or installment sale. For cash sales written on Contract Forms 5450-1, Form 5450-3, and 5450-5, respectively, payment must be made full prior to or at the time the Authorized Officer signs the contract. For installment sales written on Contract Form 5450-3, a deposit equal to one-half of an installment, as specified in the contract, must be made prior to or at the time the contract is signed by the Authorized Officer.

B. Extension of Time. If the successful bidder is not able to meet the 30-day requirement, an additional 30-day period may be requested. The application for the extension of time must be made in writing and granted in writing prior to expiration of the original 30-day period. While action on such a request is discretionary with the Authorized Officer, only in the most unusual case would the request be denied. (See Illustration 40.)

C. Retention of Bid Deposit. When a successful bidder fails to sign and return a contract, together with any required performance bond and any required payment within the time provided, the rights and privileges of the successful purchaser in and to such timber are terminated and the bid deposit retained as liquidated damages. The bidder shall be promptly notified by letter of this action and the letter shall include the right of appeal. (See Illustration 41.)

1. Cash Bid Deposit. In the event the amount of the bid deposit is in excess of the minimum deposit specified in the sale notice, the excess amount shall be refunded after the 30-day appeal period has passed and no appeal has been filed.

2. Bid Bond. If the successful bidder submitted a corporate surety bid bond to qualify for bidding, demand shall be made upon the bonding company for liquidated damages after expiration of the 30-day appeal period and in the absence of an appeal.

3. Cash Bid Bond. If the successful bidder submitted a cash bid bond supported by an irrevocable letter of credit (ILC) to qualify for bidding, demand shall be made upon the issuing bank for liquidated damages after expiration of the 30-day appeal period and in the absence of an appeal. Demand is accomplished by delivery of a sight draft (see Illustration 42) and letter explaining the reason for the sight draft.

D. Offer and Award to Other High Bidder. When the successful bidder fails to sign and return the contract, and any required bond and payments, the contract may be offered and awarded for the amount of the high bid to the highest of the bidders who is qualified, responsible, and willing to accept the contract; provided however the 30-day appeal period has expired and no appeal has been filed by the high bidder. (See Paragraph III.C.1.a.)

E. SBA Road Loans. (Reserved)



File Code: 2400

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:

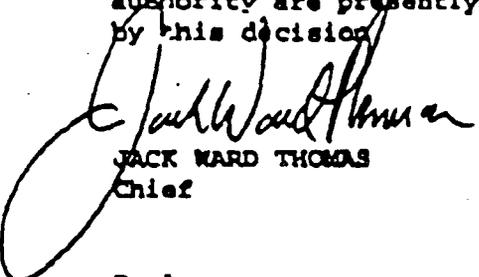
- 1) For the timber sales listed on the enclosed Table 1 (Timber Sales to Release), move to lift the suspensions on all units of these timber sales or award the sales, as appropriate.
- 2) For the timber sale listed on the enclosed Table 2 (Partial Release Timber Sales), move to award and release the 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&R 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 D  
Page 1 of 4

Caring for the Land and Serving People



As noted in your September 13, 1995 letter, we recognize that you have already acted to award the Enola 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

ENCLOSURE, REGIONAL FORESTER, R6

Table 1. Timber Sales to Release

<u>National Forest</u>	<u>Timber Sale</u>
Umpqua National Forest	Zanita
	Jack
	Redlick
	Honeytree
	Gage
Willamette National Forest	Horse Byars
Olympic National Forest	Carico Cat
	Rocky
Gifford Pinchot NF	Holdaway

Table 2. Partial Release Timber Sales

<u>National Forest</u>	<u>Timber Sale</u>
Willamette National Forest	Red 90

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

<u>National Forest</u>	<u>Timber Sale</u>
Umpqua National Forest	Cowboy
	Nita
	South Nita
	Last
	First
Siskiyou National Forest	Garden
	Boulder Crab
	Elk Fork

