

NLWJC- Kagan

Counsel - Box 012 - Folder 006

Timber - Other Litigation: Smith v.
Forest Service (Gatorson)

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

FAX NUMBER (202) 305-0506
CONFIRMATION NUMBER (202) 305-0460

PLEASE DELIVER TO:

To: Dinah Bear 456-0753
Elena Kagan 456-1647

NUMBER OF PAGES:

DATE: July 5, 1996

FROM: Michelle Gilbert

MESSAGE: Attached is a contract claim for damages recently filed by Vaagen Bros. on the Gatorson sale. This raises some interesting issues regarding this purchaser's willingness to accept damages and the appropriateness of equitable relief in light of a claim for monetary relief. The claim and contract need to be further analyzed, but I wanted to alert you to the filing.

HAGLUND & KIRTLEY

ATTORNEYS AT LAW

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101 SW MAIN, SUITE 1800
PORTLAND, OR 97204

TELEPHONE (503) 225-0777
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**FOREST SERVICE
COLVILLE NATIONAL FOREST**

JUL 3 1996

RECEIVED

July 1, 1996

CERTIFIED MAIL P 138 204 710
RETURN RECEIPT REQUESTED

Forest Supervisor
Colville National Forest
695 S. Main Street
Colville, Washington 99114

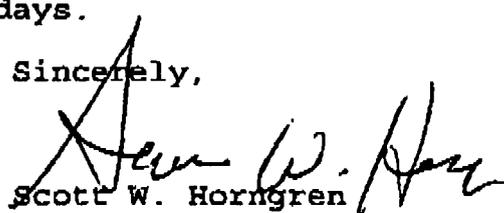
Re: Claim for Damages for Gatorson Timber Sale
Contract No. 070085

Dear Forest Supervisor:

This letter constitutes Vaagen Bros. Lumber Co., Inc.'s claim for damages for the Forest Service failure to either terminate the Gatorson Timber Sale or permit Vaagen Bros. to begin harvest of the sale. Vaagen Bros. provided you with our damage figure over a year ago for the breach of contract in not permitting Vaagen Bros. to complete harvest of the sale in 1994. The company also filed an operating plan that has never been approved.

Vaagen Bros. is filing this certified claim demanding payment of \$4,257,831.97. A copy of the contract claim information which was provided to you in early 1995 is enclosed for your information. The figures have been updated to reflect interest on bonds and additional out-of-pocket expenses. Attached is a certification of the claim by the company's president Duane Vaagen. Vaagen Bros. requests a contracting officer's decision within 60 days.

Sincerely,


Scott W. Horngren

Enclosures

cc: Mr. Duane Vaagen
Mr. Fred Ebel

**GATORSON TIMBER SALE
 Contract Claim Information**

Contract No.	070085		
Date of Bid:	03/25/91		
Date of Award:	05/06/93		
Termination Date:	03/31/97		
Mid-Point Payment Date:	11/30/95	Amount:	\$123,310.00
Down Payment		Amount:	\$ 35,100.00
Performance Bond:	\$36,000.00	Dated:	05/10/93
Blanket Payment Bond:	\$2,285,000	Dated:	05/06/93
Surety:	Great American Insurance Co.		

I. REMAINING VOLUME

<u>Species</u>	-----Volume (MBF)-----	
	<u>Sale Volume</u>	<u>Volume Remaining</u>
DF/L	9,350	8,389
WRC	1,340	1,318
AF&O	<u>2,310</u>	<u>2,169</u>
 TOTAL	 13,000	 11,876

II. INDEX INFORMATION

DF/WL	229.61	
WF	212.89	
 Average Sale Deficit		\$ 43.08/MBF
 Average Stump to Truck		
Appraisal Allowance - 2400-17		\$103.75/MBF

III. PAYMENT RELEASE

<u>Date</u>	<u>Units</u>	<u>Dollars</u>
5/17/93	47	\$15,277.75
5/19/93	1,34	54,044.66
5/21/93	23,24	19,122.73
2/01/94	33,34,36	

IV. VOLUME REMAINING BY SPECIES

<u>Species</u>	<u>Volume (MBF)</u>	<u>% by Species</u>
DF/WL	8,389	70.6
WRC	1,318	11.1
AF&O	<u>2,169</u>	18.3
TOTAL	11,876	

V. VOLUME REMAINING BY TYPE OF LOGGING

Type	Volume (MBF)	% by Type
Helicopter	6,937	58.4
Tractor	3,346	28.2
Sky Line	<u>1,593</u>	18.3
TOTAL	11,876	

VI. APPRAISAL ASSUMPTIONS

- Vaagen intended to log sale in 1993 and 1994 to meet mill capacity requirements at the Republic operation.
- Claim for replacement of stumpage is based on
 - Comparable Forest Service Sales sold from January 1994 through September 1994.
 - Market value is then adjusted downward to reflect helicopter logging cost of Gatorson sale.
 - Market value of stumpage less actual value of Gatorson stumpage.

VII. CALCULATION OF REPLACEMENT STUMPAGE DAMAGES

Species	Value	Volume (MBF)	Total Value
DF/WL	529.46	8,389	\$4,441,639.90
WRC	210.27	1,340	281,761.80
AF&C	205.29	2,169	<u>445,274.01</u>
		SUBTOTAL	\$5,168,675.71
		Adjust of Helo Logging Cost	(767,189.60)
		Less Gatorson Stumpage	<u>(319,545.32)</u>
		Total Stumpage Replacement Claim	\$4,081,940.79

More detail

VIII. OUT OF POCKET COSTS

Category	Description	Expenses
Legal	Haglund & Kirtley (thru 6/6/96)	\$ 73,121.00
Consulting	Ebel & Associates (thru 6/6/96)	16,388.00
Cruising	March 1991	5,500.00
Appraisal	March 1991	900.00
Bidding	March 1991	<u>300.00</u>
Out of Pocket	Subtotal	\$ 96,209.00

Employee Time & Expenses After Purchase (8 Hr. Days)

<u>Name</u>	<u>Total Hours</u>	<u>Expenses</u>
Duane	20.9	\$ 20,900.00
Butch	15.9	11,448.00
Bob	7.5	4,500.00
Leon	17.6	4,325.00
Joel	23.8	5,950.00
Brett	46.0	<u>9,200.00</u>
Employee Subtotal		\$ 56,323.00

Other Costs

<u>Description</u>	<u>Expenses</u>
Mileage & Other	\$ 4,100.00
Surety Costs & Interest on Bonds and Deposits	<u>6,327.18</u>
Other Costs Subtotal	\$ 10,427.18
TOTAL	\$162,959.18

**SUMMARY OF CONTRACT CLAIM
Gatorson Timber Sale**

Replacement Value of Stumpage	\$4,081,940.79
Out of Pocket Expenses	162,959.18
Road Construction Costs	<u>12,932.00</u>
TOTAL	\$4,257,831.97

GATORSON.XLS

8/28/98

GATORSON

DATE	TRANSACTION	AMOUNT	BALANCE	DAYS	9% INTEREST
4/29/93	DOWN PAYMENT	35,100.00	35,100.00		0.00
5/8/93	PERF BOND	630.00	35,730.00	7	60.58
8/23/93	RELEASE & TRANS	-33,345.00	2,385.00	109	960.30
12/22/93	PAID TO USFS	33,345.00	36,730.00	121	71.16
5/8/94	PERF BOND	630.00	36,360.00	136	1,189.37
5/8/95	PERF BOND	630.00	36,990.00	365	3,272.40
6/22/96	REFUND	-33,345.00	3,645.00	47	428.68
5/8/98	PERF BOND	630.00	4,275.00	319	286.71
6/30/98	INTEREST CALCULATION			56	57.99
	TOTALS	4,275.00			6,327.16

GATORSON CLAIM CERTIFICATION OF VAAGEN BROS. LUMBER CO., INC.

Vaagen Bros. Lumber Co., Inc., hereby certifies that the foregoing claim is made in good faith, that the supporting data is accurate and complete to the best of Vaagen Bros. Lumber Co., Inc.'s knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which Vaagen Bros. Lumber Co., Inc. believes the government is liable.

DATED this 28 day of June, 1996.

VAAGEN BROS. LUMBER CO., INC.

By *Duane Vaagen*
Duane Vaagen
President

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 United States Attorney
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 7 Washington, D.C. 20044-0663
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 8 Attorneys for Federal Defendant

9 IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF WASHINGTON

10	MITCHELL SMITH, an individual)	
11)	
12	Plaintiff,	)	No. CS-93-178-JLQ
13)	
14	v.)	
15)	
16	U.S. FOREST SERVICE, an agency	)	FEDERAL DEFENDANT'S
17	of the United States; and VAAGEN	)	NOTICE OF FILING
18	TIMBER PRODUCTS, a Washington	)	OF NINTH CIRCUIT
19	corporation,	)	DECISION
20)	
21	Defendants.)	

