SHAWN MONTEE, INC., dba SHAWN MONTEE TIMBER COMPANY,	)	**AGBCA Nos. 2003-132-1**
	)	**2003-133-1**
	)	**2003-134-1**
Appellant	)	**2003-135-1**
	)	**2003-136-1**
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RULING ON GOVERNMENT'S AND APPELLANT'S MOTIONS FOR SUMMARY JUDGMENT

March 10, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Separate opinion, concurring in part, dissenting in part, by Administrative Judge VERGILIO.

BACKGROUND

These appeals involves five timber sale contracts that were awarded by the U. S. Department of Agriculture, Forest Service (FS or Agency) to Shawn Montee Inc., dba Shawn Montee Timber Company (Appellant or Shawn Montee) of Post Falls, Idaho, between July 31 and October 31, 2000. The sales were sold as part of the FS Douglas-fir Bark Beetle Project (the Project), the purpose of which was to stem an outbreak of bark beetles by removing trees from already infested portions of the sales area. Four of the sales were located in the Idaho Panhandle National Forest (IPNF) and one in the nearby Colville National Forest (CNF). On February 23, 2001, the Ninth Circuit enjoined all timber harvesting on the Douglas-fir Bark Beetle Project in the IPNF and CNF. That resulted in the FS suspending all five of Shawn Montee's contracts. These appeals arise out of that suspension. On February 13, 2003, Appellant filed a Motion for Summary Judgment. On May 16, 2003, the FS filed an Opposition and a Cross-Motion for Summary Judgment. On August 1, 2003, the Appellant filed a reply and opposition to the Government's motion. This Ruling addresses those motions.

The Board has jurisdiction to hear these appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACTS

1. In response to a bark beetle infestation during 1996-1997, the FS (IPNF and CNF) developed the Douglas-fir Bark Beetle Project, a broad plan to salvage log infected Douglas-fir stands in those National Forests (NFs). The project proposed harvesting approximately 150 million board-feet, affecting 19,000 acres on IPNF and 4,000 on CNF. (Appeal File (AF) 1662, 1682.)

2. During the winter of 1998/99 the FS began preparing a Draft Environmental Impact Statement (DEIS). On January 19, 1999, the IPNF and CNF jointly issued a DEIS on the project (AF 1662). The DEIS included several alternatives. After the DEIS was issued, the Forest Supervisors for each of the respective forests requested that the Chief of the FS, U. S. Department of Agriculture (USDA) grant them an exemption from the Agency's administrative automatic stay on the entire project, if an administrative appeal relating to environmental issues was submitted. An administrative appeal imposes an automatic stay on any project implementation until 15 days following the disposition of the administrative appeal. On March 10, however, the Forest Supervisor for IPNF modified his exemption request, limiting the request to 4,000 acres on IPNF. It was based on fire concerns, hazardous firefighting conditions and the risk of the spread of a beetle epidemic. (AF 1662.) On April 8, 1999, the Acting Deputy Chief for the FS granted the IPNF supervisor's request. The exemption excluded 4,000 acres on IPNF from the automatic stay, should an administrative appeal be filed on the IPNF portion of the project. Salvage logging was allowed to proceed on the exempted 4,000 acres. (AF 1663.)

3. On June 11, 1999, the Forest Supervisors of the IPNF and CNF each issued a Record of Decision (ROD) in which they chose one of the alternatives and implemented the project on IPNF and CNF (AF 1682, 3602).

4. On June 14, 1999, the chosen alternative on the projects, to salvage logs, was released to the public and presented in the Final Environmental Impact Statement (FEIS). That FEIS contained the original alternatives of the DEIS plus two additional alternatives. According to the FS, the chosen alternative was responding to the need to address the Douglas-fir Bark Beetle outbreak, restore the vegetation and aquatic ecosystems, and reduce fuel buildups contributing to forest fires in CNF and IPNF, respectively (AF 1682).

5. The Project's FEIS and RODs were administratively appealed by several individuals and groups pursuant to 36 CFR 215. The time to appeal was 45 days following published notice of the Forest Supervisors' decisions to proceed with the project. The parties submitting the administrative appeal claimed that the FS environmental review of the project was inadequate and contended that the project did not protect forest resources. Those administrative appeals were not immediately resolved (as discussed below, the FS administratively denied those appeals in September 1999). Since an administrative appeal called for an administrative stay, absent an exemption, nothing was going to move forward during the pendency of the administrative appeal, except for work on the 4,000 acres that had been exempted on IPNF by the Acting Deputy Chief for the FS. (AF 1683.)

6. On June 15, 1999, a number of parties, including the parties who had administratively appealed the decision on IPNF, as well as another environmental plaintiff, hereinafter referred to as the Montana environmental plaintiff (MEP) filed suit in the U.S. District Court for Montana, challenging the entire project on grounds that the FS had violated the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) (AF 1682). In addition, the MEP brought a motion seeking a preliminary injunction to enjoin the harvest operations that had been immediately scheduled on the 4,000 acres which had been exempted from the Agency's administrative automatic stay (AF 1682).

7. The Montana District Court transferred the MEP lawsuit to the U.S. District Court for Idaho (AF 1683).

8. A month later, on July 15, 1999, the Idaho District Court held an evidentiary hearing on the MEP's Motion for Preliminary Injunction on the exempted 4,000 acres (AF 1661). The MEP alleged four NEPA violations (AF 1661-63).

9. On August 17, 1999, the Idaho District Court issued a 13-page Order denying the MEP motion for preliminary injunction. The court found that plaintiff failed to establish that it would succeed on the merits and in balancing the equities, the court concluded that the plaintiff failed to establish that it would be more harmed than would the public and adjacent landowners from the risk of extreme forest fires. In addition, the court found that plaintiff's proposal for restoration with no commercial logging was adequately addressed in the DEIS, and the views of plaintiff were considered by FS. The court further found there was not a pre-commitment of resources as charged by plaintiff. The court found that the FS had looked at alternatives, including that proposed by plaintiff, and the court found that plaintiff had failed to show that the DEIS was so inadequate so as

to preclude meaningful analysis, finding that the preferred alternative fell within the spectrum of alternatives presented and plaintiff failed to show that the FS response to the comments of plaintiff and others was in violation of the applicable regulations. (AF 1661-74.)

10. IPNF began awarding timber sale contracts within the 4,000 acre administrative exemption following the August 17, 1999 decision.

11. Meanwhile, the administrative appeal review process on the entire project proceeded pursuant to 36 CFR 215.17. The Region 1 Appeals Deciding Officer (Region 1 of the FS) (ADO) reviewed the administrative appellant's arguments, the appeal record, information contained in an August 13, 1999, IPNF letter to a District Office (DO), and the Appeal Review Officer's documented analysis and recommendation. (AF 1654-55.)

12. On September 7, 1999, the Region 1 ADO affirmed the IPNF Forest Supervisor's ROD to implement the project. Administrative appellants were informed of the Region 1 ADO affirmation in a letter dated September 7, 1999. (AF 1654-60.) Similarly, by letter of September 29, 1999, the Region 6 ADO affirmed the ROD of the Forest Supervisor regarding the ROD to implement the CNF project (AF 3575).

13. In February 2000, 6 months after the Idaho ruling of August 17, the MEP voluntarily dismissed the transferred Idaho District Court lawsuit (AF1683).

14. Within that same time frame, on February 1, 2000, environmental groups, including the Kettle Range Conservation Group (Kettle Range environmental plaintiffs (EPs)) filed a lawsuit in the Eastern District of Washington (Eastern Washington Kettle Court) (CS-00-0031-JLQ) seeking to enjoin only harvesting and work on the CNF portion of the Project. The lawsuit asserted violations of NEPA by the FS. This lawsuit is referred to here and in various district court cases as "Kettle Range 1". The environmental groups alleged various violations of NEPA and NFMA and sought an injunction of the project on the CNF, or an order directing the FS to prepare a supplemental EIS addressing changes that had been made to the project on the CNF since it had been approved. (AF 3574-75, 3631.) Shortly after the above matter had been filed, the parties stipulated that the defendants would voluntarily cease implementation of the project until the court ruled on cross-motions for summary judgment (AF 3640).