Table 4. Timber Sales with T&E Bird Species Known to be Nesting

<u>National Forest</u>	<u>Timber Sale</u>
Umpqua National Forest	Abes Wren
Willamette National Forest	Anchovy
Mt. Baker/Snoqualmie NF	Fish Story
	Old Grade
	Median Buyback
	Stalwart
	Scraps
	Boyd Creek
	Clear Creek
Olympic NF	Camel
	Not Bad
	Deodar
	You Who
	West Boundary
	Wynochee Res.
	Stevens

**Table 4. Timber Sales with T&E Bird Species Known to be Nesting  
(continued)**

<u>Forest</u>	<u>Timber Sale</u>
Siskiyou National Forest	Sugar Cube
	Winriver
	Spur Trigger
	Lobster
	Father Oak
	Taylor Ranch
	Toastberry
	Mr. Rogers
	Prong
	Foland Ridge
Siuslaw National Forest	Gordy Bluff
	North Ball
	Square Clare
	Berry Bushel
	Condon Carr.
	Fivemile Plume
	Franklin Ridge
	Indian Hook
	Lower Bailey
	Maria Skyline
	Skywalker
	South Paxton
	Sugar Maple
	Sulphur
	Uncle Condon
	Upper McLeod
	Banner Bunch
	Grass Hula
	Green Apple
	Green Horn
	Randallsalado
	Ryan Wapiti
	Beamer 712
Canal 606	
Forrader 103	
Forrader 717	
Opperten 002	
Wapiti 305	
Wheelock 403	

1  
2 THE HONORABLE WILLIAM L. DWYER  
3

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

7 SEATTLE AUDUBON SOCIETY, et al., )

8 Plaintiffs, )

9 v. )

10 JACK WARD THOMAS, et al. )

11 Defendants. )  
12

Civ. No. 89-160WD

NOTICE OF INTENT  
TO RELEASE FIRST AND  
LAST TIMBER SALES

13 The United States Forest Service, through and by its  
14 counsel, hereby provides notice of their intent to commence steps  
15 necessary to release the First timber sale and the Last timber  
16 sale located on the Umpqua National Forest in Washington State  
17 pursuant to Section 2001 of the newly enacted Rescissions Act of  
18 1995. Pub. L. 104-19 (July 27, 1995). These sales were  
19 previously the subject of litigation in the above-captioned  
20 action and are currently the subject of plaintiffs' October 3,  
21 1995 motion to clarify and enforce judgment.<sup>1</sup> The Forest  
22 Service hereby provides notice of its intent to award the First  
23

24 <sup>1</sup> On October 3, 1995, plaintiffs' Pilchuck Audubon  
25 Society et al. filed a Motion to Clarify and Enforce Judgment as  
26 to six sales, including the First and Last timber sales, that  
27 were enjoined or withdrawn from release as a result of earlier  
28 litigation in this court. See Motion to Clarify and Enforce  
Judgment (10/3/95).

NOTICE OF INTENT TO RELEASE  
FIRST AND LAST TIMBER SALES - 1

1 and Last timber sales upon resolution of the legal issues  
2 relating to these sales raised in plaintiffs' motion to clarify.

3 The Forest Service offered the First and Last Timber sales  
4 pursuant to the provisions of Section 318 of the Department of  
5 the Interior and Related Agencies Appropriations Act for Fiscal  
6 Year 1990. Pub. L. No. 101-121 (103 Stat. 701) (1989). In 1990,  
7 plaintiffs Seattle Audubon Society et al. sought to halt the  
8 release of these two sales through separate motions for summary  
9 judgment and a permanent injunction. See Minute Order (October  
10 16, 1990) (Dkt.# 675). In response to these motions, the Forest  
11 Service agreed to withdraw the First and Last Timber Sales. Upon  
12 notice of the Forest Service's action, this Court declared the  
13 motions for summary judgment and permanent injunction "stricken  
14 as moot." Id.