22 By a filing dated January 22, 1996, federal defendant the
 23 United States Forest Service requested that this Court not modify
 24 its previous orders relating to the Gatorson timber sale pending
 25 a decision by the Ninth Circuit addressing the geographic scope
 26 of Section 2001(k) of the 1995 Rescissions Act, Publ. L. 104-19
 27 (July 27, 1995). On April 24, 1996, the Ninth Circuit issued the
 28 attached decision in Northwest Forest Resource Council v.
Glickman, No. 95-36038. While the decision generally affirms the
 United States District Court for the District of Oregon's
 September 13, 1995 summary judgment order and October 17, 1995

1 injunction, a question remains, upon reading the Ninth Circuit's
2 reasoning, as to how the Court intended to define the actual
3 geographic scope of Section 2001(k)(1). As described in several
4 places within the Court's opinion, the relevant geographic scope
5 would not cover the Gatorson sale which is located on the
6 Colville National Forest, not one of the 13 national forests
7 known to contain northern spotted owls. See Opinion at 4956,
8 4957, and 4958; see also Section 318(b)(3), Department of
9 Interior and Related Agencies Appropriations Act, Pub. L. 101-
10 121.

11 Recognizing the tension between the Ninth Circuit's
12 discussion of the geographic scope issue and its general
13 affirmance of the district court's orders, federal defendants are
14 preparing to file very shortly a petition for rehearing with the
15 Ninth Circuit, seeking a ruling to clarify the actual area
16 covered by the geographic scope of section 2001(k). Accordingly,
17 federal defendant requests that this Court not modify its orders
18 to direct the release of Gatorson sale pending a decision by the
19 Ninth Circuit clarifying this relevant issue.

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1 Dated: May 3, 1996

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Respectfully submitted,

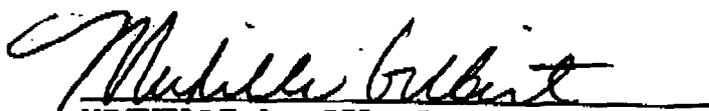
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LOIS J. SCHIFFER
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CONFIRMATION NUMBER (202) 305-0460

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	Elena Kagan	456-1647
	Jay McWhirter	690-2730
	Karen Mouritsan	219-1792

NUMBER OF PAGES:

DATE: January 22, 1996

FROM: Michelle Gilbert

MESSAGE: Attached is a draft response to Vaagen's request for a decision releasing the Gatorson sale. Please let me know if you have any comments by 2:00 today. Sorry for the short turn around, but we just learned on Friday that Judge Quackenbush wants to hear this tomorrow at 6:00, so we need to file something today.

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9 IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF WASHINGTON

10	MITCHELL SMITH, an individual)	
11)	
	Plaintiff,	)	No. CS-93-178-JLQ
12)	
	v.)	
13)	
	U.S. FOREST SERVICE, an agency	)	FEDERAL DEFENDANTS'
14	of the United States; and VAAGEN	)	RESPONSE TO VAAGEN
	TIMBER PRODUCTS, a Washington	)	BROS. LUMBER INC.'S
15	corporation,	)	REQUEST TO RELEASE
		)	GATORSON TIMBER SALE
16	Defendants.)	

17 Federal defendant the United States Forest Service hereby
 18 responds to defendant Vaagen Bros. Lumber Inc.'s request for a
 19 decision releasing the Gatorson timber sale located on the
 20 Colville National Forest. The relevant history of the Gatorson
 21 Timber sale is set forth in defendant Forest Service's filing
 22 dated December 1, 1995. As explained, the Gatorson sale was
 23 found to have violated the National Environmental Policy Act
 24 (NEPA) and effectively prohibited from proceeding by previous
 25 orders of this Court.

1 Recently, pursuant to a series of Orders, the United States
2 District Court for the District of Oregon, in Northwest Forest
3 Resource Council v. Glickman, Civ. No. 9506244-HO, has held that
4 the Gatorson sale is subject to the requirements of section
5 2001(k) (1) of the 1995 Rescissions Act, Publ. L. 104-19 (July 27,
6 1995). In so doing, the Glickman court rejected the Forest
7 Service's argument that the Gatorson sale was not within the
8 geographic scope of section 2001(k) (1) and therefore not subject
9 to its release requirements. Defendant Vaagen seeks a decision
10 modifying this Court's previous orders to permit the release of
11 the Gatorson sale pursuant to the Glickman court's rulings.

12 In the December 1 filing before this Court, the Forest
13 Service explained that "[a]s to the Gatorson timber sale, the
14 Forest Service maintains its position that subsection 2001(k) (1)
15 does not mandate its immediate release as the Gatorson sale is
16 not part of the discrete set of sales prepared and offered
17 pursuant to Section 318. However, given the Glickman court's
18 September 13 decision defining the scope of subsection 2001(k) to
19 include all previous offered sales in Washington and Oregon, not
20 just Section 318 sales and the October 17 injunction directing
21 the release of covered sales, the Forest Service recognizes that
22 such a position, while on appeal, does not currently, by itself,
23 provide a grounds for not releasing timber sales offered or
24 awarded in fiscal years 1991-1995 [which would include the
25 Gatorson sale]." The Forest Service expressly noted that it
26 "reserve[d] the right to proceed in accordance with any favorable
27

28 FEDERAL DEFENDANTS' RESPONSE TO
VAAGEN'S REQUEST FOR RELEASE OF
THE GATORSON TIMBER SALE -2

1 ruling on appeal in the future in connection with any affected
2 sales." Federal Defendants' December 1 Response at 7, note 4.
3 The Forest Service took this position before the Glickman court
4 as well.

5 The Forest Service has appealed the Glickman court's October
6 17 injunction, as based on its September 13 order defining the
7 geographic scope of section 2001(k) (1) to include the Gatorson
8 sale. The United States Court of Appeals for the Ninth Circuit
9 heard argument on the government's appeal of the Glickman court's
10 October 17 injunction on January 8, 1996. If the federal
11 government were to prevail on appeal, the Gatorson sale would not
12 be released under section 2001(k), but would be required to
13 comply with this Court's previous orders and all other applicable
14 requirements, including compliance with NEPA. In light of the
15 completion of briefing and hearing on the appeal, the Forest
16 Service requests that this Court stay any modification of its
17 orders that would permit release of the Gatorson timber sale
18 pending a decision by the Ninth Circuit.

19 Dated: January 22, 1996
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28 FEDERAL DEFENDANTS' RESPONSE TO
VAAGEN'S REQUEST FOR RELEASE OF
THE GATORSON TIMBER SALE -3

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Respectfully submitted,

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Attorneys for Federal Defendant

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 CONFIRMATION NUMBER (202) 272-8056

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	Dinah Bear	456-0753
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	Chris Nolin	395-4941
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 10

DATE: December 4, 1995

FROM: Paula Clinedinst, Paralegal, 305-0431

MESSAGE: Smith v. Forest Service, 93-178-JLQ

Attached is Federal Defendants' Response to
 Plaintiff Vaagen Bros.' Motion for Order
 Releasing Gatorson Timber Sale.

Kathryn Toffenetti 690-2730

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9 Attorneys for Federal Defendant

10 IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF WASHINGTON

11	MITCHELL SMITH, an individual)	
12)	
13	Plaintiff,	)	No. CS-93-178-JLQ
14	v.)	
15	U.S. FOREST SERVICE, an agency	)	FEDERAL DEFENDANT'S
16	of the United States; and VAAGEN	)	RESPONSE TO PLAINTIFF
17	TIMBER PRODUCTS, a Washington	)	VAAGEN BROS.'S MOTION
18	corporation,	)	FOR ORDER RELEASING
19		)	GATORSON TIMBER SALE
20	Defendants.)	

21 INTRODUCTION

22 On November 22, 1995, as part of the continuing litigation
 23 concerning the award and release of timber sales subject to
 24 Section 2001 of the 1995 Rescissions Act, Pub. L. 104-19 (July
 25 27, 1995), plaintiff Vaagen Bros. Lumber Company ("Vaagen Bros.")
 26 filed a motion requesting that this Court, following action by
 27 the U.S. District Court in the related case of Northwest Forest
Resource Council v. Glickman, Civil No. 95-6244 (Judge Hogan),

1 issue an order releasing the Gatorson Timber Sale. Plaintiff has
2 suggested that "it is in the interests of judicial efficiency to
3 wait until the" Glickman court rules on the meaning action in
4 2001(k). Plaintiff's Motion at 2. The federal defendant U.S.
5 Forest Service hereby concurs in that suggestion, with the
6 additional request that if the Glickman court does not rule on
7 December 12, 1995, the hearing on this matter be continued until
8 two days after issuance of a ruling in the Glickman Court. For
9 logistical reasons, pursuant to Local Rule 7(h), federal
10 defendant requests that the hearing herein be conducted by
11 telephone conference.

