TAMARACK MILLS, LLC, d/b/a EVERGREEN FORESTS,	)	**AGBCA Nos. 2003-115-1 2003-116-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
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RULING ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

March 31, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK. Separate concurring opinion by Administrative Judge VERGILIO.

These appeals arise out of the Filly Creek Timber Sale, Contract No. 005308 (AGBCA No. 2003-115-1) and Rubicon Timber Sale, Contract No. 005332 (AGBCA No. 2003-116-1), both located in Payette National Forest (PNF), Idaho. The Forest Service (FS) initially entered into the contracts with Evergreen Forest Products, Inc. (Evergreen) of New Meadows, Idaho. The contracts were later taken over by the Appellant, Tamarack Mills, LLC dba Evergreen Forests (Tamarack or Appellant). The matter is before the Board on Appellant's Motion for Summary Judgment.

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 FACT

1. In May 1988, The Intermountain Regional Forester approved the Payette National Forest Land and Resource Management Plan (LRMP). According to the FS, in the 15 years since, Payette National Forest has proposed, planned, and completed numerous management projects including timber sales to implement the management direction of that plan.

2. In response to the deteriorated condition of the forest and consistent with their understanding of the allocations and management direction in the LRMP, the Payette officials proposed six timber management projects, identified by their location as follows: (1) Filly Creek, (2) Rubicon, (3) West Pine Skyline, (4) Fourth Gulch, (5) Fourmile, and (6) North Round Valley (Appeal File (AF) 10-21.) The Fourth Gulch timber sale was later withdrawn[1], while the other five sales proceeded forward. The five areas to be treated lie on the west side of the Payette National Forest (PNF), defined as west of the Little Salmon River. (AF 10-21.) The objectives of the proposals were to regenerate timber stands, improve the health of the forest, reduce fire hazards and meet the desired future conditions established in the Forest Plan (AF 10).

3. In July 1994**,** the FS completed the Environmental Assessment (EA) for the Filly Creek project, which actually encompassed two adjacent timber sales, the Filly Creek and Rubicon timber sales.[2] In addition, the FS completed the Final Environmental Impact Statement (FEIS) for the Fourmile timber sale on August 8, 1997, and the Final EIS for the North Round Valley timber sale on July 7, 1998. The assessment dealing with Filly Creek apparently also involved the West Pine Skyline sale. That sale is not in issue here and the parties did not go into detail as to that sale.

4. On July 18, 1996, the PNF issued a Finding of No Significant Impact (FONSI) and Decision Notices approving the Filly Creek project analyzed in the EA[3] (AF 52). It was determined that the

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[1] The Fourth Gulch timber sale was withdrawn in response to separate, unrelated litigation.

[2] The National Environmental Policy Act of 1969 (NEPA) permits an agency to prepare an EA on any action at any time in order to assist in planning and decision making. 40 CFR 1501.3(b). An EA is a public document that provides "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 CFR 1508.9(a)(1).

[3] Finding of No Significant Impact means a document "presenting the reasons why an action, not otherwise

project would not significantly affect the quality of the human environment and therefore an Environmental Impact Statement (EIS) was not necessary (AF 75).

Administrative Appeal of the Project

5. On September 6, 1996, pursuant to 36 CFR 215, the FS received one administrative appeal from Erik Ryberg, representing the Ecology Center, on the decision for the Filly Creek project. The administrative appeal review process for the project proceeded pursuant to 36 CFR 215.17. The Region 4 Appeals Deciding Officer (ADO) reviewed the administrative appellant's arguments, appeal record, and the Appeal Review Officer's (ARO) documented analysis and recommendation. (AF 37.)

6. On October 21, 1996, the ADO affirmed the PNF Forest Supervisor's decision to implement the project (AF 37). The ADO found that administrative appellant's objections to the project's Draft EA were adequately considered in the final EA; and the PNF Forest Supervisor had made a reasoned decision, fully complying with all laws, regulations, and policy (AF 37).