15 Litigation over various provisions of Section 2001 of the  
16 Rescissions Act is currently ongoing in the United States  
17 District Court for the District of Oregon. Northwest Forest  
18 Resource Council v. Glickman, 95-6244-HO (D. Oregon) (Complaint  
19 filed August 9, 1995). As part of that litigation, the Forest  
20 Service represented that relevant courts and interested parties  
21 would be notified of the intended release of those timber sales  
22 under Section 2001 that were the subject of prior litigation in  
23 the Western District of Washington or the District of Oregon, and  
24  
25  
26  
27

1 delayed or withdrawn from release due to that court action.<sup>2</sup>

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

4 Respectfully submitted this 16<sup>th</sup> day of October, 1995.

5  
6 LOIS J. SCHIFFER  
Assistant Attorney General

7 PETER D. COPPELMAN  
Deputy Assistant Attorney General

8 KATRINA C. PFLAUMER  
9 United States Attorney

10  
11 

12 WELLS D. BURGESS  
MICHELLE L. GILBERT  
13 U.S. Department of Justice  
Environment and Natural Resources  
14 Division  
General Litigation Section  
15 P.O. Box 663  
Washington, D.C. 20044-0663  
16 (202) 272-6958

17 Attorneys for Federal Defendants  
18  
19  
20  
21  
22

23 <sup>2</sup> On this same day, the Forest Service is providing  
24 notice of intent to commence steps necessary to release two  
25 additional timber sales, the Elk Fork Timber Sale and the Boulder  
26 Krah Timber Sale, located on the Siskiyou National Forest. This  
27 notice will be filed with the United States District Court for  
28 the District of Oregon in the actions of Northwest Forest  
Resource Council v. Glickman, 95-6244-HO (D. Oregon) and Friends  
of Elk River v. U.S. Forest Service, 90-969-PA (D. Oregon).

NOTICE OF INTENT TO RELEASE  
FIRST AND LAST TIMBER SALES - 3

1 Mark C. Rutzick, OSB #84336  
2 Alison Kean Campbell, OSB #93011  
3 MARK C. RUTZICK LAW FIRM  
4 A Professional Corporation  
5 500 Pioneer Tower  
6 888 S.W. Fifth Avenue  
7 Portland, Oregon 97204-2089  
8 (503) 499-4573

9 Attorneys for Defendant-Intervenor  
10 Northwest Forest Resource Council

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

13 PILCHUCK AUDUBON SOCIETY, OREGON ) Civil No. 95-6384-TC  
14 NATURAL RESOURCES COUNCIL, PORTLAND )  
15 AUDUBON SOCIETY, BLACK HILLS AUDUBON ) NFRC'S MEMORANDUM IN  
16 SOCIETY, WESTERN ANCIENT FOREST ) OPPOSITION TO  
17 CAMPAIGN, HEADWATERS, COAST RANGE ) PLAINTIFFS' MOTION FOR  
18 ASSOCIATION, FRIENDS OF THE ELK ) TEMPORARY RESTRAINING  
19 RIVER, LEAVENWORTH AUDUBON ADOPT-A- ) ORDER AS TO BOULDER  
20 FOREST, NORTH CENTRAL WASHINGTON ) KRAB TIMBER SALE  
21 AUDUBON SOCIETY, and KNUT and ANN )  
22 AAGAARD, )

23 Plaintiffs, )

24 vs. )

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

27 Defendants, )

28 and )

29 NORTHWEST FOREST RESOURCE COUNCIL, )

30 Defendant-Intervenor. )  
31 \_\_\_\_\_ )

1 Defendant-intervenor Northwest Forest Resource Council  
 2 ("NFRFC") opposes plaintiffs' motion for a temporary restraining  
 3 order against operation of the Boulder Krab timber sale.  
 4 Plaintiffs have demonstrated neither irreparable harm nor  
 5 likelihood of success on the merits. Congress has directed the  
 6 award, release and completion of this timber sale.

7 NFRFC is filing herewith its memorandum opposing plaintiffs'  
 8 motion for a preliminary injunction against various timber sales  
 9 including Boulder Krab. NFRFC relies on that memorandum to  
 10 present the reasons why plaintiffs do not have any likelihood of  
 11 success on the merits, and do not raise serious questions going  
 12 to the merits.