12 STATEMENT OF FACTS

13 I. THE GATORSON TIMBER SALE

14 A. Description

15 The Gatorson timber sale, located in the Colville National
16 Forest in Washington, consists of approximately 11.86 mmbf board
17 feet. See NFRC v. Glickman Declaration of Jerry L. Hofer,
18 attached to Defendants' Notice of Filing of October 25, 1995
19 Compliance Report (attached as Exhibit A). It was originally
20 auctioned in 1991 and awarded to the Vaagen Brothers Lumber
21 Company on May 6, 1993. Id. However, the Gatorson sale was
22 suspended that same month as a result of litigation brought under
23 the above-captioned case challenging its release.

24 B. Litigation in this Court

25 In 1993, the Gatorson sale was challenged by Mitchell Smith,
26 a recreational user, who claimed: (1) the sale violated the

1 Washington State Wilderness Act and NEPA for failure to consider
2 uninventoried unroaded area for possible wilderness
3 classification before development and (2) violated NEPA for
4 failure of the NEPA documents to adequately consider effect of
5 the sale on a separate 5000 acre roadless area. Smith v. United
6 States Forest Service, 33 F.3d 1072 (9th Cir. 1994). This Court
7 issued a preliminary injunction enjoining any timber harvesting
8 or road building activities in the Gatorson sale area, but
9 subsequently granted the Forest Service's motion for summary
10 judgment on both claims. Judgment and Order (December 13, 1993).
11 Plaintiff appealed, and in the interim, this Court extended the
12 preliminary injunction enjoining most of the logging pending the
13 outcome of the appeal. Smith, 33 F.3d at 1073. The Ninth
14 Circuit upheld this Court's decision as to the first claim, but
15 reversed as to the second claim, finding that the NEPA
16 documentation was insufficient. Id. at 1078-1079. Thus, the
17 action was remanded to the district court for further proceedings
18 consistent with that ruling. Id. On March 30, 1995, this Court
19 granted plaintiff judgment as to the roadless issue and vacated
20 its December 13, 1993 judgment. Order (3/30/95).

21 II. SECTION 2001(k) OF THE 1995 RESCISSIONS ACT

22 The Rescissions Act of 1995 was signed into law by President
23 Clinton on July 27, 1995. See Pub. L. 104-19 §2001 (1995).
24 Subsection 2001(k)(1) of the Act directs the Secretaries of the
25 Interior and Agriculture to, inter alia, :

26
27

28 FEDERAL DEFENDANT'S RESPONSE TO
PLAINTIFFS VAAGEN BROS.'S MOTION
FOR ORDER RELEASING GATORSON TIMBER SALE - 3

1 act to award, release, and permit to be completed in
2 fiscal years 1995 and 1996, with no change in
3 originally advertised terms, volumes, and bid prices,
4 all timber sale contracts offered or awarded before
5 that date in any unit of the National Forest System or
6 district of the Bureau of Land Management subject to
7 section 318 of Public Law 101-121 (103 Stat. 745).

8 Throughout negotiations of Section 2001 and at the time the
9 bill was signed into law, it was the Forest Service's
10 understanding that subsection 2001(k) applied to a discrete set
11 of remaining section 318 sales. See Agencies' Interpretation
12 (8/22/95) (attached as Exhibit B). Thus, the Forest Service
13 commenced steps to identify and release those sales prepared and
14 offered in accordance with Section 318.

15 III. NORTHWEST FOREST RESOURCE COUNCIL V. GLICKMAN

16 Litigation ensued. On August 8, 1995, a group representing
17 industry interests, the Northwest Forest Resource Council (NFRC),
18 commenced action in the District of Oregon seeking, inter alia, a
19 permanent injunction to compel the Secretaries under Section
20 2001(k) to award and release by September 10, 1995, "all timber
21 sales offered prior to the date of enactment [of the Act] in all
22 national forests in Oregon and Washington and Bureau of Land
23 Management ("BLM") districts in western Oregon." Northwest
24 Forest Resource Council v. Glickman, Civ. No. 95-6244-HO.
25 Federal defendants opposed this motion arguing that 2001(k)
26 applied only to a discrete set of timber sales prepared and
27 offered pursuant to the ecological criteria and procedures
28 specified in Section 318.

1 By order dated September 13, 1995, the Glickman court
2 adopted the interpretation offered by NFRC, declaring that
3 Section 2001(k)(1) applies to timber sales previously offered or
4 awarded in all national forests in Washington and Oregon and BLM
5 districts in western Oregon prior to July 27, 1995, the effective
6 date of Section 2001. Litigation continued as to the effect of
7 this judgment and on October 17, 1995 the Glickman Court issued
8 an injunction directing the Secretaries to "award, release or
9 permit to be completed" timber sales offered prior to the
10 effective date of Section 2001 in the National Forests of Oregon
11 and Washington and BLM districts of Western Oregon,¹ except
12 those where endangered or threatened bird species were known to
13 be nesting.² See NFRC v. Glickman Order (10/17/95) (attached as
14 Exhibit C).

15 In conjunction with the injunction, the Glickman court
16 ordered bi-weekly progress reports to notify the court of action
17 taken to award and release timber sales offered or awarded in
18 fiscal years 1991-1995. See NFRC v. Glickman Order (10/17/95),
19 (attached as Exhibit D). Thus, on October 25, 1995 the Gatorson
20

21 ¹ The September 13, 1995 decision and October 17 Order
22 issued by the Glickman court are currently on appeal to the Ninth
23 Circuit.

24 ² Also at issue before the Glickman court and in the
25 Western District of Washington in the case of Pilchuck Audubon
26 Soc'y v. Glickman, Civil No. 95-1234, is the Forest Service's
27 interpretation of 2001(k)(2). Subsection (k)(2) precludes the
28 release or completion of sales under 2001(k)(1) if "any
threatened or endangered bird species is known to be nesting."
Pub. L. 104-19 Section 2001(k)(2).

1 Timber Sale was reported to the Glickman court as subject to the
2 rulings. At that time, the Forest Service noted that it was not
3 releasing this sale in light of this Court's prior rulings
4 relating to the Gatorson sale. See Exhibit A.

5 Certain industry plaintiffs have attacked this approach,
6 filing various motions in the Glickman action, including a motion
7 to further clarify and enforce the October 17 injunction as to
8 the Gatorson³ sale, contending that nothing within Section 2001
9 precluded the Forest Service from releasing sales subject to
10 previous court action. Briefing is continuing on this motion and
11 a hearing has been set for December 12, 1995. See NFRC v.
12 Glickman Minute Order (11/7/95) (attached as Exhibit E).

13 In accordance with representations made during briefing of
14 the motion to further clarify, the Forest Service notified this
15 Court of the aforementioned proceedings and its intent to return
16 to this Court following a ruling by the Glickman court on the
17 effect of Section 2001(k) on sales subject to previous court
18 orders, such as the Gatorson sale. See Defendants' Notice of
19 Proceedings Relating to the Gatorson Timber Sale (11/22/95).

20 ARGUMENT

21 As to the Gatorson timber sale, the Forest Service maintains
22 its position that subsection 2001(k) (1) does not mandate its
23 immediate release as the Gatorson sale is not part of the

24 ³ Also included were the Tip and Tiptop, two timber sales
25 that were subject to injunctions before the Western District of
26 Washington in the action of Leavenworth Adopt-A-Forest v.
27 Ferraro, 881 F. Supp. 1482 (W.D. Wash. 1995).

1 discrete set of sales prepared and offered pursuant to Section
2 318. However, given the Glickman court's September 13 decision
3 defining the scope of subsection 2001(k) to include all previous
4 offered sales in Washington and Oregon, not just Section 318
5 sales and the October 17 injunction directing the release of
6 covered sales, the Forest Service recognizes that such a
7 position, while on appeal, does not currently, by itself, provide
8 a grounds for not releasing timber sales offered or awarded in
9 fiscal years 1991-1995.⁴ But the Gatorson sale, unlike many of
10 the other sales identified as subject to release under the
11 Glickman court's interpretation, was effectively prohibited from
12 proceeding as a result of this Court's March 1995 Judgment and
13 the Ninth Circuit's ruling that the NEPA documentation as to
14 roadless areas was insufficient. Thus, the Forest Service
15 requires direction by the Court before releasing the sale.

16 The issue as to whether sales subject to prior litigation
17 must be released under Section 2001(k) is squarely before the
18 District of Oregon in the Glickman case and scheduled to be heard
19 on December 12, 1995. Plaintiff seeks a hearing by this Court
20 on December 13, 1995 to obtain the release of the Gatorson sale.
21 Such a hearing date, however may not provide sufficient time to
22 obtain a ruling from the District of Oregon and allow counsel to
23 participate in a hearing before the Court. Thus, federal

24

25 ⁴ The Forest Service reserves the right to proceed in
26 accordance with any favorable ruling on appeal in the future in
27 connection with any affected sales.

28 FEDERAL DEFENDANT'S RESPONSE TO
PLAINTIFFS VAAGEN BROS.'S MOTION
FOR ORDER RELEASING GATORSON TIMBER SALE - 7

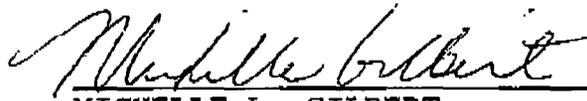
1 defendant respectfully proposes that if the Glickman court does
2 not rule on December 12, 1995, a hearing be continued until two
3 days after issuance of a ruling by the Glickman court.