7. In addition to the Filly Creek and West Pine Skyline sales, the FS was proceeding with the Grade/Dukes sale, located on the west side of the PNF. The FS's February 15, 1994 Record of Decision for the Grade/Dukes project had approved the harvest and sale of 18.8 million board feet (MBF) of timber.

8. On December 20, 1996, the Grade/Dukes EIS and ROD were challenged by Neighbors of Cuddy Mountain and Idaho Sporting Congress (ISC) which sought a preliminary injunction halting that project. Plaintiffs alleged that the FS had failed to comply with the procedural and substantive requirements of the National Forest Management Act (NFMA) and the National Environment Policy Act (NEPA). More specifically, the plaintiffs alleged that the FS (1) violated NFMA by failing to insure that the Grade/Dukes sale was consistent with the PNF, Land and Resource Management Plan and (2) failed to take the requisite "hard look" mandated by NEPA. Neighbors of Cuddy Mountain v. United States, Civ. No. 96-0553-S-MHW (1997).

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excluded, will not have a significant effect on the human environment and for which an EIS therefore will not be prepared." 40 CFR 1508.13. As noted earlier, the EA on Filly Creek also included Rubicon.

9. Thereafter, the District Court for the District of Idaho issued an Order in Neighbors denying environmental plaintiffs' motion for a preliminary injunction. The court held that the FS had sufficiently analyzed the impact of the timber sales, as required by the NFMA and the NEPA. Furthermore, the court granted the FS's Motion for Summary Judgment on all issues.

10. On June 9, 1997, again still prior to award of any of the contracts in issue here, the environmental plaintiffs appealed the Idaho District Court's ruling to the Ninth Circuit Court of Appeals. Neighbors of Cuddy Mountain v. United States, 137 F.3d 1372 (9th Cir. 1998). The Grade/Dukes sale is on the same national forest as Filly Creek and Rubicon. While the action in Neighbors did not analyze any of the EAs at issue in this case (i.e., EAs for the Filly Creek or West Pine Skyline projects), Appellants have asserted that the eventual judicial outcome of Neighbors contributed to the FS's 1999 action supplementing those EAs by means of Supplemental Information Reports (SIRs). FS records support a connection, although the full extent is not clear in the record. Key issues in Neighbors involved the range of the pileated woodpecker, affect on old growth forests and cumulative impact of the sale when combined with other planned sales.

11. As to the Fourmile and North Round Valley EIS's, the FS issued a Record of Decision (ROD) selecting an alternative that included harvesting timber. For the Fourmile project, the Forest Supervisor signed the ROD on August 8, 1997. The Forest Supervisor later signed the ROD for North Round Valley on July 7, 1998. Neither of these sales are in issue in these appeals.

12. On September 30, 1997, the FS awarded the Filly Creek timber sale contract to Evergreen. On November 14, 1997, the Rubicon timber sale contract was also awarded to Evergreen[4] (AF 380, 1447). Both sales had been the subject of EA's. The two sales each had an original termination date of March 31, 2002. (AF 380, 1447.) Each sale contract contained clause 6.01 (AF 413), which provided:

> **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
>
> (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).

[4] As of November 14, 1997, there were no lawsuits filed challenging the projects nor were there any court orders enjoining the award of timber sales on the PNF.

> 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 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.

13. In accordance with the contract, Evergreen submitted a Plan of Operations for the Filly Creek timber sale on November 10, 1997. According to Evergreen's plan all roads and harvest responsibilities for the Filly Creek contract would be completed in 1997. (AF 632.) A similar plan was submitted for the Rubicon contract on June 3, 1998. The plan indicated roads, harvest of all skyline yarded volume, and had most of the tractor yarded volume to be completed in 1998.[5] (AF 1713-16.)