13 Plaintiffs have not demonstrated any irreparable harm, nor  
 14 any balance of hardships sufficient to justify a restraining  
 15 order. This court and the Ninth Circuit both previously refused  
 16 to stay the award, release and operation of section 2001(k)  
 17 timber sales even when the defendant Secretaries objected to the  
 18 sales. Here, the defendant Secretaries released Boulder Krab  
 19 voluntarily (albeit under pressure from NFRFC), and the Secretar-  
 20 ies have not objected to logging on the sale. No irreparable  
 21 harm has been shown.

22 This motion may in fact be part of an orchestrated political  
 23 strategy by the plaintiffs herein to mount opposition generally  
 24 to section 2001(k), and to further a legislative effort to  
 25 overcome this court's October 17, 1995 injunction. A memorandum  
 26 dated November 28, 1995 from Jim Jontz, head of plaintiff Western

1 Ancient Forest Campaign (WAFC) (Exhibit A hereto) clearly reveals  
2 this strategy.<sup>1</sup>

3 The memorandum discloses (page 1) that on November 27 WAFC  
4 met with Katie McGinty, chairman of the President's Council on  
5 Environmental Quality and with "some people from the Justice and  
6 Agriculture Departments." According to the memorandum (page 1):  
7 "The specific purpose of the McGinty meeting was to seek some  
8 immediate action to stop a pre-work meeting and operating permit  
9 for the Boulder Krab sale in the Siskiyou . . . ."

10 The meeting discussed legislation to amend or repeal section  
11 2001, and the memorandum reports: "This is the crux of our  
12 challenge: to put the heat on so that Clinton is compelled to go  
13 'whole hog' on the rider repeal, not settle for some wimpy deal."  
14 *Id.* at 1. The author concludes: "So, my advice is that we do  
15 everything we can to turn up the heat. Clinton isn't to the  
16 right place yet on the issue, we don't want him to take the path  
17 of least resistance and cut a weak deal, and the only way to head  
18 this off is to build the pressure." *Id.* at 3. Six days later  
19 plaintiffs filed their TRO motion in this court.

20 The Ninth Circuit's familiar standard for the grant of a  
21 temporary restraining order or preliminary injunction is as  
22 follows:

23 A moving party is entitled to a preliminary  
24 injunction if it demonstrates that it is

25 <sup>1</sup> This memorandum was distributed, and became publicly  
26 available, on the Internet.

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

likely to succeed on the merits and may suffer irreparable injury, or that serious questions exist on the merits and the balance of hardships tips in its favor. . . . The two tests are not separate but represent a sliding scale in which the required probability of success on the merits decreases as the degree of harm increases.

*Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 1342 (9th Cir. 1995).

As shown in NFRC's opposition to the preliminary injunction, plaintiffs have not shown either a likelihood of success nor serious questions going to the merits.

Nor have plaintiffs shown irreparable harm, nor indeed any harm. Their point, simply, is that trees will be cut down. That is not sufficient to establish any harm under section 2001(k) since the point of section 2001(k) is precisely to increase and accelerate logging on previously-awarded timber sales.

Plaintiffs have offered the court no site-specific information about Unit 5 of the Boulder Krab timber sale, where timber cutting is scheduled to begin this week. Instead, they rely solely on generalizations about the North Fork Elk Creek drainage, some a decade old. Rogers Declaration. But Unit 5 is not even in the North Fork Elk River drainage (Declaration of Jim Churchill, ¶ 6, filed December 5, 1995 on behalf of Scott Timber Co.), so plaintiffs' generalities about that drainage are not relevant.

Further, there are no streams inside Unit 5, or within one-quarter mile of Unit 5, so no impact on fish is possible. Chur-

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

chill Dec., ¶ 6. The unit is one and one half miles away from the hiking trail mentioned in plaintiffs' TRO papers. *Id.*

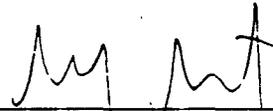
Plaintiffs have not factually demonstrated that any irreparable harm, nor indeed any harm at all, will result from logging on Unit 5. This failure, along with the lack of merit to their legal arguments, requires denial of their requested TRO.