4 Dated this 1st day of December, 1995.

5 Respectfully submitted,

6 JAMES P. CONNELLY
United States Attorney

7 LOIS J. SCHIFFER
8 Assistant Attorney General

9
10 

11 MICHELLE L. GILBERT
ELLEN M. ATHAS
12 STEPHEN G. BARTELL
U.S. Department of Justice
13 Environment and Natural Resources
Division
14 General Litigation Section
P.O. Box 663
15 Washington, D.C. 20044-0663
(202) 272-8338

16 Attorneys for Federal Defendant
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 1995, I served a copy of defendant agency's FEDERAL DEFENDANT'S RESPONSE TO PLAINTIFF VAAGEN BROS.'S MOTION FOR ORDER RELEASING GATORSON TIMBER SALE upon counsel, by sending said copy via facsimile and first class mail, addressed to the persons hereinafter named at the places and addresses below stated, which are the last known addresses:

Todd True
Patti Goldman
Sierra Club Legal Defense Fund, Inc.
203 Hoge Building
705 Second Avenue
Seattle, WA 98104-1711
Fax: (206) 343-1526

Scott W. Horngren
Haglund & Kirtley
101 S.W. Main, Suite 1800
Portland, OR 97204
Fax: (503) 225-1257

Michael J. Casey
Reed & Giesa
222 N. Wall St., Suite 410
Spokane, Washington 99201
Fax: (509) 838-6341



Michelle L. Gilbert

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT AND NATURAL RESOURCES DIVISION
 GENERAL LITIGATION SECTION
 601 PENNSYLVANIA AVENUE, N.W.
 WASHINGTON, D.C. 20004
 FAX NUMBER (202) 272-6817, 6815, 5775
 CONFIRMATION NUMBER (202) 272-8056

PLEASE DELIVER TO:

To:	Don Barry	208-4684
	Bob Baum	208-3877
	David Gayer	
	Dinah Bear	456-0753
	Ted Boling	514-4231
	Peter Coppelman	514-0557
	Lois Schiffer	
	Jim Simon	
	Greg Frazier	720-5437
	Mike Gippert,	690-2730
	Jay McWhirter	
	Jim Perry	
	T.J. Glauthier	395-4639
	Jeff Handy (503)	326-3807
	Nancy Hayes	208-5242
	Elena Kagan	456-1647
	Don Knowles (503)	326-6282
	Jim Sutherland(503)	465-6582
	Karen Mouritsen	219-1792
	Kris Clark	
	Roger Nesbit (503)	231-2166
	Chris Nolin	395-4941
	Dave Shilton	514-4240
	Al Ferlo	
	Anne Almy	
	Tom Tuchmann (503)	326-6254
	Sue Zike (503)	326-7742

NUMBER OF PAGES: 41

DATE: November 24, 1995

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

MESSAGE: Attached are papers filed by Scott Horngren in relation to the Gatorson Timber Sale. The Vaagen Bros. Lumber, Inc.'s Exhibits (#10 in the letter to the Court) are available upon request. They are: 1) Opinion in NFERC v. Glickman, 9/13/95; 2) Order compelling release of sales; 3) Order denying stay pending appeal; 4) Order regarding stay in SAS v. Thomas; 5) Defendants' Response brief in NFERC v. Glickman, and 6) Senate Report 104-17.

HAGLUND & KIRTLEY

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TELEPHONE (503) 225-0777

FACSIMILE (503) 225-1257

November 22, 1995

VIA FAX (509) 456-0169

Clerk's Office
U.S. District Court
Eastern District of Washington
c/o Storey & Miller
Court Reporters
818 West Riverside, Room 102
Spokane, Washington 99201

Re: Mitchell Smith v. United State Forest Service
Case No. CS-93-0178-JLQ

Dear Clerk:

Enclosed for (via fax) are the following documents:

1. Motion to Cite Unpublished Opinions;
2. [Proposed] Order Granting Defendant Vaagen Bros. Lumber, Inc.'s Motion to Cite Unpublished Opinions;
3. Motion for Order Releasing Gatorson Timber Sale;
4. [Proposed] Order Releasing Gatorson Timber Sale;
5. Notice of Hearing;
6. Memorandum in Support of Motion for Order Releasing Gatorson Timber Sale;
7. Declaration of Duane Vaagen;
8. Declaration of Robert Heater;
9. Declaration of Robert Beckley; and

HACLUND & KIRTLEY
ATTORNEYS AT LAW

Clerk's Office
November 22, 1995
Page 2

10. Vaagen Bros. Lumber, Inc.'s Exhibits (being filed
by mail only).

Thank you for your courtesies.

Sincerely,



Scott W. Horngren

Enclosures
cc w/enclosures: Counsel

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2 SCOTT W. HORNGREN, OSB #88060
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11 Telephone: (509) 838-8341

12 Attorneys for Defendant Vaagen Bros. Lumber, Inc.

13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF WASHINGTON

15 MITCHELL SMITH, an individual,)
16)
17 Plaintiff,)
18)
19 v.)
20)
21 UNITED STATES FOREST SERVICE,)
22 an agency of the United)
23 States; and VAAGEN TIMBER)
24 PRODUCTS, a Washington)
25 corporation,)
26 Defendants.)

No. CS-93-0178-JLQ

MOTION TO CITE UNPUBLISHED
OPINIONS

18 Defendant Vaagen Bros. Lumber, Inc. respectfully
19 requests that this Court grant permission to cite the unpublished
20 opinions in Northwest Forest Resource Council v. Glickman, Civ.
21 No. 95-6244-HO (D. Or. Sept. 15, 1995), and its related Order
22 denying stay pending appeal in Northwest Forest Resource Council
23 v. Glickman, No. 95-36042. These orders have a direct bearing on

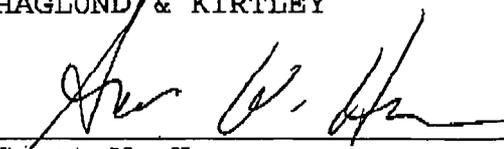
24 : : :
25 : : :
26 : : :

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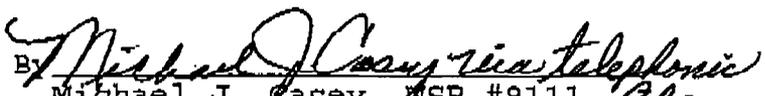
1 this case and interpret Pub. L. No. 104-19 § 2001(k) which
2 applies to the Gatorson Timber Sale.

3 Dated this 22nd day of November, 1995.

4 HAGLUND & KIRTLEY

5
6 By 
7 Scott W. Horngren

8 REED & GIESA

9
10 By 
11 Michael J. Casey, WSB #9111 *Approval*
12 Attorneys for Defendant Vaagen
13 Bros. Lumber, Inc.

HAGLUND & KIRTLEY
ATTORNEYS AT LAW
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TELEPHONE (503) 224-0777

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
MOTION TO CITE UNPUBLISHED DECISIONS on the following parties:

Mr. Todd True VIA REGULAR MAIL
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

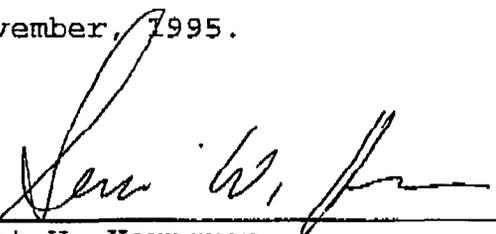
Attorney for Plaintiff

James Connolly VIA REGULAR MAIL
U.S. Attorney
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Spokane, Washington 99211

Michelle L. Gilbert VIA FEDERAL EXPRESS
Steve Bartell
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
601 Pennsylvania Avenue, N.W.
Suite 5000
Washington, D.C. 20004

by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

Dated this 21st day of November, 1995.



Scott W. Horngren
Attorneys for Defendant Vaagen
Bros. Lumber, Inc.

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12 Attorneys for Defendant Vaagen Bros. Lumber, Inc.

13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF WASHINGTON

15 MITCHELL SMITH, an individual,)
16)
17 Plaintiff,)
18)
19 v.)
20)
21 UNITED STATES FOREST SERVICE,)
22)
23 an agency of the United)
24)
25 States; and VAAGEN TIMBER)
26)
27 PRODUCTS, a Washington)
28)
29 corporation,)
30)
31 Defendants.)

