

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

29-Apr-1996 06:21pm

TO: Jennifer M. O'Connor
TO: Dinah Bear

FROM: Elena Kagan
 Office of the Counsel

SUBJECT: timber

1. As I've told both of you, Jack has asked me to do an edit on the curent DOJ brief. I'd be grateful for your input. No point is too big or too small. If you want to mark up a draft and give it to me, that's great. If you want to make just a few general comments, that's great too. I'd like your comments sometime tomorrow, so I can get this under way as quickly as possible.

2. And as I've told Dinah, we need to decide one of these days whether we wish to seek cert on the areas vs. sales issue. Jack is very much of the mind to defer to you guys: if you want to seek cert (even recognizing we won't get it), he'll argue the case to the SG. Let me know.

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MARKING INITIALS: M DATE: 4/24/24
2024-0267-5

DRAFT BRIEF -- WRITTEN OUTSIDE
THE CONTEXT OF SPECIFIC FACTS
Not Reviewed By Client Agencies

INTRODUCTION

The Secretary of Agriculture seeks a clarification of this Court's [date] injunction[s], directing the award and release of certain timber sales previously withdrawn from the Forest Service's timber program. NFRC v. Glickman, Order (date of relevant order[s]). The Court's Order interprets section 2001(k) (1) of the 1995 Rescissions Act, Pub. L. No. 104-19, to require the Secretary to award, release and permit to be completed [identify relevant sales and location]. By this motion, federal defendant seeks clarification of this Court's injunction[s] to assure that the Forest Service can properly rely on the original terms of the contracts to suspend, modify or cancel these particular timber sales released pursuant to this Court's order[s] interpreting section 2001(k). This Court has jurisdiction to entertain this motion under the Court's inherent authority to enforce and clarify its own injunctions. Alternatively, if after being presented with this issue, the Court determines that its previous Orders require modification to permit the agency's reliance on these contract terms, defendants

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request that the Orders be so modified. In connection with this request, if the Court determines that it does not have jurisdiction to grant such a modification in connection with its enforcement authority, defendants respectfully move for a limited remand to allow such modification under Crateo, Inc. v. Intermark, Inc., 536 F.2d 862, 869 (9th Cir. 1976).

Recent events have prompted this motion. Section 2001(k)(1) directs the Secretary to release and permit to be completed certain timber contracts under "originally advertised terms," which expressly incorporate contract terms. An essential component of the original contracts are those terms that authorize modification, suspension and termination of the contracts to protect national forest resources. While the Forest Service successfully has negotiated mutual agreements to modify certain 2001(k)(1) sales to address significant environmental issues, it has been unable to do so to date with these sales. Accordingly, reliance on these provisions has now become critical. Moreover, the scope of remedies that the Forest Service now can provide when implementing certain of these original contract terms recently has been expanded. An interim final rule published on April 3, 1996 authorizes substitution of timber outside the sale area for timber within the 2001(k) sale area without engaging in competitive bidding if the parties mutually agree.

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Section 2001(k) (1)'s explicit incorporation of these contract terms provides the Secretary the necessary flexibility to utilize the terms as part of contract completion. While section 2001(k) served to resurrect these sales, their original terms now guide the contracts' completion. Indeed, the Secretary must be able to continue to rely on contracts terms as they in essence define the sale. In light of this Court's outstanding injunction[s], before the Secretary takes any action to implement these terms, defendant seeks clarification from the Court that such actions are permitted. Alternatively, if after consideration of the issues presented, modification of the orders is deemed necessary, defendant requests that the Court exercise its inherent authority to enforce its orders to issue the appropriate modification. If necessary, defendants seek permission to proceed in accordance with Crateo.¹

Statement of the Case

Origin of Sales. Pursuant to Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745 ("Section 318"), a number of timber sales were proposed for the [name] National Forest by the Forest Service. Of particular importance here are [number] sales, named [list

¹ If the Court grants this motion in the alternative, the Secretary would then file a motion for a limited remand with the Court of Appeals for the Ninth Circuit. See Jenkins v. Whittaker Corp., 785 F.2d 720, 722 n.2 (9th Cir. 1986).

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sales]. [Explain why sales did not proceed as Section 318 sales.]

[Identify any non-318 sales and explain why they did not proceed.]

Inconsistency of Sales with Pacific Northwest Forest Plan.