**CONCLUSION**

Plaintiffs' motion for a temporary restraining order as to the Boulder Krab sale should be denied. Plaintiffs have shown neither likelihood of success on the merits nor irreparable harm.

Dated this 5th day of December, 1995.

MARK C. RUTZICK LAW FIRM  
A Professional Corporation

By:   
\_\_\_\_\_  
Mark C. Rutzick  
Alison Kean Campbell  
Attorneys for Defendant-  
Intervenor Northwest Forest  
Resource Council

TO: Forest Activists  
FROM: Jim Jontz  
DATE: November 28, 1995

SUBJECT: LOOKING-AHEAD

We had a meeting this past Monday with Katie McGinty of CEQ and some people from the Justice and Agriculture Departments which has helped me to piece together a sense of what should be happening in the immediate future to address the crisis facing our Ancient Forests. I must confess that I am just starting to think this through, so most of this may be obvious to you, or you may have reached different conclusions (which I would be eager to hear about) based on a more complete perspective.

The specific purpose of the McGinty meeting was to seek some immediate action to stop a pre-work meeting and operating permit for the Boulder Knob sale in the Siskiyou, and also raise some issues regarding the ongoing sales on the Umpqua, which I had visited just last week.

We made some progress in that regard, but the purpose of this memo is to focus on the bigger picture. The political message from the meeting, to me, was clearly that the White House is feeling pressure from "logging without laws," they recognize they made a bad mistake in signing the Rescission bill, and they are sensitive to the "bad press" the President is getting on the issue.

The good news: the White House is obviously interested in some sort of legislative "fix" for the rider. The bad news: for right now -- they aren't looking for very much of one. This is the crux of our challenge: to put the heat on so that Clinton is compelled to go "whole hog" on the rider repeal, not settle for some wimpy deal.

The political people in the McGinty meeting suggested that we should use our influence to stop criticism of Clinton on the issue in the Northwest. We responded by suggesting that Clinton needs to help himself by making clear statements that the "logging without laws" which is going on is terrible, he won't stand for it, and he insists that the Congress restore the law. (This does seem consistent with the "be strong, pro-environment" stand he took in the budget showdown).

The revealing response was that Clinton could "demagogue" on the issue, but that would irritate key Members of Congress whose cooperation was needed to pass legislation necessary to "fix" the rider!

The only way I can read this is that the White House is interested in cutting some anemic deal with Hatfield, Gorton, Dicks, or whoever to get very modest legislation through which corrects the Hogan decision (which is really all the President has committed himself to) or maybe doesn't even go that far. In fact, we were told that such discussions were underway, at least at the staff level.

Of course, we pointed out that this same bunch (Hatfield/Gorton/Dicks) are the ones who sold the President down the river in the first place. Having learned once that Hatfield is not to be trusted on this issue, could the President really count on Hatfield to write a second "rider"?

My sense is that the Hogan decision opens the door to get a legislative remedy, and the President will either settle for half a loaf (a couple slices?) or -- with enough pressure -- take advantage of the opportunity to insist on the complete repeal of the rider.

The President could easily argue, "I wanted to reach an accommodation, I trusted Sen. Hatfield, but I was misled and tragic consequences have resulted. I now have no choice but to insist on my original position which is, this sort of 'timber salvage' language does not belong in the law and we must repeal it completely."

The political argument which I would make to the White House is that anything short of complete repeal will leave them vulnerable to criticism anytime an Ancient Forest is clearcut. "The President said he was against suspending the laws, the President said he would correct the rider, but the forests are still coming down," an activist could easily say if the Hogan decision is corrected but still Sec. 318 green tree sales are being sold. More flip-flops by Clinton.

What is most important, to repeat, is that the White House is clearly feeling some heat. My analysis: they don't like it, and for that reason, they need to feel a lot more. We all know that Clinton likes to find a "middle ground," do only the minimum, and cut a deal. BUT in this particular circumstance that path is a dangerous one for him. We shouldn't underestimate the opportunity -- with enough pressure -- to sell the White House on a "complete repeal" position, based on its political benefits to them.