No. CS-93-0178-JLQ

[PROPOSED] ORDER GRANTING
DEFENDANT VAAGEN BROS.
LUMBER INC.'S MOTION TO CITE
UNPUBLISHED OPINIONS

32 Vaagen Bros. Lumber, Inc.'s Motion to cite unpublished
33 opinions is hereby GRANTED.

34 Dated this ___ day of November, 1995.

35 _____
36 UNITED STATES DISTRICT JUDGE

HAGLUND & KIRTLEY
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TELEPHONE (503) 225-0777

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
[PROPOSED] ORDER GRANTING DEFENDANT VAAGEN BROS. LUMBER INC.'S
MOTION TO CITE UNPUBLISHED OPINIONS on the following parties:

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Seattle, Washington 98104

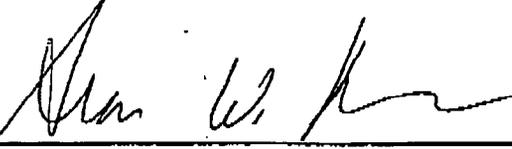
Attorney for Plaintiff

James Connolly VIA REGULAR MAIL
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Michelle L. Gilbert VIA FEDERAL EXPRESS
Steve Bartell
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
601 Pennsylvania Avenue, N.W.
Suite 5000
Washington, D.C. 20004

by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

Dated this 27th day of November, 1995.



Scott W. Horngren
Attorneys for Defendant Vaagen
Bros. Lumber, Inc.

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8 Attorneys for Defendant Vaagen Bros. Lumber, Inc..

9 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10	MITCHELL SMITH, an individual,)	
11	Plaintiff,	)	No. CS-93-0178-JLQ
12	v.	)	MOTION FOR ORDER RELEASING
		)	GATORSON TIMBER SALE
13	UNITED STATES FOREST SERVICE,	)	(Expedited Consideration and
14	an agency of the United	)	Oral Argument Requested)
15	States; and VAAGEN TIMBER)	
	PRODUCTS, a Washington)	
	corporation,)	
16	Defendants.)	

17
18 Defendant Vaagen Bros. Lumber, Inc. respectfully
19 requests that this court order defendant to release and permit to
20 be completed the Gatorson Timber Sale. The procedural steps of
21 the National Environmental Policy Act are no longer required
22 because Pub. L. No. 104-19 § 2001(k)(1) requires the Secretary of
23 Agriculture to release the existing timber sale contracts
24 "notwithstanding any other provision of law" within 45 days of
25 enactment and to permit completion of the sale by September 30,
26 1996. The interpretation of Pub. L. No. 104-19 § 2001(k)(1) is

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1 currently before the District Court of Oregon in Northwest Forest
2 Resource Council v. Glickman, Civ. No. 95-6244-HO. The District
3 of Oregon is expected to rule on the meaning of § 2001(k)(1) as
4 applied to the Gatorson and other similarly situated timber
5 sales. Vaagen believes it is in the interests of judicial
6 efficiency to wait until the District of Oregon rules on the
7 meaning of Section 2001(k), as the Western District of Washington
8 has done in the Seattle Audubon Society v. Thomas, Civ.
9 No. C-89160-WD. If the District of Oregon declares that
10 § 2001(k)(1) releases the Gatorson Sale, then this Court should
11 enter a subsequent order requiring the release of the Gatorson
12 Sale.

13 Vaagen Bros. Lumber, Inc. in late October filed an
14 operating plan to reinitiate harvest on the Gatorson Sale.
15 Because of impending winter weather that could limit access to
16 the sale, the severe hardship to Vaagen Bros. from being denied
17 the logs on the Gatorson Sale, the emergency nature of Pub. L.
18 No. 104-19 § 2001(k), and the Ninth Circuit's denial of an
19 emergency stay pending appeal ordering release of timber sales
20 (Northwest Forest Resource Council v. Glickman, No. 95-36042,
21 Vaagen Bros. requests expedited consideration of this motion
22 immediately following the district court's ruling in NFRC v.
23 Glickman. This motion is supported by the accompanying

24 : : :

25

26

1 Memorandum in Support of Motion to Release Gatorson Timber Sale
2 and the Declarations of Duane Vaagen, Robert Heater, and Robert
3 Beckley.

4 Dated this 22nd day of November, 1995.

5 HAGLUND & KIRTLEY

6 By *Scott W. Horngren*
7 Scott W. Horngren

8 REED & GIESA

9
10 By *Michael J. Casey* *via telephone*
11 Michael J. Casey, WSB #9111 *Approval*
12 Attorneys for Defendant Vaagen
13 Bros. Lumber, Inc.
14
15
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8 Attorneys for Defendant Vaagen Bros. Lumber, Inc.

9 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10	MITCHELL SMITH, an individual,)	
11		)	No. CS-93-0178-JLQ
12	Plaintiff,)	
13		)	[PROPOSED ORDER] RELEASING
14	v.	)	GATORSON TIMBER SALE
15)	
16	UNITED STATES FOREST SERVICE,)	
17	an agency of the United)	
18	States; and VAAGEN TIMBER)	
19	PRODUCTS, a Washington)	
20	corporation,)	
21)	
22	Defendants.)	

23
24 The Court has considered defendant Vaagen Bros. Lumber,
25 Inc.'s Motion for Order Releasing Gatorson Timber Sale and has
26 considered the briefs and arguments of the parties, and Vaagen's
motion is hereby GRANTED.

Defendant United States Forest Service is ORDERED to
release the Gatorson Sale and permit harvest to be completed
pursuant to Pub. L. 104-19 § 2001(k).

Dated this ___ day of November, 1995.

UNITED STATES DISTRICT JUDGE

HAGLUND & KIRTLEY
ATTORNEYS AT LAW
ONE MAIN PLACE
101 S.W. MAIN, SUITE 1800
PORTLAND, OREGON 97204
TELEPHONE (503) 225-0777

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
[PROPOSED ORDER] RELEASING GATORSON TIMBER SALE on the following
parties:

Mr. Todd True VIA REGULAR MAIL
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

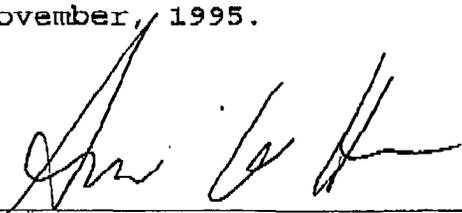
Attorney for Plaintiff

James Connolly VIA REGULAR MAIL
U.S. Attorney
P.O. Box 1494
West 920 Riverside, Suite 300
Spokane, Washington 99211

Michelle L. Gilbert VIA FEDERAL EXPRESS
Steve Bartell
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
601 Pennsylvania Avenue, N.W.
Suite 5000
Washington, D.C. 20004

by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

Dated this 22nd day of November, 1995.



Scott W. Horngren
Attorneys for Defendant Vaagen
Bros. Lumber, Inc.

HAGLUND & KIRTLEY
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HON. JUSTIN L. QUACKENBUSH

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11 Telephone: (509) 838-8341

12 Attorneys for Defendant Vaagen Bros. Lumber, Inc.

13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF WASHINGTON

15 MITCHELL SMITH, an individual,)
16)
17 Plaintiff,)
18)
19 v.)
20)
21 UNITED STATES FOREST SERVICE,)
22)
23 an agency of the United)
24 States; and VAAGEN TIMBER)
25 PRODUCTS, a Washington)
26 corporation,)
27)
28 Defendants.)

No. CS-93-0178-JLQ

NOTICE OF HEARING

Date: December 13, 1995
Time: 9:00 A.M.
CTRM: 4

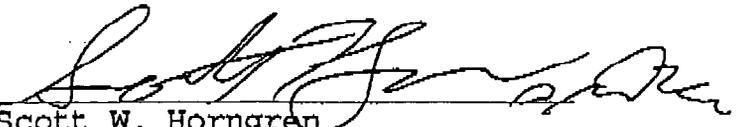
18 Pursuant to Local Rule 7(c), defendant Vaagen Bros.
19 Lumber, Inc. gives notice of a hearing on its Motion for Order
20 Releasing Gatorson Timber Sale. The hearing on this motion will
21 occur on Wednesday, December 13, 1995, at 9:00 a.m. in
22 Courtroom 4. Vaagen Bros. respectfully requests expedited
23 consideration of its motion prior to December 13, 1995 should the
24 District of
25 : : :
26 : : :

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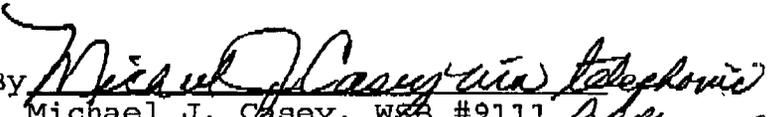
1 Oregon declare before December 13, 1995 that § 2001(k) applies to
2 the Gatorson Timber Sale.

3 Dated this 22^d day of November, 1995.

4 HAGLUND & KIRTLEY

5
6 By 
7 Scott W. Horngren

8 REED & GIESA

9
10 By 
11 Michael J. Casey, WSB #9111 *Approval*
12 Attorneys for Defendant Vaagen
13 Bros. Lumber, Inc.

HAGLUND & KIRTLEY
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SWH\pwhr6985

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8 Attorneys for Defendant Vaagen Bros. Lumber, Inc.

9 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10	MITCHELL SMITH, an individual,)	
11		)	No. CS-93-0178-JLQ
	Plaintiff,)	
12	v.	)	MEMORANDUM IN SUPPORT OF
		)	MOTION FOR ORDER RELEASING
		)	GATORSON TIMBER SALE
13	UNITED STATES FOREST SERVICE,)	
	an agency of the United)	
14	States; and VAAGEN TIMBER)	
	PRODUCTS, a Washington)	
15	corporation,)	
)	
16	Defendants.)	