15. On May 25, 2000, plaintiffs, The Land Council; Idaho Sporting Congress, Inc.; The Ecology Center and the Kootenai Environmental Alliance (Eastern Washington EP's) filed a lawsuit in the District Court for Eastern District of Washington regarding both IPNF and CNF. The plaintiffs here requested a temporary restraining order but this time sought to stop the Project on all forests. The plaintiffs claimed that the decision to implement the Project violated NEPA, NFMA and the Clean Water Act (CWA). (AF 1683, 1690.)

16. During the 9-month period from August 17, 1999, the date the District Court denied the MEPs injunction to May 25, 2000, the IPNF had entered into 12 timber sale contracts to implement the project (AF 1691). None of those contracts are in issue in these appeals.

17. In a May 25, 2000 lawsuit on the entire project, the Eastern Washington EP's renewed the previously alleged NEPA and NFMA violations and added claims under the Administrative Procedures Act (APA) and CWA, as well as regulations implementing those statutes. In this lawsuit, they also sought their first injunction on the entire project. This lawsuit was essentially the same as the lawsuit previously filed by the MEPs in the Montana and Idaho courts. (AF 1683.)

18. On June 23, 2000, the Eastern Washington Lands Court heard arguments on plaintiffs' first injunction motion seeking to enjoin the entire project (AF 1683). It would later be denied by a letter ruling dated July 25, 2000.

19. On July 12, 2000, the Eastern Washington Kettle Range Court dismissed the Kettle Range environmental plaintiffs' lawsuit, Kettle Range I, concluding that plaintiffs lacked standing. The court found that the plaintiffs had failed to establish an injury-in-fact. The court noted, in its opinion dismissing the suit, that "This is not to say that the court does not believe that plaintiffs have raised serious questions about whether Federal Defendants violated NEPA when preparing the Project FEIS." (AF 1740, 3600-13.)

20. On July 14, 2000, the same Kettle I EPs filed a second lawsuit, commonly referred to as Kettle II. (Lands Council v. Vaught, CS-00-185-EFS). This dealt only with the CNF portion of the project. The allegations were the same as those in Kettle I. (AF 3632.)

21. On July 25, 2000, in a one-page letter, Judge Shea of the Eastern Washington Land's Court denied the Eastern Washington environmental plaintiffs' request for a restraining order/preliminary injunction on the entire Project. All parties were informed that an Order would follow shortly. That decision or order was later issued on December 6, 2000 (addressed in detail below). The July 25 letter from Judge Shea did not affect the current ongoing timber sale operation on the IPNF, it only affected CNF. IPNF had in fact been proceeding, despite the filing of the Eastern Washington environmental plaintiffs' second lawsuit. (AF 1679.)

22. During the pendency of the plaintiffs' request in the above decision for a temporary restraining order (TRO), the FS advertised and awarded the Bismark and Pleasant No Bug Heli sales. Bids were received on IPNF Bismark Timber Sale on June 13, 2000, and awarded to Appellant on July 19, 2000. Bids were received for IPNF Pleasant No Bug Heli Timber Sale on June 28, 2000. That contract was awarded to Appellant on July 19, 2000 (AF 671, 688, 866-67, 1204, 1214, 1411).

23. At the time the Bismark and Pleasant No Bug Heli sales were awarded (summer of 2000), no court had enjoined the award of timber sales. There had been the earlier agreement in February 2000 regarding CNF. (Findings of Fact (FF) 14.) Work activity did not start on the Bismark contract

immediately. Rather, the first activity occurred about 3 months after award, with the first apparent activity being a pre-work meeting held on October 18, 2000. (AF 1484-90.) Appellant removed the first timber volume in November 2000 (AF 1547-50). Operations on the sale ceased soon thereafter, closing for the season on or about December 19, 2000 (AF 1531). As to the Pleasant No Bug Heli sale, Appellant removed the first volume of timber in September 2000. There, operations continued until February 26, 2001. (AF 1062-64, 1026-28.)

24. CNF advertised the Bead/Lodge Salvage Sale on August 2, 2000. When that sale was advertised, it included the following public notice. (AF 3524.)

> Bead/Lodge Salvage is currently under litigation as part of the Douglas-fir Beetle Project Environmental Impact Statement. Litigation may delay, restrict or prohibit sale award. (AF 3524.)

25. On August 17, 2000, the Eastern Washington Kettle Court issued a temporary restraining order on CNF (AF 3638). Thereafter, on August 18, 2000, the FS held an oral auction on the Bead/Lodge project and again the information in the above- cited written notice was announced (AF 3549-50).

26. On August 23, 2000, the Eastern Washington Kettle Court dismissed plaintiffs' Kettle Range II lawsuit (AF 3629). The court's dismissal of Kettle Range II also included vacation of the court's temporary restraining order, which had been issued on August 7, 2000 (AF 3638). In that August 23 dismissal, the court concluded that plaintiffs were trying to side step Kettle I and that the right remedy was to appeal Kettle I to the Ninth Circuit. Kettle Range II had only involved CNF.

27. On August 31, 2000, the CNF awarded the Bead/Lodge contract to Appellant (AF 3115-16). On September 8, 2000, Kettle Range environmental plaintiffs (Kettle I) appealed the Eastern Washington Kettle Court's decision of July 12, 2000, to the Ninth Circuit (AF 3640).

28. On September 21, 2000, the Washington Office of the USDA FS approved a request by the Regional Forester of Region 6 to proceed with the award of timber sales on CNF. In that approval, the Director of Forest Management cited favorable rulings for the Government on Kettle Range I and II and also cited the fact that in Lands Council v. Vaught, CIV CS-00-185-EFS (E.D. Wash.) the court indicated in July that it would deny plaintiffs' motion for preliminary injunction. It is not clear how this information squares with the August 31, 2000 award of Bead/Lodge (FF 27) (AF 3551-52.) On September 28, 2000, the plaintiffs filed a motion for an injunction from the Eastern Washington Kettle Court that would have halted all further implementation of the Project (AF 3640-41).

29. CNF and Appellant held a pre-work meeting on October 2, 2000 on Bead/Lodge (AF 3117-36). On October 4, Appellant notified CNF that it wanted to proceed. Appellant proceeded with permission on October 5, 2000. (AF 3140-41.) At this point, there were no injunctions in place on any of the awarded projects.

30. On October 12, 2000, after hearing plaintiffs' Motion for Preliminary Injunction Pending Appeal, the Eastern Washington Kettle Court enjoined all project timber sales on the CNF, including Appellant's Bead/Lodge Salvage Sale, pending resolution of Kettle Range environmental plaintiffs' appeal of the court's July 12, 2000 decision. The injunction, however, allowed ongoing operations to continue. In allowing the injunction, the court noted that the Supreme Court had noted in cases such as this that "an environmental injury, by its nature can seldom be remedied by money damage and is often permanent or at least of long duration, i.e. irreparable." *Citations Omitted.* The court, stating, "Consequently, when environmental injury is "sufficiently likely," the balance of harm will usually favor the issuance of an injunction to protect the environment." *Citations Omitted*. (AF 1741, 3639-44.) Although the court granted the injunction, it did so only as to the portions of the Project which had not yet been implemented. Further, the court provided that the injunction would remain in place provided that plaintiffs satisfy the court that they were unable to procure a bond which would secure against any losses the defendants suffer as a result of the appeals and injunction. (AF 3642.)

31. On October 17, 2000, the CNF CO suspended operations on the Bead/Lodge Salvage Sale, pending resolution of that same Kettle Range environmental plaintiffs' appeal of the court's July 12, 2000 decision (AF 3639-44). On October 17, 2000, Appellant continued operations through the normal operating season of October 31, 2000, as had been previously allowed by the Eastern Washington Kettle Court's October 12 order (AF 3146, 3267-76, 3642).

32. Thereafter, on October 20, 2000, the FS awarded the IPNF Beauty & Beast Heli Bug timber sale. On October 30, 2000, it awarded the Blue Swan Heli Bug timber sale (on IPNF). Appellant never performed work on these sales. (AF 219-20, 512-13.)