I'm all for beating up the Congress and linking every sale to their ankles, but the benefit of keeping the President on the hotseat is that he can DO SOMETHING to get the rider repealed, which is to insist that the repeal be tacked onto something else.

Clinton is the one for whom the environment is working as an

issuc now. He is vulnerable for having made a big deal out of his Forest Plan that is completely obliviared by the rider, and he cannot afford to have photos of clearcuts from Oregon/Washington/ California which contradict his pro-environment message in those key states.

The White House would like to have the "logging without laws" issue go away, but we can't let that happen.

So, my advice is that we do everything we can to turn up the heat. I believe it will get results. Clinton isn't to the right place yet on the issue, we don't want him to take the path of least resistance and cut a weak deal, and the only way to head this off is build the pressure.

Here are the avenues of attack I propose:

1) We have to get a truckload of information in the door every day at CEQ (white papers, fact sheets, photographs, sign-on letters, petitions, you name it) on individual timber sales, and why they are bad, and what we plan to do about it. WAFC can collect information from the field, but we will need help from everyone. I suggest that we keep a running list of bad sales and try to have a meeting with McGinty on every one of them, rotating who asks for the meeting.

2) I would strongly encourage every activist who has a timber sale they are working on to plan to come to Washington as soon as you can, to make your case in person. Plan on spending several days, if possible. Trips to the Hill, trips to Ag, trips to the Forest Service, trips to CEQ, trips to the enviro groups, come tell your story.

3) We have to start getting our friends in Congress (and some who should be our friends) in on this. They need to be educated and motivated. Everyone needs to be calling up Wyden, DeFazio, McDermott, Furse, Murray, Miller, Vento, Leahy, Boxer, and asking for help. If you're from Oregon, ask Ron Wyden to go with you to CEQ, and get you in the door. Ask Peter DeFazio to write to Clinton to stop your sale. I would suggest starting individual letters in the Congress opposing specific sales, and circulating them to known Congressional Greens. Bring videos and pictures and news clips to Congress, or catch the Member when they are home. Insist that they help you stop these sales (and restore the laws).

4) Press is critical. We must get news coverage and editorials to convince the White House that people know and care. Put a press packet together on your sale. Take it to papers you can visit, mail it to papers you can't. The San Francisco and LA papers ought to be among our targets; certainly papers in the region (Oregonian, PL, etc.)

are also important. I don't know if it takes arrests to get ink, or what else we can do (rallies, reports, etc.). WAFC will do everything we can to take information about individual sales and get it to national reporters. We will also look at packaging the issue for the national press. One thing we need to do (perhaps some people have suggestions on how) is to get an assessment or statement by some credible scientific panel or persons evaluating the damage that is being done. To help communicate the "big picture," WAFC plans to issue a "report" on the impacts of logging without laws. Please send us your analysis of the sales you are working on as new information becomes available.

5) Base building is key. It is important to demonstrate that a lot of people care about these sales, but it is also important to demonstrate that folk who are not the usual activists care about them too. Local officials, religious leaders, educators, professionals, business people, and similar "mainstream" voices need to be heard. The goal should be to get as many people as possible "on record" by petition, letter, in a sign-on newspaper ad, in a letter to the editor with multiple signatures (5 religious leaders opposed to the Boulder Krab sale) or by other means. Using the suspension of law as a "hook" to interest people who might not otherwise be obvious candidates might work -- suspending laws does not normally appeal to the "pillar of the community" types. I would think a suitable message for any of the above would be "Stop the XXX Sale, and Restore the Laws." The local sale is the means by which people are interested in the subject, the repeal of the rider is a "universal" remedy.

6) Legislation to repeal the rider must be introduced soon. Our intention is to try to get the bill filed in both the House and Senate ASAP with as many Western Democrats as possible (excepting CA and HA, there are only 10 House Dems and 5 Senate Dems). We can then mount a national campaign to add cosponsors. The problem we face is time: the Congress comes back to work Nov. 29 and we have no more than three weeks, maybe less.