17
18 I. INTRODUCTION.

19 Defendant Vaagen Bros. Lumber, Inc. respectfully
20 requests that this Court order the release of the Gatorson Timber
21 Sale. A statute enacted in July, Pub. L. No. 104-19 § 2001(k),
22 109 Stat. 194, 246 (1995), established the Emergency Salvage
23 Timber Sale Program and requires release of existing timber sales
24 in Oregon and Washington national forests such as the Gatorson
25 sale. The interpretation of § 2001(k)(1) is currently before the
26 Oregon District Court in Northwest Forest Resource Council v.

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1 Glickman, Civ. No. 95-6244-HO. Should that court rule that
2 § 2001(k) (1) applies to release the Gatorson Sale, Vaagen
3 Brothers seeks a subsequent order from this Court specifically
4 ordering the release.

5 The Ninth Circuit concluded that the Gatorson Sale
6 would not cause environmental harm to fish, wildlife, watershed,
7 and other resources. Smith v. United States Forest Service, 33
8 F.2d 1072, 1078 (9th Cir. 1994). However, the Ninth Circuit held
9 that the sale violated the National Environmental Policy Act
10 because the environmental assessment did not adequately discuss
11 the effect of the timber sale on a roadless area. The Court
12 declined to order the preparation of an EIS or an EA and left to
13 the agency the decision of how best to comply with NEPA. Id. at
14 1079.

15 The legislation requiring that existing timber sales in
16 Oregon and Washington from national forests be released within 45
17 days of enactment, and requiring that the Secretary permit
18 completion of the sales by the end of fiscal year 1996, supplants
19 NEPA and compels the Secretary to move forward with the Gatorson
20 sale.

21 **II. SECTION 2001(k) OF PUBLIC LAW NO. 104-19.**

22 In July 1995, Congress passed legislation that
23 specifically addressed the fate of timber sales like the
24 Gatorson. Section 2001(k) of Pub. L. No. 104-19, which President
25 Clinton signed into law, directs the Forest Service
26 "[n]otwithstanding any other provision of law . . . to award,

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1 release, and permit to be completed in fiscal years 1995 and 1996
 2 . . . all timber sale contracts offered or awarded before that
 3 date in any unit of the National Forest System . . . subject to
 4 section 318 of Public Law 101-121." Pub. L. No. 104-19,
 5 § 2001(k), 109 Stat. 194, 246 (1995). Congress specifically
 6 directed that sales are to be released without change to the
 7 originally advertised terms, volumes, and bid prices. Id.
 8 Section 2001(k) provides for one and only exception to this
 9 congressional mandate -- sale units where threatened or
 10 endangered bird species are "known to be nesting." Id.¹

11 _____
 12 ¹ Section 2001(k), reads in full as follows:

13 (k) AWARD AND RELEASE OF PREVIOUSLY OFFERED AND
 14 UNAWARDED TIMBER SALE CONTRACTS. -

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

26 (2) THREATENED OR ENDANGERED BIRD SPECIES.--No sale
 unit shall be released or completed under this subsection if any
 threatened or endangered bird species is known to be nesting
 within the acreage that is the subject of the sale unit.

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

Pub. L. No. 104-19, § 2001(k), 109 Stat. 194, 246 (1995).

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1 III. THE NORTHWEST FOREST RESOURCES COUNCIL V. GLICKMAN CASE.

2 The District of Oregon held that § 2001(k) (1) applied
 3 to timber sales sold in the geographic area effected by
 4 section 318 which includes the national forests in Oregon and
 5 Washington. Northwest Forest Resource Council v. Glickman, Civ.
 6 No. 95-6244-HO (Order regarding release of sales September 13,
 7 1995), attached as Exhibit 1. The Oregon district court ordered
 8 release of the sales (Exhibit 2) and the Ninth Circuit refused to
 9 prevent release of the sales in denying the government's motion
 10 for emergency stay pending appeal. (Exhibit 3.)

11 The Forest Service has begun releasing sales in eastern
 12 Oregon and eastern Washington. However, despite Vaagen Bros.
 13 filing of an operating plan on October 24, 1995, the Forest
 14 Service has yet to release the Gatorson Timber Sale. Declaration
 15 of Duane Vaagen.

16 The issue of whether the "notwithstanding any other
 17 provision of law" language means that sales that were subject to
 18 previous injunctions or court orders are also released by the
 19 legislation is currently before Judge Hogan. A hearing on this
 20 issue is scheduled for December 12, 1995 in Eugene. Vaagen Bros.
 21 has sought to intervene in the case, and if the District of
 22 Oregon declares that § 2001(k) applies to the Gatorson sale, then
 23 this court should subsequently order the release of the Gatorson
 24 Sale.

25 : : :
 26 : : :

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1 IV. THE NEED FOR A RAPID DECISION.

2 There are numerous legal and equitable reasons for a
3 prompt decision on Vaagen Brothers' Motion to Release the
4 Gatorson Timber Sale.² Section 2001(k) was emergency
5 legislation.

6 The Senate Report explains that the Conference
7 Committee "is concerned about the impacts of current policies on
8 timber supply and forest management issues on the timber-
9 dependent communities across the Nation." Sen. Rep. 104-17 at
10 122 (Mar. 24, 1995). Congress directed quick release of the
11 sales, yet the Forest Service has dragged their feet in the
12 release of the Gatorson Timber Sale. The Forest Service disputed
13 that the sales in eastern Oregon and eastern Washington were
14 released by the legislation, but that position was rejected by
15 the District Court of Oregon and the Ninth Circuit Court of
16 Appeals in denying the government's motion for emergency stay of
17 release of the sales pending appeal. Exhibits 2 and 3. Given
18 the Ninth Circuit's denial of the emergency stay, there is no
19 reason that the Gatorson Sale should continue to be withheld.

20 _____
21 ² Because the District of Oregon has substantial
22 experience in the interpretation of § 2001(k), Judge Dwyer in
23 Seattle Audubon v. Thomas, No. 89-160-WD, stayed his decision on
24 whether to modify an injunction of several timber sales pending
25 the District of Oregon's analysis of the application of § 2001(k)
26 to the sales. Exhibit _____. Vaagen likewise believes this Court
should wait until the District of Oregon interprets § 2001(k) as
applied to the Gatorson sale. Assuming the District of Oregon
concludes the Gatorson Sale released, this Court should enter the
order requiring release of the Gatorson sale.

1 Vaagen Bros. dire need for timber is an example of the
 2 very reason why the Emergency Salvage Timber Sale Program was
 3 enacted. Vaagen Bros. is in special credits with First
 4 Interstate Bank. Heater Dec. Vaagen Bros. has only a few weeks
 5 supply of logs at its sawmills in Republic and Colville. Vaagen
 6 Dec. The Gatorson Sale volume represents Vaagen Bros. last
 7 remaining significant source of supply to operate the mills.
 8 Without the Gatorson Sale, Vaagen Bros. will be unable to operate
 9 the mills and generate the cash flow needed to remain in
 10 business. Heater and Beckley Decs.

11 Given the legislative and practical reasons for quick
 12 action to release the Gatorson Sale, Vaagen Bros. believes a
 13 prompt decision on its motion to release the sale is warranted.

14 V. CONCLUSION.

15 Vaagen Bros. respectfully requests this Court order the
 16 release of the Gatorson Timber Sale following a decision by the
 17 Oregon District Court on the application of § 2001 to this and

18 : : :
 19 : : :
 20 : : :
 21 : : :
 22 : : :
 23 : : :
 24 : : :
 25 : : :

26

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1 several other sales subject to prior court orders. Vaagen will
2 concurrently file with this Court its brief that it files with
3 the District of Oregon on this issue.

4 Dated this 22^d day of November, 1995.

5 HAGLUND & KIRTLEY

6
7 By *Scott W. Horngren*
8 Scott W. Horngren

9 REED & GIESA

10
11 By *Michael J. Casey via telephonic*
12 Michael J. Casey, WS# #9111 *Approved*
13 Attorneys for Defendant Vaagen
14 Bros. Lumber, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
MEMORANDUM IN SUPPORT OF MOTION FOR ORDER RELEASING GATORSON
TIMBER SALE on the following parties:

Mr. Todd True VIA REGULAR MAIL
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

Attorney for Plaintiff

James Connolly VIA REGULAR MAIL
U.S. Attorney
P.O. Box 1494
West 920 Riverside, Suite 300
Spokane, Washington 99211

Michelle L. Gilbert VIA FEDERAL EXPRESS
Steve Bartell
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
601 Pennsylvania Avenue, N.W.
Suite 5000
Washington, D.C. 20004

by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

Dated this 27th day of November, 1995.



Scott W. Norngren
Attorneys for Defendant Vaagen
Bros. Lumber, Inc.