33. On October 23, 2000, the Eastern Washington environmental plaintiffs (in Lands Council v. Vaught) filed their Second Injunction Motion, which included a motion for reconsideration on their First Injunction Motion (which had been previously denied on July 25, 2000), and their Renewed Motion for Temporary Restraining Order and Preliminary Injunction (AF 1683-84). The court treated Eastern Washington environmental plaintiffs' First Injunction Motion and Second Injunction Motion as motions for preliminary injunction on the entire project (AF 1688).

34. On December 6, 2000, in follow-up to its July 25, 2000 letter decision, the Eastern Washington Lands Court issued an order denying environmental plaintiffs' motion for a temporary restraining order and preliminary injunction on the project. This 44-page opinion (AF 1680 -1724) was the follow-up to the same court's July 25, 2000 denial of the environmental plaintiffs' temporary restraining order and preliminary injunction on the project. The court provided approximately 29 pages of environmental analysis assessing the plaintiffs' likelihood of success on the merits. (AF 1691-1720.) The court denied environmental plaintiff's motion because the "public interest" opposed such an injunction (AF 1723). The court pointed out that the public had an interest in the beneficial effects of the Project, which it identified to include reduced fire danger and restoration of ecosystems. The court stated that by halting the project and hence the harvesting and removal of the beetle-damaged timber, an injunction could perpetuate and increase the risk of a catastrophic fire in

the summer of 2001. (AF 1721.) Additionally, in its decision, the Eastern Washington Lands Court cited Alpine Lakes Prot. Sec'y v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) in support of its decision, noting that in Alpine, the Ninth Circuit had refused to enjoin logging of insect- infested trees, despite allegations that the continued logging would irreparably harm the wilderness characteristics of the area. The Eastern Washington Lands Court noted that the Ninth Circuit's refusal to enjoin was based upon the fact that absent prompt removal of insect-infested trees, such trees would become economically worthless. While the Eastern Washington Lands Court denied the plaintiffs' motion, the court did find that "A review of the Plaintiffs' claims, reveals that for purposes of the preliminary injunction motions, there is a probability that two will succeed on the merits: (1) the claim that NFMA was violated because the FEIS fails to set forth sufficient information to demonstrate compliance with the IPNF LRMP fish standard, and (2) the claim that the FEIS violated NEPA by failing to disclose and analyze the impacts of ongoing and planned logging within the IPNF Project area." The court went on to identify four other claims that it saw had the possibility of succeeding. The court said, "Although a preliminary injunction would typically be granted because of probability that two of Plaintiffs' claims will succeed on the merits, the public interest opposes an injunction." (AF 1722-23.)

35. The Eastern Washington environmental plaintiffs appealed the Eastern Washington Land Court's December 6, 2000 decision to the Ninth Circuit and requested an injunction on all project activities, pending disposition of the appeal (AF 1741).

36. Effective January 17, 2001, the Eastern Washington Kettle Court lifted its first injunction (issued October 12, 2000) on CNF because the Kettle Range environmental plaintiffs failed to post a $10,000 security bond (AF 3645-646). As of January 17, 2001, the October 12 injunction was the only one in effect as to the Project on either CNF or IPNF. The suspension of operations on Bead/Lodge had remained in place until the District Court lifted the injunction. The CO, on Bead/Lodge, notified Appellant of the lifting of the contract suspension on January 25, 2001. (AF 3152.) At that time, Appellant could not resume work, since it was outside the normal operating season.

37. On February 23, 2001, the Ninth Circuit granted Eastern Washington environmental plaintiffs' motion for an injunction pending appeal on all activities within the project, pending disposition of plaintiffs' appeal of the Eastern Washington Lands Court decision of December 6, 2000 (Lands Council v. Vaught) (AF 1725-26). This was the first injunction affecting the entire project. The Ninth Circuit injunction was a three-sentence order which provided no elaboration on the merits of environmental plaintiff's allegations. The court imposed the injunction on all project activities, pending disposition of the environmental plaintiff's appeal of the December 6, 2000 decision. (AF 1725-26.) According to the FS, at that point, the FS did not know how long it would take for the Ninth Circuit to issue its decision.

38. On February 26, 2001, and pursuant to clause C6.01 of the timber sales contract, the IPNF CO suspended the project related timber sale contract operations. This was in direct response to the

Ninth Circuit February 23, 2001 Order. (AF 240-42, 903-05, 1446-48.) The FS also attributed suspension of Bead/Lodge to CT6.01. The C6.01 clause in the IPNF contracts provides as follows:

> C6.01- INTERRUPTION OR DELAY OF OPERATIONS. (10/96) Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:
>
> (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
>
> * * * *
>
> Purchaser agrees that in the event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (i) Contract Term Adjustment pursuant to B8.21, or (ii) 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, attorney's fees, 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.

(AF 123-24.)

The Bead/Lodge sale was suspended pursuant to CT6.01. It provided:

> CT6.01 - INTERRUPTION OR DELAY OF OPERATIONS. (10/96) Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contract Officer:
>
> (a) To prevent serious environmental degradation or resource damage that may require contract modifications under CT8.3 or termination pursuant to CT8.2;
>
> (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).

> Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (i) Contract Term Adjustment pursuant to BT8.21, or (ii) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to BT8.21, 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, attorney's fees, 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.

(AF 3054-55.)

39. In the letter suspending the sales, the CO on IPNF stated, "We expect the Ninth Circuit to issue a decision within a month or so on the appeal. The appeal is only on the injunction. Meanwhile, the issues of the case are before Judge Shea in U.S. District Court for the Eastern District of Washington." (AF 903.) On May 9, 2001, before the normal operating season resumed, the CNF contractually suspended the Bead/Lodge salvage sale pursuant to CT6.01 (AF 3054-55, 3153).

40. According to Appellant, as of the date of suspension of the Bead/Lodge sale on CNF, the Appellant had removed 3,728 MBF of timber from the sale areas. According to Appellant, it anticipated removing all of the remaining included timber on the sales during the 2001 Normal Operating Season of each contract. As a result of the suspension however, Appellant was allowed to remove only an additional 528 MBF, all of which had been felled before the suspension.

41. On April 20**,** 2001, the Ninth Circuit issued a memorandum decision in CV-00-0031-JLQ, Kettle Range I (this related back to October 12, 2000, when the lower court had dismissed this suit on the basis of a lack of standing). The Ninth Circuit in this April 20 ruling allowed environmental plaintiffs to argue the issue of standing to file their lawsuit, thereby reversing the decision of the lower court. On May 8, 2001, the Ninth Circuit denied plaintiffs' emergency motion for injunction pending issuance of a mandate. (AF 3649-54.) It should be noted, however, that as of April 20, all sales were suspended as a result of the February 23, 2001 injunction.

42. On July 10, 2001**,** the Kettle Range I Court issued a 51-page Memorandum Order granting summary judgment in favor of the environmental plaintiffs. This case had involved only the CNF. In its July 10 ruling, the court had determined that the FS had violated its environmental obligations because in its FEIS, the FS had failed to adequately consider the condition of the soils within the project area, failed to perform proper cumulative effects analyses and failed to address the extent to which the Project could have been financed without the use of timber sales. Based on these conclusions, the district court issued another injunction against the FS proceeding with the project on the CNF pending the FS compliance with its statutory obligations. This decision did not address IPNF, which was still subject of another suit. The FS did not seek rehearing nor did it appeal the district court ruling. In addition, on November 11, 2001, the district court issued a stipulated order

and under it, the FS had agreed to pay the environmental plaintiff's costs and fees under the Equal Access to Justice Act (EAJA) in an amount in excess of $50,000. Appellant points out that under EAJA, a party is entitled to relief only where the position of the Government is not "substantially justified." (AF 3655-3706.) While that is the standard for a court or board awarding EAJA fees, the Government decision to pay such fees may be based on a variety of factors including the economics of defending the claim for fees.

43. In its decision of July 10, 2001, the court also noted, however, that Defendant-Intervenor is correct that a finding that an agency has violated NEPA does not automatically result in an injunction and the court must determine whether the Project would result in irreparable injury and, if so, balance the completing claims of injury and consider the effect on each party of the granting or withholding of the requested relief. The court continued that in an environmental case such as that in issue, the scales from the outset are tipped in favor of injunction. Where the court finds that there would indeed be injury, in the case at point, the permanent removal of thousands of trees, the defendants must come forward with "unusual circumstances" that would indicate an injunction would be inappropriate. (AF 3696.) Finally, it must be noted that as to a number of issues that had been raised by the plaintiffs, the court found that the FS had complied with NEPA. As of July 10, the timber sales on the Project had already been suspended in direct response to the Ninth Circuit order in February (Eastern Washington Lands Court) to enjoin all project activities. (AF 3655-3706.)