If, when the Congress goes home for Christmas, we have a bill filed with most every Western Democrat and a total of 50-60 cosponsors in the House and 8-10 in the Senate, this will give the White House something to think about. Remember, the President will be writing his State of the Union message, and making strategic decisions for the 1996 offensive within just a few weeks. We want to demonstrate by means of cosponsorships, press, a steady flow of traffic into CEQ, calls, etc., that "Repeal the Rider" is a winning component of his environmental message.

This is a lot to do in a few weeks. But time is critical, as we

must make use of the tragedy that is now occurring in the woods to inform and alert the public, the media, and decision makers to the magnitude of this disaster. Only by making "logging without laws" a national issue, turning up the heat from the West, and demanding action to stop the sales and restore the law will we be successful. WAFC is committed to this course.

1 Mark C. Rutzick, OSB #84336  
Alison Kean Campbell, OSB #93011  
2 MARK C. RUTZICK LAW FIRM  
A Professional Corporation  
3 500 Pioneer Tower  
888 S.W. Fifth Avenue  
4 Portland, Oregon 97204-2089  
(503) 499-4573

5  
6 Attorneys for Defendant-Intervenor  
Northwest Forest Resource Council

7  
8

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

11 PILCHUCK AUDUBON SOCIETY, OREGON ) Civil No. 95-6384-TC  
NATURAL RESOURCES COUNCIL, PORTLAND )  
12 AUDUBON SOCIETY, BLACK HILLS AUDUBON ) CERTIFICATE OF SERVICE  
SOCIETY, WESTERN ANCIENT FOREST )  
13 CAMPAIGN, HEADWATERS, COAST RANGE )  
ASSOCIATION, FRIENDS OF THE ELK )  
14 RIVER, LEAVENWORTH AUDUBON ADOPT-A- )  
FOREST, NORTH CENTRAL WASHINGTON )  
15 AUDUBON SOCIETY, and KNUT and ANN )  
AAGAARD, )

16 )  
17 Plaintiffs, )

18 vs. )

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

21 )  
22 Defendants, )

23 and )

24 NORTHWEST FOREST RESOURCE COUNCIL, )  
25 Defendant-Intervenor. )  
26

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

I hereby certify that I served the following:

- 1. NFRC'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION and
- 2. NFRC'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AS TO BOULDER KRAB TIMBER SALE

on:

Patti A. Goldman  
 Sierra Club Legal Defense Fund  
 705 Second Avenue, Suite 203  
 Seattle, Washington 98104  
 (206) 343-1526 (fax)

Wells D. Burgess  
 Michelle L. Gilbert  
 U.S. Department of Justice  
 Environment and Natural Resources Division  
 General Litigation Section  
 601 Pennsylvania Avenue N.W., 8th Floor  
 Washington, D.C. 20044  
 1-202-272-6817 (fax)

James L. Sutherland  
 Assistant United States Attorney  
 701 High Street  
 Eugene, Oregon 97401  
 (541) 465-6582 (fax)

on December 5, 1995, by facsimile and by delivering to said attorneys via Federal Express true copies thereof, certified by me as such, contained in sealed envelopes, prepaid, addressed to said attorneys at said attorneys' last known addresses, and deposited with Federal Express in Portland, Oregon, on said day, and on:

Scott Horngren  
 Haglund & Kirtley  
 Attorneys at Law  
 One Main Place  
 101 S.W. Main, Suite 1800  
 Portland, Oregon 97204  
 225-1257 (fax)

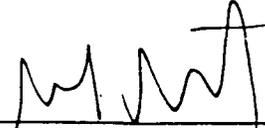
on December 5, 1995, by facsimile and by mailing to said attorney a true copy thereof, certified by me as such, contained in a

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

sealed envelope, with postage paid, addressed to said attorney at said attorney's last known address, and deposited in the post office at Portland, Oregon, on said day.

Dated this 5th day of December, 1995.

MARK C. RUTZICK LAW FIRM  
A Professional Corporation

By: 

Mark C. Rutzick  
Alison Kean Campbell  
Attorneys for Defendant-  
Intervenor Northwest  
Forest Resource Council