In the years following the withdrawal of these sales, the Forest Service worked closely with the BLM to address the problems of the northern spotted owl and other elements of the old growth ecosystem affected by logging in the Pacific Northwest. During the period from 1993 through 1994, much progress was made on reaching a solution to the years of litigation and injunctions on the Pacific Northwest forests. The Pacific Northwest Forest Plan provided a new landscape for both protection of the old-growth habitat and sustainable timber harvests. It remains unclear whether these sales were considered to be standing or harvested during the preparation of this Plan. [Confirm re individual sales.] The Forest Service, however, had assumed that these sales would not be released. [Confirm]

Under the Pacific Northwest Forest Plan, these sales could not go forward in their original form. The sales lie within Late Successional Reserves and Key Watersheds [check location as to identified sales], as those terms are defined in the Pacific Northwest Plan. See Declaration of XXX.

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Late Successional Reserves. A Late Successional Reserve ("LSR") is a land allocation for reserved lands that are to be managed to protect and enhance conditions of late-successional and old-growth related species, including the northern spotted owl, as part of ecosystem management strategy. Very limited timber harvesting is permitted in the LSRs, mostly thinning, which is only permitted if it will positively affect the reserve.

Key Watersheds. A Key Watershed is part of a system of large refugia comprising watersheds that are crucial to at-risk fish species and stocks and provide high quality water. Timber harvest cannot occur in Key Watersheds without a watershed analysis. No new roads are to be built in the unroaded portion of previously inventoried roadless areas. [Identify sales' location in key watershed[s] and whether they have been a part of any aquatic strategy review.]

To date, the Forest Service has not undertaken any review of these particular timber sales for their compliance or non-compliance with the Umpqua Forest Plan [or other Plan], as amended by the Pacific Northwest Plan.

[Describe individual sales.]

The Rescissions Act resurrects these abandoned sales. In July 1995, Congress passed the Rescissions Act, P.L. 104-19. Litigation surrounding this statute began almost immediately after passage.

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Litigation Over Section 2001 In The United
States District Court At Eugene, Oregon

On August 8, 1995, Northwest Forest Resources Council (NFRFC) filed a complaint seeking mandamus and a permanent injunction to compel the Secretaries to award and release by September 10, 1995, "all timber sales offered prior to the date of enactment [of the Act] in all national forests in Oregon and Washington and Bureau of Land Management ("BLM") districts in western Oregon." See Northwest Forest Resource Council v. Glickman, Civil Action No. 95-6244-HO. On August 22, 1995, the land management agencies issued their interpretation of the scope of subsection 2001(k)(1), explaining that the provision applies to the release of a set of sales that had been offered pursuant to section 318 of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act, but which had not proceeded.² Pursuant to this interpretation, the federal defendants opposed NFRFC's challenge to subsection 2001(k)(1) on the ground that plain language of the statute, its legislative history, and the principle of deference to agency interpretation required that the subsection only applied to a the discrete set of sales prepared and offered in the 13 northern spotted owl forests pursuant to

² See August 22, 1995 Memorandum to Jack Ward Thomas, Chief of the Forest Service and Elaine Zielinski, Oregon State Director of BLM, from James R. Lyons, Under Secretary of Agriculture, Natural Resources and Environment and Mike Dombeck, Director of the BLM.

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the ecological criteria and procedures specified in section 318 during the period it was in effect, fiscal year 1990.

On September 13, 1995, this Court held that Section 2001(k) applies to timber sales previously offered or awarded in all national forests in Washington and Oregon and BLM districts in western Oregon up to July 27, 1995. NERC v. Glickman, No. 95-6244-HO (D. Or.). On October 17, 1995, the Court entered an order tracking the language of the statute that "compelled and directed" the Secretary of Agriculture and the Secretary of the Interior, "to award, release and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995, in any national forest in Oregon and Washington or BLM district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting." [Identify which sales fall under which orders described herein.] The government has appealed the district court's ruling.

After these orders, the Forest Service proceeded to release timber sales to previously identified high bidders. In one category of sales, however, the high bidders were either unwilling, unable or unqualified to take advantage of the renewed offer of the timber sale. In another category of sales, courts had previously issued injunctions preventing the award of the

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sales, or the Forest Service had rejected bids, suspended, or terminated sales as a result of earlier litigation. For both categories, the Forest Service did not pursue the award or release of timber sales and this was challenged in district court.