14. On March 4, 1998, the Ninth Circuit, in Neighbors found the Grade/Dukes EIS insufficient under NFMA and NEPA. The EIS was found insufficient under NFMA because it failed to address whether logging would reduce old growth habitat below the levels specified in the LRMP, as necessary to sustain management indicator species, such as the pileated woodpecker.

15. The LRMP contains an old growth retention standard which specifies that within each "theoretical pileated woodpecker home range" there would be a "minimum of 5 percent mature or old growth forest, of which 2.5 percent must be old growth habitat . . ." (Forest Plan P.IV-34). The Grade/Dukes EIS concluded that "there would be at least 5 percent/2.5 percent of old growth in the Grade/Dukes sale area as a whole." Neighbors, 137 F.3d 1372, 1378. However, this failed to comply with the LRMP standard which required the FS to examine the impact on the woodpecker's home range circles, not the sale area as a whole. *Id.*

16. The Ninth Circuit also concluded that the EIS was insufficient under the NEPA for two other reasons. First, the Circuit found that the EIS contained an insufficient cumulative effects analysis of three other nearby sales. Second, the Circuit concluded that the FS failed to take a hard look at measures to mitigate logging impacts. *Id.* at 1379-1380. The Circuit remanded the case to the FS to determine whether "after the sale, a sufficient percentage of old growth would remain in each affected pileated woodpecker home range." *Id.* at 1382. In addition, the Circuit enjoined future logging in the Grade/Dukes area until studies were completed in compliance with the NFMA, NEPA, and the PNF LRMP. *Id.* The Grade/Dukes sale was held by Boise Cascade Corporation.

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[5] According to the FS Appellant has completed 85% of the road work for the Filly Creek sale (15.46 miles of road reconstruction and 16.73 miles of new road construction). Appellant has harvested 2220.5 CCF (11% of the 19,593 CCF under the contract). Appellant has completed 85% of the road work for the Rubicon sale (20.5 miles of road reconstruction and 9.1 miles of new construction). On the Rubicon sale Appellant has harvested 286.54 CCF (2% of the 16.757 CCF under the contract).

17. On May 21, 1998, approximately 2 months after Neighbors was decided, and almost 1 year after award of the Filly Creek and Rubicon timber sales, a number of environmental plaintiffs, including the Idaho Sporting Congress (ISC) (which had been one of the plaintiffs in Neighbors), filed a new suit against the FS to block nine other timber sales in the PNF including the Filly Creek and Rubicon timber sales. The suit followed the same reasoning as had been argued in the Neighbors case involving Grade/Dukes. See Idaho Sporting Congress, Inc. v. Alexander, No. 98-0223 (Williams, J.) (hereinafter *ISC I*) (AF 2476).

18. In *ISC I*, plaintiffs alleged that the FS decision to proceed with the nine timber sales was arbitrary and capricious under the Administrative Procedures Act (APA). ISC alleged that the FS had failed to comply with the requirements of NFMA and NEPA in preparing the EA's and EIS's for these sales, just as the FS had failed to do with the Grade/Dukes sale in Neighbors, *Id.*

19. On June 30, 1998, Evergreen informed the FS that it was in the process of transferring its operations to Appellant. Evergreen further notified the FS that it would remain a viable company with the continuing operations until reassignment of the operations was complete. (AF 1031, 2476.)

20. On July 7, 1998, the FS completed the FEIS for the North Valley timber sale and on that same day the Forest Supervisor signed the ROD on that project .

21. On July 28, 1998, Evergreen Forest Products, Inc., as the purchaser of the Filly Creek and Rubicon timber sales, along with Intermountain Forestry Industry Association and Boise Cascade Co. (another purchaser), moved to intervene in the pending *ISC* litigation (*ISC I*). On August 5, 1998, the Idaho District Court granted Defendant-Intervener's Motion to Intervene.