HAGLUND & KIRTLEY
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 2 SCOTT W. HORNGREN, OSB #88060
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 5 Portland, Oregon 97204
 6 Telephone: (503) 225-0777

HON. JUSTIN L. QUACKENBUSH

5 MICHAEL J. CASEY, WSB #9111
 6 Reed & Giesa
 7 222 N. Wall St., Ste. 410
 8 Spokane, Washington 99201
 9 Telephone: (509) 838-8341

Attorneys for Defendant Vaagen Bros. Lumber, Inc.

9 UNITED STATES DISTRICT COURT
 10 EASTERN DISTRICT OF WASHINGTON

10 MITCHELL SMITH, an individual,)
 11)
 12 Plaintiff,)
 13 v.)
 14 UNITED STATES FOREST SERVICE,)
 15 an agency of the United)
 16 States; and VAAGEN TIMBER)
 17 PRODUCTS, a Washington)
 18 corporation,)
 19)
 20 Defendants.)

No. CS-93-0178-JLQ

DECLARATION OF DUANE VAAGEN

I, DUANE VAAGEN, declare and state:

1. I am the president of Vaagen Bros. Lumber, Inc.

Our company is a family-owned small business that operates
 sawmills and planing mills in Republic and Colville. Vaagen
 Bros. Lumber, Inc. employs approximately 310 people directly in
 its sawmills and planing mills and there are many hundreds of
 more people employed in related logging, log hauling and service
 industries.

2. Vaagen Bros. Lumber, Inc. is in a severe financial
 squeeze and needs wood to operate our Republic and Colville

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HAGLUND AND KIRTLEY

FAX NO. 503 225 1257

P. 04

1 sawmills to generate cash flow to continue to run the business.
2 The logs in the Republic mill log yard provide only enough volume
3 to run the Republic mill for approximately ten to twelve days.
4 While we are replenishing this supply, we desperately need to
5 build a winter log deck that will take us through the winter and
6 spring breakup. The Colville mill has a similarly depleted log
7 deck and it is essential that we build the log deck to sustain
8 operations through late winter and spring.

9 3. During the last year Vaagen Bros. has reduced its
10 work force from 485 to 310 employees. Most of these jobs paid
11 good wages to support families and we are fearful that without a
12 log supply to sustain our mills that further layoffs or an entire
13 shutdown may be required.

14 4. Vaagen Bros. closed its mill in Ione because of
15 the lack of federal timber. Last week the mill equipment was
16 auctioned and a company from China bought the equipment.

17 5. While we have other Forest Service timber volume
18 under contract, that volume is only sufficient to sustain
19 operations through mid-December and is entirely insufficient to
20 provide the winter log deck needed to operate through next
21 spring. Without this timber, the Republic mill will face a
22 shutdown and an inevitable 60-day notice of plant closure.

23 6. In late October, Vaagen Bros. filed an Operating
24 Plan for the Gatorson Timber Sale, attached as Exhibit A to my
25 declaration. We seek to begin harvest on Units 1 and 24 of the
26 sale that are adjacent to existing roads. In addition, we want

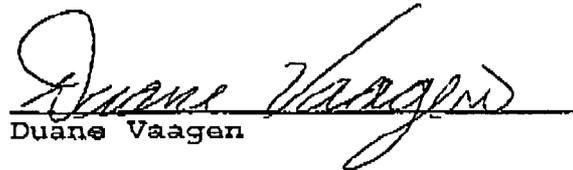
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1 to begin road construction in the western portion of the sale
2 area to access Units 3 to 7 for harvest this winter.

3 7. It is essential that our equipment be moved into
4 the sale area before heavy snow this winter. Consequently, we
5 are seeking a hearing on our motion to dissolve an injunction at
6 the earliest date possible.

7 I declare that under penalty of perjury that the
8 following is true and correct.

9 DATED this 21st day of November, 1995.

10
11 
12 Duane Vaagen

HAGLUND & KIRTLEY
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TELEPHONE (503) 225-0777



VAAGEN BROS. LUMBER, INC.

565 W. 5th Colville, Wa. 99114

October 24, 1995

Harv Skjerven
Kettle Falls Ranger District
Kettle Falls, WA

RE: Gatorson Timber Sale #070085

Vaagen Bros. Lumber Co., Inc. requests the release of payment units #1, 24 and 47 for cutting. Payment bond is allocated sufficient to cover these units.

Sincerely,

BRETT WINTEROWD
PURCHASER REPRESENTATIVE

EXHIBIT A

GENERAL PLAN OF OPERATION (CT8.1)

Vaagen Bros
Purchaser

Gaberson 07085
Sale Name / Contract No.

3/31/97
Termination Date

1. ROAD CONSTRUCTION / RECONSTRUCTION OPERATIONS:

ROAD NUMBER	ROAD COMP. DATE (CT8.101)	TENTATIVE START (Month and Year)	TENTATIVE COMP. (Month and Year)
6114420		10/26/95	7/96
6114400		7/96	7/96
6114435		7/96	7/96
9565245		8/96	9/96

2. REMOVAL OF INCLUDED TIMBER:

LOGGING SYSTEM	VOLUME TO REMOVE	TENTATIVE START (Month and Year)	TENTATIVE COMP. (Month and Year)
Timber	29.3	10/95	9/96
Cable	15.73	6/96	11/96
Helicopter	69.37	6/96	3/97

3. POST LOGGING REQUIREMENTS:

All erosion control, slash disposal and road maintenance will be completed within the timing requirements stated in the following CT Provisions: 5.42, 5.43, 6.6 and 6.74; and no later than the termination date unless otherwise agreed to.

4. SPECIAL SITUATIONS CT2.321, CT5.31, CT6.311 will be met as follows:

5. ATTACHMENTS:

--	--	--	--

Submitted: *Paul Wintrow* 10/24/95
 Purchaser / Purchaser Representative Date

Approved: _____ Date _____
 Forest Service Representative

OPERATING SCHEDULE CALENDAR YEAR 1995 (B6.31)

TO: Harv Skjerve, Forest Service Representative

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

TSO # 070085, Georgetown Sale Name, 5/6/93 Sale Date

Purchaser Name, Address & Phone: Vaagen Bros Lumber Inc 20 North Colville 624-5071

A. PURCHASER PERSONNEL: Brett Wintermoot Representative, 624-8550 Phone #

Logging Contractor TBA (Optional) Phone #

Field Representative(s) TBA (if applicable) Phone #

Fire Foreman N/A Patrolman N/A

B. ROAD CONSTRUCTION RECONSTRUCTION

Start Staking Done Start Staking

Start Construction 10/27/95 Start Reconstruction

Material Delivery Dates TBA

Road Oiling Sequence Dates N/A

Road Maintenance Schedule As Needed

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

C. PRODUCTION (STARTING)

Unit #	Felling (Start)	Yarding (Start)	Hauling (Start)	Erosion Control Complete	Slash Disposal Complete
Unit # <u>24</u>	<u>10/30</u>	<u>10/31</u>	<u>10/31</u>	<u>within 15 days or ASAP in the following</u>	<u>NOS</u>
Unit # <u>1</u>	<u>11/3</u>	<u>11/4</u>	<u>11/4</u>	<u>"</u>	<u>"</u>
Unit #					
Unit #					
Unit #					
Unit #					
Unit #					
Unit #					

C

Production Rates

Estimated volume to be cut is 10 MBF/day # Tractor Sides 1
 Estimated volume to be cut is 300 MBF/month # Cable Sides _____
 Estimated volume to be cut is 3000 MBF this season _____
 Estimated complete date 12/31

B. PAYMENTS

Advance deposits will be by (B4.221):

Payment Bond "Performance Bond" Cash Purchaser Road Credit

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

G. LOG ACCOUNTABILITY

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

Burt Wintrowe, Russ Gurdahl

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

TRA

Scaling: Bureau _____ Location(s) Leville, Republic
 Forest Service _____ State Brand Registration No. 001
 (If Any)

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

Map Attached? No

H. SPECIAL SITUATIONS

Submitted by: Burt Wintrowe
 Purchaser Representative

For: Vaagen Bros. Lumber, Inc.
 Company's Name

Date: 10/24/95

Received: _____
 Forest Service Representative

Date

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing

DECLARATION OF DUANE VAAGEN on the following party:

Mr. Todd True VIA REGULAR MAIL
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

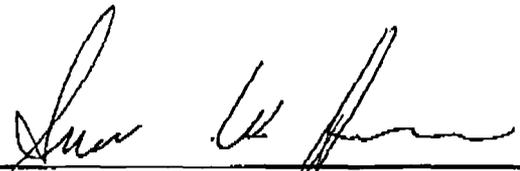
Attorney for Plaintiff

James Connolly VIA REGULAR MAIL
U.S. Attorney
P.O. Box 1494
West 920 Riverside, Suite 300
Spokane, Washington 99211

Michelle L. Gilbert VIA FEDERAL EXPRESS
Steve Bartell
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
601 Pennsylvania Avenue, N.W.
Suite 5000
Washington, D.C. 20004

by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

Dated this 22nd day of November, 1995.