44. On August 14, 2001, the Ninth Circuit reversed and remanded back to the Eastern Washington Lands Court the Washington Lands Court's December 6, 2000 decision. That December decision had addressed both CNF and IPNF and had been the subject of the earlier Ninth Circuit February 23, 2001 preliminary injunction. The February decision of the Ninth Circuit however, was just three sentences and had addressed only the appropriateness of an injunction on the project and had not addressed the merits. The August 14, 2001 ruling from the Ninth Circuit similarly did not go to the merits and again addressed the matter of the preliminary injunction. In reversal and remand to the lower court, the circuit determined that the district court had based its opinion on errors as to the risk of catastrophic fire in 2001 and that the court should consider the appropriateness of granting the injunction without relying on that erroneous finding of fact. The court found that in issuing the decision on the basis it did, the court below had abused its discretion. The decision further extended the injunction (which had been issued in February 2001) pending appeal of the lower court's denial of plaintiffs' motion for preliminary injunction or until the matter was finally disposed of on the merits. This order affected both forests and thus all of the Project's timber sale contracts. (AF 1735-36.)

45. As of August 14, 2001, the various cases had proceeded to a point where the FS had only one unfavorable ruling which had actually discussed the merits of the environmental challenge. That was the Eastern Washington Kettle Court ruling on July 10, 2001, which had determined that the CNF portion of the Project required further NEPA analysis.

46. The FS points out that it was not until March 29, 2002, 7 months later, that the Eastern Washington Land Court ruled on the merits (AF 1737-825). On March 29, 2002 the court issued

"ORDER GRANTING IN PART AND DENYING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT, AND GRANTING PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION." The order was 83 pages. The court noted that it had heard oral arguments in the case on March 9, 2001, approximately a year earlier. In its lengthy determination, the court reviewed many aspects of the environmental review process. On five issues (a number with sub-parts), it found that the FS had violated either NFMA or NEPA. Among these issues were that the FEIS had failed to demonstrate consistency with the FS's old growth standards, and the FEIS contained inadequate cumulative effects analyses and failed to fully disclose certain information regarding impacts to water quality on both CNF and IPNF. On four issues, again with multiple sub-parts, the court found that the FS had complied with its obligations. (AF 1814-17.) The district court issued a permanent injunction, basing that on the finding that the plaintiffs had properly invoked the presumption that a permanent injunction should flow from the court's finding that the defendants had violated NEPA's procedural requirements. The court noted that the Ninth Circuit recognized only one exception to the usual rule, that being when the grant of an injunction would cause irreparable harm. The court found that the defendants had not established irreparable harm. (AF 1819-20.) The FS did not appeal the district court ruling.

47. On May 22, 2002, the court amended in part the Order of March 29, 2002, responding to Defendants' Motion for Clarification or in the Alternative, to Amend Judgment. The parties were concerned as to the scope of the injunction as to the logging and road construction. In clarifying, the court provided that defendants were enjoined from proceeding with road construction or logging activity on the Project areas of the IPNF and CNF until such time as the FS had fully complied with the requirements of NEPA, NFMA, APA, CWA, but were not enjoined from carrying out other Project activities. (AF 1822.)

48. By March 29, 2002, Appellant's timber sales contracts had been suspended for 399 days. The FS asserts that the length of the suspension and the suspension were not its fault but simply reflects the time it took for the judiciary to work. It asserts that it had no control over the judicial process and as such waited, and "had no choice but to maintain the contract suspensions in compliance with the Ninth Circuit Orders of February 23, 2001, and August 14, 2001." The FS asserts that the Board cannot find that delay caused by Ninth Circuit orders was of sufficient magnitude or hindrance to constitute breach by the Agency, again reiterating that the 399 days was the result of the judicial process.

49. Appellant, while acknowledging that the FS had authority to suspend under C6.01, so as to comply with a court order, alleges that the FS suspension of February 26, 2001, breached the FS implied duty to cooperate and not hinder Appellant's performance.

50. Going back in time to the initial preliminary injunction of February 23, 2001 by the Ninth Circuit (Eastern Washington Lands Court), Appellant and the FS (IPNF and CNF) were unable to negotiate a mutual cancellation of Appellant's five awarded contracts (AF 250, 545, 916, 1458, 3171). As noted earlier, work had begun on two of the contracts, IPNF Pleasant No Bug Heli and the Bismark contracts. According to the FS, the Appellant was not completing the contract work

and the FS then issued a notice of breach on August 12, 2002. (AF 932-33,1474-75.) During the time period of August 26 to September 3, 2002, Appellant submitted five claims based upon the FS's alleged "lengthy and ongoing suspension," which Appellant contended precluded it from harvesting timber. In a letter of September 10, 2002, Appellant declared the FS in breach of the Pleasant and Bismark sales. (AF 936, 1480.) On September 27, 2002, the IPNF CO terminated the Pleasant and Bismark contracts based on Appellant's alleged breach and failure to complete contractual work (AF 939, 1483). By letter dated October 21, 2002, the USDA-Forest Service National Director of Forest and Rangelands canceled Appellant's contracts on Beauty & Beast (IPNF), Blue Swan (IPNF), and Bead/Lodge Salvage (CNF) (AF 266, 560, 3236). Bead/Lodge was terminated pursuant to CT8.2 of the sales contract.

51. In August and September 2002, Appellant filed claims for damages with the CO for the respective contract sales citing that the damages resulted from the FS's suspensions, asserting that the FS's suspensions were improper, unduly long and a breach of the FS implied duty to cooperate and not hinder Appellant's performance (AF 282, 580, 1105, 1582, 3185). In October 2002, the FS issued separate final decisions on each contract, denying Appellant's claim for each in full. On November 19, 2002, Appellant filed timely Notices of Appeal as to each final decision. The appeals were docketed as follows: AGBCA Nos. 2003-132-1, 2003-133-1, 2003-134-1, 2003-135-1 and 2003-136-1.

52. While the Board recognized that there are some differences (particularly as to dates, status of sales and location) the parties agreed that the appeals would be treated together for purposes of processing.

53. In its Complaint, which covers all five appeals, Appellant set out four counts, two of which are pertinent to this motion. The two pertinent counts, each claiming breach, are as follows: Count I, The Suspension Was Unauthorized and Count II, The Suspension Was of Unreasonable Duration. Count III addressing Out-of-Pocket Expenses under C6.01 and Count IV addressing FS Assumed Liability for Timber Value Loss are not involved in the motion.

54. On February 13, 2002, Appellant filed a motion for summary judgment as to Counts I and II of its Complaint. The basic contentions of the Appellant's Motion were as follows. The reference to C6.01 also refers to CT6.01.

> (1) Whether despite FS putative authority contained in contract clause C6.01 to suspend Appellant's operations in order to comply with a court order, the FS February 26, 2001 suspension breached its implied duty to cooperate and not hinder Appellant's performance because the court order which precipitated the suspension resulted from the FS's adjudicated failure to meet its statutorily imposed environmental obligations prior to putting the sales out for bid; (2) Regardless of FS suspension authority, whether the FS suspension was for a per se unreasonable duration; and (3) Regardless of FS suspension authority, whether, under the

circumstances the suspension was unreasonable in duration where it was so long that during the term the contracted-for timber became worthless.

55. On May 16, 2003, the FS submitted a cross-motion for summary judgment as well as a memorandum in support of the motion and in opposition to Appellant's motion. The FS asserted that it did not breach its implied duty to cooperate and not hinder performance and on that basis asked for summary judgment.

56. On August 1, 2003, Appellant filed Appellant's Combined Reply in Support of Its Motion for Summary Judgment With Respects to Counts I and II and Opposition to the Government's Cross-Motion for Summary Judgment (65 pages plus attachments).