At the same time, Pilchuk Audubon Society filed a separate complaint in this Court challenging the release of a number of sales that had been enjoined, cancelled or withdrawn on a number of grounds.³ They argued that such sales were no longer offered within the meaning of Section 2001(k)(1), and, as to certain of the challenged sales, it would violate the separation of powers principle to require them to proceed in the face of an injunction or judicially-approved withdrawal. Federal defendants agreed that section 2001(k) did not cover sales that had been enjoined for violating Section 318⁴ or were cancelled at the request of

³ Pilchuk's complaint alleged generally that cancelled sales, or those that were no longer in the timber pipeline at the time of passage of the Act, were not subject to the Act's award and release requirements. While Pilchuk did not explicitly identify all the sales it deemed subject to this claim, Pilchuk did clearly contest the release of four sales canceled pursuant to stipulated dismissals, First, Last, Boulder Krab and Elk Fork, as well as specific sales that had been enjoined or subject to orders effectively preventing the sale from proceeding, Cowboy, Nita, South Nita, Garden, Tip, Tiptop and Gaterson. The [identify] sales at issue here appear to fall within Pilchuk's general complaint regarding cancelled sales. Accordingly, they are subject to this Court's January 10, 1996 injunction.

⁴ Section 318 of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990.

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the high bidder or because the apparent high bidder was no longer willing or able to proceed. Giving effect to the "return of the bid bond" provision, defendants did not agree with Pilchuk plaintiffs' claims that sales for which the agencies had rejected bids were not covered by section 2001(k). Defendants also disagreed that section 2001(k) violated the separation of powers principle.

In response, by decision dated January 10, 1996, amended to address typographical errors on January 17, 1996, the Court enjoined the Secretary of Agriculture to "immediately award, release and permit to be completed immediately all sales subject to Section 2001(k)(1) as declared in this order." [Explain which relevant sales this order covers.]

Following this Court's January 10 decision, the Secretary of Agriculture sought a stay of the release of all the Section 2001(k)(1) sales covered by the Court's January 10, 1996 injunction whose release the agency had contested. This stay request was denied by the Court and similarly denied by the Ninth Circuit.

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ARGUMENTS

I.

THE INJUNCTION[S] SHOULD BE
CLARIFIED TO CONFIRM THAT
THE SECRETARY CAN MODIFY AND SUSPEND
THE SUBJECT SALES PURSUANT TO THE
ORIGINAL CONTRACT TERMS

A. This Court Has Authority to Clarify Its Injunction.

A district court retains full jurisdiction to define the scope of an injunction issued by the court. See New York State NOW v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989). In particular, in cases such as this, where a motion for contempt has already been filed against the United States by plaintiff Northwest Forest Resource Council earlier in this litigation, the seeking of clarification is prudent and should be allowed. The Ninth Circuit has clearly stated that a district court does not lack jurisdiction to clarify its original injunction and to supervise compliance. Meinhold v. U.S. D.O.D., 34 F.3d 1469, 1480 n.14 (9th Cir. 1994), citing Hoffman v. Beer Drivers Salesman's Local Union No. 888, 536 F.2d 1265, 1276 (9th Cir. 1976) (appeal from a supervisory order does not divest the district court of jurisdiction to continue supervision of order).

B. By Directing That Sales Proceed Under Originally Advertised Terms, Section 2001(k)(1) Expressly Authorizes The Secretary To Modify, Suspend Or Terminate The Subject Sales.

The first rule of statutory interpretation is that a statute is interpreted and applied according to its plain meaning.

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Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Section 2001(k)(1) explicitly requires the award, release and completion of "contracts" under "the originally advertised terms" The advertised terms expressly incorporate the terms of the contracts. [Confirm when sales are identified/attach advertisements.] Remedial terms, such as those authorizing modification, suspension and termination, are critical, long-utilized and well-known components of these contracts. For example, if a contractor were to begin harvesting outside the designated cutting area or ignore required operating conditions, the Forest Service must be able to take the appropriate remedial actions, including, when necessary, termination. If Congress had intended that these particular remedial provisions were to be singled out as no longer applying, or only applying under particular circumstances, as in the scenario described above, it should have expressly stated so. Absent such an express exemption, one should not be read into the statute.