Scott W. Horngren
Attorneys for Defendant Vaagen
Bros. Lumber, Inc.

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Attorneys for Defendant Vaagen Bros. Lumber, Inc.

12 UNITED STATES DISTRICT COURT
 13 EASTERN DISTRICT OF WASHINGTON

14 MITCHELL SMITH, an individual,)
 15)
 16 Plaintiff,)
 17)
 18 v.)
 19)
 20 UNITED STATES FOREST SERVICE,)
 21)
 22 an agency of the United)
 23 States; and VAAGEN TIMBER)
 24 PRODUCTS, a Washington)
 25 corporation,)
 26)
 27 Defendants.)

No. CS-93-0178-JLQ

DECLARATION OF ROBERT HEATER

I, ROBERT HEATER, declare and state:

1. I am a director of Vaagen Bros. Lumber, Inc. I have been a director for three years and I make this declaration based on my personal knowledge.

2. Vaagen Bros. Lumber, Inc. is in a financial crisis and everyone in the company is working hard to avoid a permanent shutdown.

3. Our banker, First Interstate Bank, has placed Vaagen Bros. Lumber, Inc. in "special credits" and has refused to extend credit to provide working capital for sawmill operations.

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1 Consequently, we must generate all of our working capital
2 directly from operating our mills in Colville and Republic in
3 order to build a winter-spring log deck or face certain shutdown
4 of both facilities.

5 4. The maximum amount of working capital can be
6 generated by using the most economically priced logs in the
7 sawmills. At a stumpage cost of approximately \$27 per thousand
8 board feet, the logs from the Gatorson Timber Sale are the most
9 economical logs that Vaagen Bros. has under contract.

10 5. If we can operate our mills efficiently with lower
11 priced logs, we can generate the cash flow needed to continue
12 paying the employees and contributing to the local economy in
13 Stevens and Ferry Counties.

14 6. Most of the logs from the Gatorson Timber Sale
15 meet the species and quality needs of the Republic mill. The
16 cash flow created by the Republic mill is important to the
17 continued existence of the company. If we must shut the Republic
18 mill, the cash flow lost from these operations would jeopardize
19 our Colville mill as well.

20 7. Attached to my declaration as Exhibit A is a
21 letter which Vaagen Bros. sent to the Internal Revenue Service
22 explaining the large losses the company incurred during the last
23 year and requesting an emergency tax refund. Vaagen Bros. will
24 be irreparably harmed if it is unable to access the logs in the
25 Gatorson Timber Sale, particularly at this time of year when it
26

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1 is essential that we build a log deck to provide cash flow from
2 lumber sales throughout the winter and spring.

3 I declare that under penalty of perjury that the
4 following is true and correct.

5 DATED this 5 day of November, 1995.

6
7 
8 Robert Heater

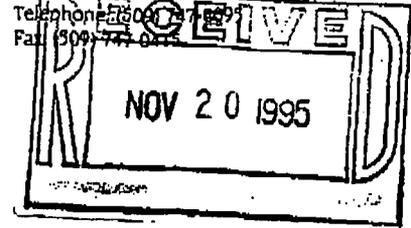
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HAGLUND & MURLEY
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BDO Seldman, LLP
Accountants and Consultants

900 Seattle Financial Center
601 West Riverside Avenue
Spokane, Washington 99201-0611
Telephone: (509) 471-8995
Fax: (509) 471-0275



October 27, 1995

Internal Revenue Service
Problem Resolution Office
915 2nd Avenue
MS 412
Seattle, WA 98174

We are the Independent Certified Public Accountants for Vaagen Brothers Lumber, Inc. The company is experiencing severe liquidity problems and, as a result, requests that they be given consideration for a "quick" refund relative to their carryback claim.

Conditions giving rise to the need result from the Company's \$5,000,000 loan for the fiscal year ended June 30, 1995. The Company has current liabilities of \$20,442,325 and current assets of \$15,541,772. This ascending capital deficit and loan covenant default has caused their bank to not extend their revolving line of credit, and the bank is jeopardizing the line balance by the withholding of their cash receipts through a control account. The exam is being administered by the Special Credit Department of First Interstate Bank.

As a result of the cash shortage, the Company has repeatedly missed payroll payment dates and has been unable to pay vendors on a timely basis. Their primary diesel supplier has stopped delivering fuel and independent logging contractors will not provide sufficient logs to their plants to maintain production.

The Company has applied for federally guaranteed loans but has been unable to reach any agreement at this time to provide additional cash to the Company. Because of its geographic location, the Company has to acquire and store large quantities of logs over the current period since, when the spring season arrives, the State Department of Transportation restricts the travel of heavy lumber on the highways.

The intended use of their money is to acquire these logs and insure that their critical vendors will deliver necessary supplies to run the sawmill; without which production will be stopped and the Company would have to terminate a work force of over 300 people.

If you require any further information, please contact me or their Administrative Vice-President, Mr. Robert Heater.

Very truly yours,

Daniel L. Pavelich

EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
DECLARATION OF ROBERT HEATER on the following party:

Mr. Todd True VIA REGULAR MAIL
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

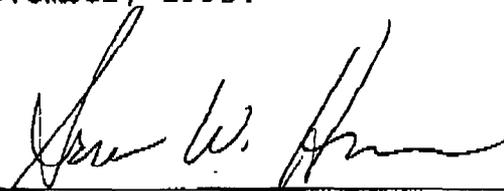
Attorney for Plaintiff

James Connolly VIA REGULAR MAIL
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Steve Bartell
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General Litigation Section
601 Pennsylvania Avenue, N.W.
Suite 5000
Washington, D.C. 20004

by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

Dated this 22nd day of November, 1995.



Scott W. Horngren
Attorneys for Defendant Vaagen
Bros. Lumber, Inc.

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8 Attorneys for Defendant Vaagen Bros. Lumber, Inc.

9 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10 MITCHELL SMITH, an individual,)
11)
12 Plaintiff,)
13 v.)
14 UNITED STATES FOREST SERVICE,)
an agency of the United)
15 States; and VAAGEN TIMBER)
PRODUCTS, a Washington)
corporation,)
16 Defendants.)

No. CS-93-0178-JLQ

DECLARATION OF ROBERT
BECKLEY

17 I, ROBERT BECKLEY, declare and state:

18 1. I serve on the Board of Directors of Vaagen Bros.
19 Lumber, Inc. I make this declaration based on my personal
20 knowledge. My duties as director for Vaagen Bros. is to help
21 stabilize the business and to get operations running smoothly.
22 In particular, I have been working to strengthen cost controls to
23 achieve greater certainty in operations in what has become a very
24 uncertain timber supply climate.
25

26 2. One of the vital elements to successfully
controlling costs is to maintain a sufficient cash flow to offset

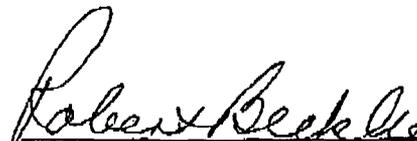
HAGLUND & KIRTLEY
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1 the fixed costs of running the Republic and Colville mills. One
2 of the greatest costs of operating a sawmill is for the logs that
3 are the raw material of our business. A stable source of
4 competitively priced logs is essential to profitability.

5 3. The logs from the Gatorson Timber Sale are the
6 lowest cost logs under contract to the company. Because of the
7 low cost of the Gatorson Timber Sale logs, the Gatorson volume
8 will provide flexibility in attempting to control costs. Our
9 ability to process this material will help provide a margin to
10 continue operating the mills and avoid layoffs. The Gatorson
11 logs are critical to our survival and closure of our sawmills
12 would be an economic blow to the communities of Republic and
13 Colville.

14 I declare that under penalty of perjury that the
15 following is true and correct.

16 DATED this 15th day of November, 1995.

17
18 
19 Robert Beckley

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing
DECLARATION OF ROBERT BECKLEY on the following party:

Mr. Todd True VIA REGULAR MAIL
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, Washington 98104

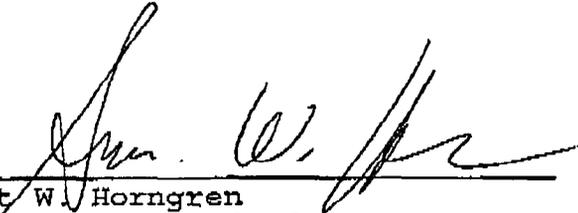
Attorney for Plaintiff

James Connolly VIA REGULAR MAIL
U.S. Attorney
P.O. Box 1494
West 920 Riverside, Suite 300
Spokane, Washington 99211

Michelle L. Gilbert VIA FEDERAL EXPRESS
Steve Bartell
U.S. Department of Justice
Env. & Nat. Res. Div.
General Litigation Section
601 Pennsylvania Avenue, N.W.
Suite 5000
Washington, D.C. 20004

by serving a true and correct copy thereof by the means indicated
to said parties on the date stated below.

Dated this 21st day of November, 1995.



Scott W. Horngren
Attorneys for Defendant Vaagen
Bros. Lumber, Inc.

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