57. On August 5, 2003, Appellant submitted a Motion in Limine where it asked for an order prohibiting the FS from asserting three specific points, which Appellant asserted were not addressed in the FS Memorandum in Support of its Cross-Motion and Opposition. Appellant contended that the FS had failed to respond in its Opposition to Appellant's argument that the suspension of the contract was per se for an unreasonable duration and that the FS suspension was unreasonable under the circumstances. Appellant asserted that the FS should be precluding from raising such defenses. Appellant also asked that the FS be prohibited from including in its reply any argument that the FS properly terminated the contracts pursuant to C8.2. The presiding judge denied the motion by letter of August 5, 2003, citing the Board's desire for a full record. As a postscript, the matter of termination is dealt with at the close of the discussion. The Board did not see that as an issue being argued by the FS here on summary judgment.

DISCUSSION

LEGAL STANDARD

This matter is before us on summary judgment. In deciding such a case we take the facts in a light most favorable to the non-moving party. If a jury could find in favor of that party, then we cannot properly grant summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986). American Growers Ins. Co. , AGBCA No. 98-200-F, 00-2 BCA ¶ 30,980. As the court stated in Anderson, "At the summary judgment stage the judge's function is not* * *to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. In performing this function, the court treats any fact as "material" if that fact "might affect the outcome of the suit under governing law." and the [*15] court will conclude that a dispute over a material fact "is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Id*. at 248. In determining whether a trial is necessary, the court must resolve any disputes over material facts in favor of the nonmovant and draw all inferences in its favor. *Id.* at 255; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

It is not appropriate for this Board to grant summary judgment where there are "unexplained gaps" in the movant's evidence, Adickes v. V.S.H. Kress & Co., 398 U.S. 144, 26 L.Ed. 2d 142, 90 S. Ct. 1598 (1970), particularly if those gaps relate to issues on which the movant will bear the ultimate burden of proof at trial. See, e.g., Lencco Racing Co. v. Jolliffe, 1999 U.S. App. LEXIS 14239 (Fed. Cir. 1999). Moreover, a mere assertion by one party that its motion rests only upon undisputed facts does not relieve the court of its responsibility to determine the appropriateness of summary disposition of the case. See, e.g. Lockheed Martin Corp. v. United States, 49 Fed. Cl. 241 (2001). In a matter before a court on summary judgment, a court must deny summary judgment if there is reason to believe that the better course would be to proceed to trial in order to obtain a full hearing of all the facts that may bear upon the outcome of the case. See Anderson, 477 U.S. at 255.

Throughout its Memorandum in Support of its motion, Appellant takes the position that the salient facts are not in dispute and the only question before the Board is what Appellant characterizes as the legal conclusion to be drawn from those facts, which it says is proper for resolution on summary judgment. Appellant's position is an oversimplification and does not properly characterize the matter or issues before us. Notwithstanding the label placed by Appellant, what Appellant is asking the Board to do is to make a factual conclusion from the various evidence as to whether or not the FS was reasonable. The deciding question here of reasonableness is a factual one, where we line up the reasons supporting the reasonableness of the FS actions against the evidence indicating otherwise. If there is sufficient evidence from which a trier of fact could find in favor of the non-moving party, then, for summary judgment purposes, that ends the matter.

BREACH DUE TO FS FAILURE TO COMPLY WITH STATUTES

Appellant filed this motion prior to the decision of the Court of Appeals for the Federal Circuit in Scott Timber, 333 F.3d 1358, 1370-71 (Fed. Cir. 2003). In Scott Timber, the court found that a suspension due to the Government's failure to comply with a statute, could constitute such a breach, notwithstanding the authority to suspend set out in clause CT6.01 of the contract. In addition and more on point in this appeal, the court provided that even where compliance with a statute is not incorporated into the contract as a term, the Government may still be liable for breach notwithstanding its right to suspend under CT6.01, if its actions in suspending or continuing a suspension of a contract are found not to be reasonable. Simply put, the decision in Scott Timber makes it clear that under certain circumstances CT6.01 will not shield the Government. We will not here reiterate what the Federal Circuit found as to CT6.01 in Scott Timber nor will we review in detail the decision of the Court of Federal Claims in Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 63 (2001), which came to a similar conclusion. Rather, we refer the parties to the discussion in those decisions.

Having established that despite C6.01, Government actions in suspending a contract containing 6.01, may still constitute breach, we now turn to how one determines whether Government action, and in this case actions of the FS, were of such a nature so as to qualify as not reasonable and constitute breach. In that regard, the court in Scott Timber stated:

> While the violation of a statutory obligation does not establish a breach of contract unless those statutory obligations are incorporated into the contract at issue, see Smithson v. United States, 847 F.2d 791, 794-95 (Fed. Cir. 1988), these violations may nonetheless serve as a factor in a reasonableness analysis. Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 63 (2001)("the Scott Timber Court's reliance on Smithson is misplaced"). Although violations of statutory obligations not incorporated into the contract cannot constitute by themselves, a breach of contract, this court finds that the requirements under the ESA can be considered a factor in the analysis of whether the suspensions were reasonable, which is a question of fact.

There has been no allegation in these appeals that the statutory obligations in issue are incorporated directly into the contract. Thus, in order for Appellant to establish breach, it must show more than simply violation of a statute or statutes on the part of the FS. It must show that the FS actions were not reasonable so as to constitute a breach of the FS obligation not to hinder or a breach of the FS's duty to cooperate. Whether the FS acted reasonably is an intensely factual question. Error alone on the part of the FS will not necessarily suffice. To find in favor of the Appellant, or for that matter the FS (on its cross-motion), we need to weigh evidence as to various FS actions in administering the contract and in administering the FS environmental review responsibilities. This requires us to look at matters both before the suspension and during the suspension. It requires us to look at such surrounding circumstances as the reasons behind the FS actions, the options available to the FS and look at and decide what the parties knew or should have known during the pre-award, award and then contract suspension process. Among factors we need to look at is whether the FS acted with due diligence, both before and after the suspension.

Since we have the matter before us on summary judgment, we are required to look at the facts surrounding these matters in a light most favorable to the non-moving party and to draw reasonable inferences in favor of the non-moving party and not the party asserting the motion. If, given the evidence before us in a light most favorable to the FS, a trier of fact could find in the FS favor, then the motion of the Appellant cannot be sustained. The same applies, as to the FS motion against Appellant, with the Appellant there being given all inferences in its favor.

Appellant has presented the argument that since the courts have found the FS to be at fault, in failing to properly comply with the FEIS and other environmental processes, there are no facts to dispute and the FS should be found liable for breach. We agree factually that the decision of the Kettle Range I court on October 12, 2000, enjoining project sales on CNF (however not addressing the merits), and that same court's decision of July 10, 2001 (on the merits) were unfavorable to the FS. The July 10 decision specifically found a lack of statutory and regulatory compliance on the part of the FS. Additionally, the March 2002 decision placed fault on the FS as to IPNF and CNF. Finally, we note that in the December 6, 2000 decision, the Eastern Washington Lands Court did note that it recognized some violations of the environmental obligations (this case involving both IPNF and CNF), however, there the court decided not to grant the injunction on the basis of what it described as the public interest.

While we recognize that at various times both prior to and during the suspension, there were court decisions indicating environmental error, there is no legal authority which mandates (absent incorporation into the contract) that where is it shown that the Government failed to meet a statutorily (or regulatory) imposed environmental obligation prior to putting out a sale for bid, that such failure automatically constitutes a breach of an implied duty to cooperate and not hinder a contractor's performance, so as to make no further inquiry necessary. The fact is that the case law is otherwise. Failure to comply with statutes and regulations may qualify, but only after a finding that the failure was due to the FS not acting reasonably in its carrying out of its duties and obligations. Error or misjudgment is not per se unreasonable. Scott Timber, supra; H.N. Wood Products v. United States, No. 98-433 (COFC 2003).

Additionally, not only must we consider in deciding reasonableness whether the FS was reasonable in how it handled its environmental obligations, how it assessed the risks of the lawsuits, but we also must take into account that there is a body of law, which provides that even where an agency acts improperly as to its environmental obligations, the issuance or continuation of an injunction has to be weighed against public interest. That is indeed what the Eastern Washington Lands Court did when it rendered its December 2000 decision. Consequently, we need to not only assess the FS actions as to the likelihood of the FS actions being vindicated as to meeting environmental obligations, but further, even if we were to find that the FS should have recognized environmental error, we still need to look at whether the FS was reasonable in expecting that a court would not have stopped the project because of a finding of an overriding public interest need to proceed.