The contracts, and thus their terms, are creatures of the National Forest Management Act (NFMA), 16 U.S.C. § 472a.⁵ As

⁵ Section 2001(k)(1) provides "notwithstanding any other provision of law" in the same sentence as the direction that sales proceed under original terms. In the absence of an explicit repeal, the contract terms, arising under NFMA, should be given effect to avoid an inconsistency between laws. See In re The Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (finding (continued...))

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this court has recognized, "[a]gency regulations which operate consistently with section 2001(k)(1) . . . remain in effect." Jan. 10 Order at 21. Utilization of the subject contract terms is consistent with Section 2001(k)(1). The statute requires the Secretaries to take actions that ultimately permit the contracts "to be completed." For these sales, suspending the contracts followed by either modification or termination allows completion of that process, either through provision of substitute timber pursuant to the interim final rule or payment of damages provided under the contract, as further explained below. At the same time, the statute protects the Secretaries' exercise of contract authority from challenge under other laws.

1. The Contract Terms Authorize
Suspension of the Contracts.

Provision C6.01 of the subject contracts specifically permits the Forest Service to interrupt a purchaser's operations to prevent environmental damage that may require contract modification or termination. C6.01 -- INTERRUPTION OR DELAY OF OPERATIONS -- provides:

Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

⁵(...continued)
phrase "notwithstanding any other provision of law" is not dispositive where other laws are included by reference).

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(a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2;

(b) To comply with a court order, issued by a court of competent jurisdiction; or

(c) Upon determination of the appropriate Regional Forester, Forest Service, that conditions existing on this sale are the same as, or nearly the same as, conditions existing on sale(s) named in such an order as described in (b). . . .

The Forest Service approved provision C6.01 for use nationally in June 1990, during a time when environmental challenges to Federal timber sales were becoming more common and suspensions of sales for environmental reasons were becoming more frequent. Under such circumstances, this clause authorizing suspension of operations to protect national forest resources became an

⁶ The provision continues:
Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (1) Contract Term Adjustment pursuant to B8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to B8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

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essential tool for effective timber sale contract management, and thus, a critical component of the subject contracts.

Utilization of this suspension provision is particularly appropriate here. Allowing these particular sales to proceed before the Forest Service can determine what modification is necessary or whether cancellation is warranted, would result in "serious environmental degradation or resource damage."

[*Describe environmental problems of sales, once identified.*]

2. The Contract Terms Authorize Modification
or Termination of these Sales

Suspension of a contract, as discussed above, is generally initially utilized to preserve the status quo before the next step is taken to prevent damage to resources. The contracts provide a number of different means for addressing the environmental concerns, with associated remedies for the purchaser. For example, as authorized by the suspension clause, the Contracting Officer can request the purchaser to delay operations, in whole or in part, while the Forest Service decides whether to modify the contract under CT8.3. Provision CT8.3 - CONTRACT MODIFICATION - provides, in relevant part:

Forest Service may make modifications in Timber Specifications in BT2.0, Transportation Facilities in BT5.0, or Operations in BT6.0, or in related Special Provisions, to the extent that such changes are reasonably developed to implement Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended and with land management plans, developed or revised thereunder. Such modifications

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shall be limited to requirements with which the Purchaser can reasonably comply. . . .

Thus, the Forest Service is authorized to modify sale contracts to the extent necessary to comply with land management plans and standards and guidelines. None of the subject sales comply with the relevant Forest Plans or applicable standards and guidelines. Here, the [name] Forest Plan[s] was[were] amended to include the standards and guidelines of the Pacific Northwest Forest Plan. Proceeding with the [identify sales] sales would violate several of these standards and guidelines. First, the contemplated type of harvesting would otherwise not be permitted in a Late Successional Reserve. Second, this type of harvesting would not be permitted in a watershed without a watershed analysis. Road construction, such as that planned to enable the sales to go forward, would also not be permitted. [Confirm which points are applicable once sales are identified.]

Modifications under CT8.3 can take different forms. For example, the Contracting Officer could request the purchaser to delay operations for a set period of time (under CT6.01), while the parties attempt to work out mutually agreeable modifications. In light of the new interim final rule, such modifications may be necessary to substitute timber from outside the sale area for the unharvested portion of the suspended sale.