It is not disputed that the FS suspension of February 2001, and the continuation of the suspension through March 2002, was for the purpose of complying with the court injunction issued pending the Eastern Washington plaintiffs' appeal of the December 2000 decision on both CNF and IPNF. Additionally, it is also without dispute that the FS actions as to the EIS and other environmental matters was the cause of the suspensions that are now before us. The argument made by the FS that the FS should be absolved of responsibility, because the court's suspension was an "independent action" does not per se shield the FS from potential liability for breach in these appeals.

In presenting this motion, Appellant spends considerable time in its brief arguing the merits of why we should find that the FS actions were unreasonable. Appellant emphasizes various findings on the environmental matters from discussions in the various cited district court proceedings dealing with the status of the IPNF and CNF Project. In its defense, the FS points out that it was not until July 10, 2001, that courts issued the first unfavorable court rulings against the FS. The FS acknowledges that there was an earlier injunction issued to environmental plaintiffs on October 12, 2000; however, it notes that the earlier injunction was issued pending appeal of the Eastern Washington Kettle Court's decision of July 12, 2000 (Kettle I) and involved only the CNF. In response to that pending appeal, the CO had suspended Appellant on the Bead/Lodge Salvage sale, citing clause 6.01. The FS asserts that prior to February 2001, the FS had four favorable district court rulings, two of which were based upon the merits. These four rulings all preceded award of any of the subject contracts to Appellant.

The FS additionally emphasizes that not only had the environmental challenges prior to February 2001 not been successful, but further, it was not until March 2002, that the FS received an explanation from a court on the merits as to its violations. Because of that, the FS urges that we should find that it had reasonable beliefs that it had complied with the law and that the courts would ultimately so rule. For purposes of review under summary judgment, a trier of fact can find that the legal precedent prior to February 2001 provided the FS with a reasonable basis to believe that it had acted properly as to its environmental obligations or if not, that the public interest overrode the propriety of an injunction halting the Project. Moreover, a trier of fact could find that the decision of February 2001, while adverse to the FS, in that it upheld an injunction, did not provide the FS with an explicit road map as to where the FS might have to make corrections nor did it necessarily indicate that the Eastern Washington court would not find in the FS favor. Additionally, as noted in the letter from the CO suspending the sales, at the time the February suspension was issued, the FS expected a decision from the court within a month or so of the appeals.

Taking all inferences in favor of the FS, the lack of a clear decision putting it on notice that its actions were not compliant with the law and its belief that a speedy decision would be forthcoming, could persuade a trier of fact that the FS acted reasonably in proceeding with the suspensions in issue. The February 23, 2001 injunction by the Ninth Circuit pending appeal did not address the lawsuit's merits but rather simply imposed an injunction on the Projects pending disposition of the appeal of the Eastern Washington Land Court decision of December 6, 2000, a decision which the court had rendered in favor of the FS. One can read into the Ninth Circuit injunction of February 2001, an inference that the Ninth Circuit viewed the Plaintiff's case in the manner that the suit of the environmental plaintiffs would be successful, however, that would require us to draw that inference for Appellant and against the FS, the non-moving party. Further, various decisions as to injunctions on environmental challenges indicate that courts tend to tilt in favor of injunction in cases such as this, where the removal of the trees cannot be rolled back.

Appellant has asserted that on July 10, 2001, the District Court in Kettle Range ruled that the FS's selection of alternative D of the FEIS for the CNF project violated NEPA and NFMA. The court found that among the errors were deficiencies in soil analysis, cumulative impact analysis and role of financing and lack of disclosure. The FS did not appeal that injunction and further entered into a stipulation. We do not find as the Appellant urges, however, that the FS action in not appealing and in entering into a stipulation establishes a lack of reasonableness per se. The FS rationale and thinking as to how it reacted to that injunction is a matter that needs to be addressed. We will not draw a negative inference with the limited record before us as to that matter. We do note, however, that the July 10 decision does go to the matter of what the FS knew or should have known as of that date regarding the likelihood of continued suspensions on at least the CNF portion of the Project. Certainly, we will look at whether the FS continued a suspension where it knew or should have known that its position on the litigation causing the injunction would not be sustainable. In reviewing that however, we will also take note that at the time of the July 10 decision, the suspension was already in place on both CNF and IPNF due to the Ninth Circuit February 2001 decision.

Appellant argues that because of the Ninth Circuit reversal on August 14, 2001, of the district court's denial of a preliminary injunction in the Lands Council case, where the Ninth Circuit held that the district court had abused its discretion in finding that risk of fire would be reduced by the project in the summer of 2001, it should have come as no surprise that the lower court ruling denying the Lands Council injunction would be reversed and that the lower court, Eastern Washington Lands Court would issue a decision in favor of the environmental plaintiffs. We cannot draw that inference here. The FS had a lower court opinion which stated that an injunction should not be granted. The Ninth Circuit did indeed overturn that, however, the matter on the merits had still not been addressed at that point. All the Ninth Circuit was determining is that as to the issue of fire risk, the lower court had reached the wrong factual conclusion. Taking inferences in favor of the FS, a trier of fact could find that the FS had the right to anticipate that notwithstanding the remand as to the fire issue, the Eastern Washington Court would still rule that the FS did not violate its environmental obligations or that even if it did the public interest did not favor an injunction. Another matter that must be considered in any analysis is the fact that the FS put out the information in both the bid and oral auction on the Bead/Lodge sale (the only one on the CNF) that the sale was under litigation and that litigation "may delay, restrict or prohibit award." Appellant has made a number of arguments, one of which is that the publication and oral announcement actually had the opposite effect from providing a warning. It asserts that bidders may have been lulled through the announcement into believing that there were no problems. Appellant has also pointed out that the published statement (as opposed to the oral) only addressed delays in award. Appellant's arguments as to the notice issues however again are replete with calls for us to draw inferences, implications and assumptions in Appellant's favor. However, when viewed in a light most favorable to the FS, they do not yield the results asserted by Appellant. We must again come back to the fact that this is before us on summary judgment and not on the merits.

Appellant contends that the decisions in Precision Pine, supra and Superior Timber Co, Inc., IBCA No. 3459, 97-1 BCA ¶ 28,736 are controlling. As to the applicability of the decisions in those cases, both presented different factual scenarios from what we have here. Of particular importance is the fact that in each of those decisions, the court and Board found that the Government had failed to follow explicit rulings issued by the courts or acted in the face of settled matters and thus the Government was on notice or should have been on notice of its noncompliance.

Regarding Appellant's contention that a faulty FS pre-bid analysis or FS failure as to proper environmental analysis and documentation immunizes a bidder from the risk of having one of its contracts suspended due to successful environmental litigation (even if caused by the FS), there is no support for that in the law. Scott Timber, in fact holds to the contrary. The law requires a showing that the FS did not act reasonably before it will find that a suspension issued under C6.01 becomes a breach. In order to be unreasonable, while prior knowledge would be a factor, it is not the only factor (nor is it necessarily needed in order to constitute breach). As the court pointed out in Precision, "This Court believes it is impossible to formulate rigid rules as to which provisions of a government contract the implied duty is to apply or as to the scope of the implied duties." The court continued later, "As such, the scope of the implied duty must be resolved on a case by case basis."

Another item called to our attention by the FS, is the fact that the Eastern Washington Lands Court in support of its decision of December 2000, cited Alpine Lakes Prot. Sec'y v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975). The FS asserts that it was relying on that and other decisions. The FS points out that in Alpine Lakes, the Ninth Circuit had refused to enjoin logging of insect-infested trees despite allegations that continued logging would irreparably harm the wilderness characteristics of the area. The Eastern Washington District Court, in discussing that Ninth Circuit decision of the Washington Lands Court, noted that the circuit's refusal to enjoin the logging was based upon the fact that absent prompt removal of the insect infested trees, such trees would become economically worthless.