As explained, on April 3, 1996, the Forest Service published an interim final rule revising existing regulations regarding

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noncompetitive sales of timber based on the Secretary of Agriculture's determination that extraordinary conditions exist. See 61 Fed. Reg. 14618 (April 3, 1996), Interim Final Rule, Disposal of National Forest System Timber; Modification of Timber Sale Contracts in Extraordinary Conditions. The rule allows forest officers to implement modifications to timber sale contracts awarded or released pursuant to section 2001(k), by substituting timber from outside the sale area specified in the contract for timber within the sale area, without advertisement, with the mutual agreement of the purchaser. Without this regulation, the Forest Service was constrained by the competitive bidding requirement to look within the sale contract area for substitute timber in the event of any contract modification. In these cases, such timber is unavailable. [Confirm.] Thus, the Forest Service is now in a position to provide substitute timber, as agreed upon by the purchaser, through the contract modification process.⁷

In the absence of any such mutually agreeable solution, under the contract terms specified, the Contracting Officer may request delay in operations for an indefinite period of time

⁷ Indeed, the agency has already successfully utilized this regulation in reaching an agreement to implement mutual modifications of the First and Last timber sales on the Umpqua National Forest. Unlike the remaining timber in the First and Last sale units, which is in Late Successional Reserves, the substitute harvest units are in matrix lands, as defined in the Northwest Forest Strategy, on the Tiller Ranger District.

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while the Forest Service determines what unilateral modifications are appropriate under the circumstances. For example, the Forest Service may suspend while the contract is modified to increase stream buffers to comply with standards and guidelines. Any such modifications that result in a reduction in available timber could lead to a rate redetermination to reflect resulting changes in the value of remaining included timber. See CT8.3, ¶ 1.

In addition, contract provision C6.25 provides other authority for modifying, or if necessary, cancelling, contracts:
C6.25 -- PROTECTION OF HABITAT OF ENDANGERED, THREATENED, AND SENSITIVE SPECIES -- states that:

Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-5 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract as stipulated in the List of Controlled Areas on the Sale Area Map.

If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species List, Forest Service may either cancel under C8.2 or unilaterally modify this contract to provide additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.

Declaration of XX. See Janicki Logging Co. v. Bruce Mateer, 42 F.3d 561, 562 (9th Cir. 1994) ("Section C6.25 of the contract expressly permitted the Forest Service to 'either cancel' or

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'unilaterally modify [the] contract' in order to provide additional protection for animals that were listed either as threatened or endangered under the Endangered Species Act, or as sensitive by the Regional Forester").

Thus, if protection measures prove inadequate or areas needing protective measures are discovered, under the contract terms, the Forest Service can unilaterally modify the contract to provide the necessary additional protection or cancel the contract.

Here, [identify the sales] sales are in the [describe location], home to [identify threatened or endangered] species. [Include points which continue to remain relevant: First, the Oregon Coast Coho Salmon, which was proposed for listing as a threatened species on July 25, 1995, is found there. Second, the Coastal cutthroat trout (resident and sea-run) is found there and was proposed to be listed as endangered on July 8, 1994. As set forth in the Declaration of XX, on April 14, 1995, the Regional Forester sent a letter to each Forest, including the [name] National Forest, stating that any proposal to list a fish species automatically entitles that species to R-5 sensitive species listing.] Accordingly, contract clause C6.25, applies to these sales. [Explain whether particular contract is being modified or cancelled.]

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As when modifications are made under contract clause CT8.2 discussed above, it is equally clear that prior to modifications under C6.25, suspension of the sale is appropriate. See Thomas Creek Lumber & Log Co. v. United States, 32 Fed. Cl. 787 (1995), appeal pending, 95-5080 (Fed. Cir. filed June 5, 1995). That case involved a timber sale dispute between the Bureau of Land Management (BLM) and a timber company concerning the BLM's suspension of two BLM timber sale contracts in order to protect the northern spotted owl. In analyzing an analogous contract provision, the Court described the BLM's deliberative process as follows:

[A]fter the initial suspension, the BLM begins consultations with the FWS to assess the extent to which continued harvesting under the contract may affect the endangered animal. The purpose of the suspension is therefore prophylactic -- suspension maintains the status quo until an appropriate analysis can be made regarding the effect that continued timber harvesting in the area may have on the endangered animal. Plaintiff's proposed interpretation of Section 41x would negate this prophylactic purpose. It would permit timber harvesting to continue until a new survey could be completed without any consideration of the effect that such continued harvesting would have on the endangered animal previously identified on the contract area. Continued harvesting under such circumstances could potentially destroy an endangered animal and/or its critical habitat. This would seem precisely the type of environmental harm that Section 41x was intended to protect against.

32 Fed. Cl. at 790-91. This reasoning applies with equal force to the present facts. [Explain once sales are identified.]

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3. Contract Clause C8.2 Permits Termination Based on Serious Environmental Degradation Or Inconsistency With Land and Resource Management Plans.

In addition to the remedies discussed above, the Forest Service is expressly authorized under the contracts, under circumstances present here [confirm once sales are identified], to cancel the sale under contract provision CT8.2. Contract Clause C8.2, referred to in the previously discussed contracts clauses, specifically provides:

The Chief, Forest Service, by written notice, may terminate this contract, in whole or in part, (1) to comply with a court order, regardless of whether this sale is named in such an order, upon determination that the order would be applicable to the conditions existing on this sale; or (2) upon a determination that the continuation of all or part of this contract would:

(a) cause serious environmental degradation or resource damage;

(b) be significantly inconsistent with land management plans adopted or revised in accordance with Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended;

(c) cause serious damage to cultural resources pursuant to C6.24;

(d) jeopardize the continued existence of Federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester.

Compensation for termination under this provision shall be calculated pursuant to C9.5, except; compensation for termination under (1) shall be calculated pursuant to

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C9.51 when included in this contract and compensation for termination under (2)(d) shall be calculated pursuant to C9.52 when included in this contract.

Thus, pursuant to C8.2(b), a sale can be terminated for a number of reasons, including environmental degradation, damage to cultural resources, jeopardizing threatened or endangered species or adversely impacting sensitive species, or significant inconsistency with land management plans. As explained above, these sales are not consistent with the applicable plans. [Identify and explain why these particular sales require termination, rather than modification; any evidence that all other avenues have been exhausted.] The standards and guidelines, therefore, direct that these sales should not go forward based on their contract terms alone. [Describe other reasons for termination applicable to particular sale at issue.]

In the event of contract termination, the contract describes the purchaser's remedies. See C9.5; C9.52. If the contract is terminated under C8.2, pursuant to C9.5 the purchaser may be entitled to certain out-of-pocket expenses, the difference between current contract rates and rates for comparable timber, plus other miscellaneous expenses. If the contract is terminated due to a determination that the contract may jeopardize the continued existence of a threatened or endangered species, the purchaser's remedies are more limited under C9.52.

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[Explain reasons for termination of particular sale and damages available to purchaser as part of the contract completion process.]

All of the scenarios discussed above are expressly authorized by the relevant contracts and allow the contracts to be finally resolved, consistent with the plain language and intent of section 2001(k) (1). The contracts will either be modified to provide substitute timber, after a short suspension, unilaterally modified to prevent serious environmental harm with appropriate rate redeterminations applied to remaining uncut timber, or terminated with compensation to the purchaser as provided under the contract. Section 2001(k) brought these sales back to life, and in accordance with their original terms, they will now be finally resolved, upon clarification by this Court that such actions are consistent with the statute and this Court's orders.

II.

ALTERNATIVELY, THE ISSUES
DISCUSSED ABOVE
WARRANT THE COURT'S AGREEMENT TO ENTERTAIN
OR GRANT A POSTJUDGMENT MOTION.

If, upon examination of this issue now directly before the Court, the Court determines that jurisdiction over this matter is vested solely with the Ninth Circuit to modify or clarify the [date] injunction, the Secretary requests that this Court consider a motion pursuant to Crateo, Inc. v. Intermark, Inc.,

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536 F.2d 862, 869 (9th Cir. 1976) (party seeking relief from district court's order, at same time order is on appeal, must follow procedure whereby first, matter is presented to district court for decision as to whether district court would entertain or grant motion seeking to alter or modify order; and second, if district court indicates that it would entertain or grant motion, moving party can move forward and request limited remand from appellate court).

Conclusion

For the reasons set forth above, the Secretary of Agriculture requests a clarification that 2001(k)(1), as interpreted by this Court, allows the agencies to rely on the subject contracts' original terms to modify, suspend or terminate the contracts as part of the contract completion process. Alternatively, the Secretary requests this Court to modify its [date] injunction, or if deemed necessary, direct the parties to proceed in accordance with the Crateo procedure for obtaining a modification.

Dated:

Name	Date
<i>Steven Reich</i>	<i>6/4/99</i>

Counsel

Name	Date
Steven Reich	6/4/99

Counsel