The above is relevant because, in all of the litigation surrounding the subject Project, fire prevention was identified by the FS as a major concern driving the sales. How and why the FS reached certain decisions goes to its motivation and due diligence. We are mindful of the fact that the Ninth Circuit in its August 2001 decision reversing and remanding back to the Eastern Washington Land Court had concluded that the factual finding made by the district court in the Eastern Washington proceeding, specifically the finding that there was a risk of catastrophic fire in the summer of 1991, was not supported by the record. However, the matter of potential fire and how that played out in the FS thought process, both before the August 2001 decision and after, as well as the validity of the risk, is again a matter to be weighed as to any ultimate finding as to reasonableness and breach.

Much of Appellant's case is premised on the assertion that in the wake of the Ninth Circuit ruling in February 2001, it was incumbent on the FS to take all reasonable steps within its control, including acting quickly to have the Ninth Circuit reconsider or lift the injunction, appeal the Ninth Circuit ruling, and/or take whatever steps were necessary to correct the deficiencies in the environmental work identified in that decision The Appellant says that had the FS so acted, such an action may have mooted the current dispute. Appellant says that the FS knew of these problems going back to 1999. The fact is, however, that the FS has argued and has provided adequate evidence for a trier of fact to make a finding that the FS had adequate reasons to believe that it would prevail and adequate reasons to believe that it had conducted its responsibilities properly. Whether that will stand up on the merits, with a fully developed record, is left for another day. But for summary judgment, the FS has shown enough.

In general, the FS was suspending the contracts in accordance with court orders, such orders maintaining the status quo pending resolution of the environmental plaintiffs' appeal of a ruling that had been favorable to the FS and which had allowed it to proceed with the project. Throughout the suspensions, taking inferences in favor of the FS, it appears that it was the position of the FS that it would ultimately prevail, either as to its environmental compliance or as to its compliance when measured against the public interest. What we had was a disagreement between the FS and others over whether the FS actions as to various environmental obligations was sufficient. Much of the environmental disputes involve matters of degree. There is no bright line. In determining whether the FS acted reasonably, a trier of fact, with the evidence before us and taking all inferences in favor of the non-moving party, could find in favor of either party.

DURATION OF SUSPENSION

Confining ourselves to the record before us and the motion, the duration of suspension in issue in this appeal, as of the date of filing of the motion was 399 days of delay. That dates from the Ninth Circuit ruling of February 23, 2001, to the final ruling on March 29, 2002. We have discussed above the history of litigation leading up to the February 23, 2001 order by the Ninth Circuit and subsequent decisions in July and August 2001 and in March 2002.

Appellant asserts that assuming the FS had some authority to suspend Appellant's operations in the circumstances of this case under C6.01, the FS also retained an obligation to implement the suspension reasonably, Precision Pine, supra. Appellant contends that even if suspensions were not the FS fault, there comes a point where a delay lasts so long that a contractor cannot be expected to bear the risk and cost of the delay and as such, the delay is per se unreasonable. Appellant then cites a list of cases.

At this juncture, we will not address nor set out the distinguishing factors that make this case different from the instances cited by Appellant. That is not to say that such cases do not provide some support to Appellant. More important however, is that for us to decide the question of whether a delay due to suspension is so unreasonable so as to merit relief, regardless of fault, requires us to carry out an "intensely factual" inquiry. Scott Timber, supra; H.N. Wood Products, Inc. v. United States, No. 98-433 (COFC 2003). The amount of delay needs to be reviewed in context. The delay needs to be weighed relative to the circumstances surrounding why the suspension occurred and the degree of knowledge held by the Government at certain times. The FS has challenged the unreasonableness argument put forward by Appellant on the basis that it acted in good faith and with due diligence. That may mitigate allegations as to the length of the delay. As with the question of breach caused by the suspension, we find that the record needs to be better developed for us to have the evidence to fully make the needed factual conclusions as to breach, if any. We will not award damages for breach on the basis of days alone.

We also point out that unlike the case in Precision Pine, we cannot find on summary judgment that the FS engaged in any inappropriate delaying procedures which prolonged the length of the suspension. Here, at least on the record before us, with inferences in favor of the FS, the suspensions were driven by an attempt to accommodate the courts and not due to specific interference or active prolongation by the FS.

In Scott Timber, at 1369-70, the court found genuine issues of material fact which precluded judgment in favor of either party on the issue of the reasonableness of a suspension. There, as pointed out by Appellant, the FS had charged that Scott had taken actions that had prolonged the suspension and may have expressed a preference for continuation of the suspension rather than having the contracts canceled. Appellant asserts that there are no similar facts here. We agree that unlike Scott there was no agreement regarding continuation of a suspension. However, as noted earlier, there was notice in the Bead/Lodge sale as to potential delays due to litigation and taking that in a light favorable to the FS, that raises questions as to whether the Appellant assumed the risk, at least as to that contract. Also, how we view the decision-making of the FS, as the

suspension continued is another factor. There is no bright line defining when a reasonable suspension stretches into an unreasonable suspension and certainly no bright line which one can set out for "per se" unreasonable. The court must examine the particular contract, its context, and surrounding circumstances. That is not appropriate on the record before us to be resolved on summary judgment.

The FS position is that all suspensions up to March 29, 2002 were not the fault of the Government but rather were only imposed by the CO in response to court orders enjoining activities pending disposition of the appeals on the merits by the Eastern Washington Kettle Court and the Eastern Washington Lands Courts. As we stated earlier, the suspensions go back to FS action and as such the FS cannot disclaim responsibility.

The FS also presents an argument which attempts to use the court decision in Precision Pine to support a finding that any measurement of unreasonable time only can start from when the FS had actual knowledge of its errors (March 2002), here equating that with a court explanation, as to those errors. We do not read Precision Pine to mandate that and do not read such a determination in either Precision Pine or Scott Timber. The issue here is whether the FS acted reasonably. To not be reasonable does not necessarily require the FS action to fly in the face of a court order. The issue before us is what did the FS know or what should it have known, and with that knowledge, did it act reasonably in the context of these contracts and Project. That is not a matter that is going to be resolved on summary judgment.

Finally, it is a fact of life in the timber industry, that projects are delayed because of environmental litigation. It is a fact of life that the Government, from time to time makes errors in how it accomplishes its environmental obligations. In response to the argument of Appellant, we do not read clause 6.01 to deal only with suspensions not caused by Government error. A suspension under 6.01 can be proper even where there is Government error. That is what Scott Timber says. What must be decided to establish breach is whether the FS acted reasonably.

The record here is such that taking all inferences in favor of the FS, a trier of fact could find that the FS acted reasonably in suspending the contracts for the period in issue. As such, the motion dealing with the length of the delay is not sustained.

TERMINATION

As noted in the Findings of Fact, Appellant expressed concerns that the FS was attempting to argue in its motion that Appellant could not recover because the FS properly terminated the contracts. Accordingly, Appellant responded in part to that matter. We do not see that issue as being before us in the FS motion. We, therefore, will not address the matter but point out that in Poston Logging, AGBCA No. 97-168-1, 99-1 BCA ¶ 30,188, the Board did address an argument relating to a termination overriding a breach. We cite that case here, purely for purposes of information.

SUMMARY

Here the FS engaged in the various environmental activities that were required before proceeding with the Project. At various times, both prior and subsequent to award of the contracts in dispute, the FS was the defendant in litigation relating to the Project. Taking all inferences in favor of the FS, the record shows that the FS had no pre-bid judicial warnings (but for that identified in the bid documents for Bead/Lodge on CNF) as to non-compliance with environmental obligations and that is was not until February 2001, that the FS received a decision which caused it to have to stop sales on both CNF and IPNF. Even then, the decision did not address FS errors on the merits and the injunction was issued to give plaintiffs time to appeal on a matter where the lower court had gone in the FS favor. While the FS received some adverse decisions after February 2001, it did not receive a decision on the merits as to IPNF and CNF until March 2002, when the Eastern Washington Land Court issued its decision and imposed a permanent injunction. Whether the FS acted reasonably in issuing the suspension in February 2001 and acted reasonably in continuing the suspensions for the time in issue are questions of fact, which require us to consider and weigh considerable evidence as to the motives and actions of the FS. On the evidence before us in this motion, a trier of fact taking all reasonable inferences in favor of the FS, could find that there was no breach. Accordingly, Appellant's motion is denied. As to the FS cross-motion, the record is such that a trier of fact taking all inferences in favor of Appellant could find breach on the part of the FS. Accordingly, the FS motion is also denied.

RULING

Accordingly, Appellant's Motion and Government's Cross-Motion for Summary Judgment are denied.

_____

HOWARD A. POLLACK
Administrative Judge

Concurring:

_____

ANNE W. WESTBROOK
Administrative Judge

Administrative Judge VERGILIO, concurring in part, dissenting in part.

Shawn Montee Timber Company, the purchaser, contends that it is entitled to summary judgment on the question of liability on counts I and II of its complaints. In a cross-motion, the Government asserts that it is entitled to summary judgment on the two counts. Subsequent to the initial submissions, the Federal Circuit issued Scott Timber Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003). Thereafter, the purchaser submitted a combined reply and opposition, with some references to the opinion; the Government submitted a reply without reference to the opinion.

I write separately, because I come to some conclusions at variance with the majority. The instruction found in the opinion of Scott Timber permits a succinct resolution of the issues presented. I grant the Government's motion for summary judgment on count I (the contracts authorized the suspensions issued to comply with court orders, such that the alleged breach could not have occurred), and deny the other motions.

Each of the underlying contracts contains clause C6.01, Interruption or Delay of Operations (10/96) (or CT6.01, identical for purposes of resolving the motions), which states in pertinent part, that the "Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer . . . [t]o comply with a court order, issued by a court of competent jurisdiction." By order filed February 23, 2001, the United States Court of Appeals for the Ninth Circuit issued an order, stating in full:

> Appellants' motion for an injunction pending appeal is granted. Appellees are enjoined from further implementing the Douglas Fir Bark Beetle Project as it applies to the Idaho Panhandle National Forests and the Colville National Forest pending disposition of this preliminary injunction appeal.
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> Appellants' request for oral argument is referred to the panel that will consider the merits of this appeal.

(Appeal File at 1725-26, Land Council v. Vaught, No. 01-35088 (Feb. 23, 2001).) Thereafter, pursuant to the clause, the contracting officer issued written requests to the purchaser to interrupt or delay operations. The purchaser complied with the requests. Courts determined that logging and road construction operations in the subject forests could not resume or continue, pending actions and determinations by the Forest Service to be made in compliance with statutory obligations regarding the environment. During this later period of suspension, the Government terminated some of the contracts, based upon its determination that it could not complete an environmental impact statement before the timber deteriorated so as to no longer meet the sawtimber specifications; the Government terminated other contracts based upon a finding that the purchaser was in breach and had failed to complete contractual work.

Count I

In count I of each of its complaints, the purchaser asserts that the Government breached the contract because the suspension (originating after the injunction issued by the Ninth Circuit) was unauthorized. The purchaser states:

> where the Forest Service's failure to comply with its environmental obligations caused the court order to be entered, clause C6.01 [or CT6.01] does not authorize the Forest Service to suspend operations or relieve the Forest Service of liability for breach of contract.

Complaint at 8 (¶ 29) (citations omitted).) It continues:

> Due to the fact that the Forest Service's failure to meet its environmental obligations was the cause of the court ordered injunction, and the fact that the Forest Service did not bargain for the contractual right to absolve itself from liability for court orders that its improper actions caused, the Forest Service's suspension breached the [underlying] contract.

Complaint at 8 (¶ 29). Although the purchaser maintains that the Government failed to meet environmental obligations, the purchaser has not indicated that those obligations were expressly incorporated into the contract; rather, the purchaser puts forward its arguments alleging an implied warranty.

I conclude that clauses C6.01 and CT6.01 provided the Forest Service with the express authority to suspend the contracts given the court-issued orders. The plain language of the clause authorizes a suspension in such a circumstance. See Scott Timber at 1366 ("The Court of Federal Claims found express suspension authority in clause C6.01. Both parties agree that clause C6.01 supplies express authority. Thus, the Forest Service had authority to unilaterally suspend operations under any contracts with the C6.01 clause.")

Count I asserts a breach of contract premised solely on violations of statute, although the purchaser has not asserted that the statutory obligations are incorporated into the underlying contracts. The teaching of Scott Timber is applicable here:

> While the violation of statutory obligations does not establish a breach of contract unless those statutory obligations are incorporated into the contract at issue, these violations may nonetheless serve as a factor in a reasonableness analysis. Although violations of statutory obligations not incorporated into the contract cannot constitute, by themselves, a breach of contract, this court finds that the requirements under the ESA [Endangered Species Act] can be considered as a factor in the analysis of whether the suspensions were reasonable, which is a question of fact.

Scott Timber at 1369. Count I relates to an alleged breach of contract by the Government in suspending operations. The count does not address the reasonableness of the suspension period; that issue is found in count II.

The violations of statutory provisions, not incorporated into the contract, by themselves do not constitute a breach. Accordingly, regarding count I, I grant the Government's motion for summary judgment and deny the purchaser's motion.

Count II

In count II of each of its complaints, the purchaser alleges that the Government breached the contract because the suspension was of unreasonable duration: "even assuming the Forest Service had some discretionary authority to suspend [the purchaser's] operations under clause C6.01 [or CT6.01] (which it did not), the Forest Service also retained an obligation to implement the suspension reasonably." (citation omitted). Moreover, "The Forest Service's February 2001 suspension of [the purchaser's] operations has been in place for an unreasonable period of time as evidenced by the fact that timber on the sale has deteriorated to such an extent that it is now virtually without commercial value." In conclusion, "The Forest Service's ongoing and unreasonable suspension breached the Forest Service's implied contractual duties to cooperate and not to hinder [the purchaser's] operations." (Complaint at 8-9 (¶¶ 32-34).)

Specific guidance from this Board's appellate authority is directly on point: "Because the reasonableness issue is intensely factual, this court finds that the Court of Federal Claims erred when it determined the suspensions were reasonable on summary judgment." Scott Timber at 1369. Just as in that case, I find that the evidence of record does not compel a result in favor of either party. Scott Timber at 1369-70. The particulars of the litigation pre-dating and post-dating the contract awards, and the specific actions of Government personnel and the purchaser, before and after the awards, and in response to the suspensions, need not be itemized. Neither party has presented an undisputed factual scenario compelling a result. Facts must be established and weighed in order to resolve the issues of reasonableness in these cases, without the constraints of motions for summary judgment. The motions of each party regarding count II fail.

Other matters raised by the purchaser

In support of summary judgment on the issue of liability under counts I and II, the purchaser identifies the "issues presented" as follows:

> 1. Whether, despite the Forest Service's putative authority contained in contract clause C6.01 to suspend [the purchaser's] operations in order "[t]o comply with a court order," the Forest Service's February 26, 2001 suspension breached its implied duty to cooperate and not to hinder [the purchaser's] performance because the court order which precipitated the suspension resulted from the Forest Service's adjudicated failure to meet its statutorily imposed environmental obligations prior to putting the sales out for bid?
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> 2. Regardless of the Forest Service's suspension authority, whether the Forest Service's suspension was for a *per se* unreasonable duration?

3. Regardless of the Forest Service's suspension authority, whether, under the circumstances, the suspension was unreasonable in duration where it was so long that during its term, the contracted-for timber became worthless?

(Motion at 1-2.)

Regarding the first item, the Forest Service had actual authority to suspend the contracts in light of the court order; the implied duty to cooperate and not hinder performance is relevant to the determination of the reasonableness of the suspension period. The Government correctly notes that although the court enjoined performance, the order was not based upon the Government's adjudicated failure to meet statutorily imposed environmental obligations prior to putting the sales out for bid. Subsequent periods in the suspension period were the result of such adjudicated findings of violations. The issues raised are pertinent to count II of the claims, which remains to be resolved outside of a motion for summary judgment.

In the second item, the purchaser maintains that the suspensions were for a per se unreasonable duration. Given the initially on-going litigation, the subsequent litigation, and the various determinations to be made by the Forest Service, the record does not demonstrate that the periods of suspension were unreasonable per se. One must engage in a factual analysis to determine the reasonableness or not of the suspension periods.

In item three, the purchaser focuses upon one alleged fact (that the contracted-for timber became worthless during the suspension periods) as paramount when making a determination "under the circumstances." The condition of the timber is but one factor that can be considered in the reasonableness analysis.

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JOSEPH A. VERGILIO
Administrative Judge

Issued in Washington, D.C.
March 10, 2004