22. On July 31, 1998, Appellant acquired all of Evergreen's assets associated with the operation and maintenance of Evergreen's sawmill. This agreement provides that Appellant will assume all of Evergreen's obligations under the assets transferred. Specifically, section 3.1(f) of the Master Agreement for Purchase provides that "[o]ther than the Idaho Sporting Congress suit against the U.S. Forest Service, there are no pending or to the knowledge of the Warrantors threatened investigations, actions, suits, proceedings or claims against or affecting any Corporation. . ." (FS Reply to Appellant's Motion, Exhibit 1).

23. On September 24, 1998, the two timber sale contracts were transferred by third party assignment to Tamarack as part of the sale of most of Evergreen's assets. Soon thereafter, Appellant, Evergreen, and the FS entered into a Third Party Agreement, formally transferring the Filly Creek and Rubicon timber sale contracts from Evergreen to Tamarack. (AF 622-23, 1699-98.) The Third Party Agreement imposed all the rights and obligations assumed by Evergreen on Appellant (AF 622, 1697). According to Appellant, upon completion of the transfer, the two companies continued to operate their respective timber businesses independently from one another.

24. After acquiring the Filly Creek and Rubicon timber contracts, Appellant participated in the environmental litigation in place of Evergreen. Appellant's participation is reflected in a subsequent letter of December 20, 1999, from Tamarack to the Contracting Officer (CO) where Tamarack

references the May 10, 1999 settlement of *ISC I.* (AF 622, 1697-99; FS Reply to Appellant's Motion, Exhibits 2 and 3.)

25. On October 26, 1998, ISC moved for a Temporary Restraining Order (TRO) where it sought to prohibit the FS from "continuing to harvest the Filly Creek/Rubicon timber sale." ISC claimed they would suffer irreparable harm if the TRO was not granted.

26. On October 28, 1998, 2 days after ISC acted, Appellant submitted a response to ISC's Motion for a TRO and informed the court that they "presently had no plans to commence harvest activities on the sales until the summer of 1999" (Exhibit 4). Based on Appellant's representations, the court denied ISC's Motion for a TRO on October 30, 1998. (FS Reply to Appellant's Motion, Exhibit 5.)

27. On November 9, 1998, Magistrate Judge Williams issued a decision in *ISC I* that denied ISC's motion for a preliminary injunction and dismissed the first three counts.

28. Specifically, the Magistrate Judge dismissed counts one and two because the counts failed to challenge a site-specific action. Count three was dismissed for two reasons. First, a portion of the claim overlapped with counts one and two and thus was dismissed on the same grounds. Second, according to the FS (¶ 31, Government Reply to Appellant's Motion), to the extent that count three alleged a separate claim, it was barred because it was raised and resolved in an earlier unsuccessful ISC case on somewhat different NFMA grounds. ISC v. Forest Service, Civ. No. 96-0025-S-BLW. The court decided not to dismiss counts four or five noting they had not been properly briefed.

29. The environmental plaintiffs then appealed the denial of the preliminary injunction, but did not appeal the dismissal of counts one, two and three. The Ninth Circuit affirmed the district court and remanded the case for disposition on the merits.

30. Thereafter, on February 5, 1999, at the request of the FS, Tamarack agreed to suspend its operations on the Filly Creek and Rubicon sales from February 5, 1999 to July 1, 1999. According to Appellant this was done so that the FS could go back and complete an additional environmental review. The understood purpose of the review was to ensure that the sales complied with NEPA and the Ninth Circuit's ruling in Neighbors. (AF 1036, 1038.) In a memorandum to the record written by the CO, dated February 18, 1999, the CO says that due to request from Department of Justice (DOJ) lawyers, Boise Cascade and Tamarack agreed to mutually suspend logging operations in West Pine, Filly Creek and Rubicon from February 5, 1999, to July 1, 1999. The CO continued, that "Department of Justice needed this suspension as part of the defense of the Payette National Forest in the Old Growth lawsuit." (AF 1038.)

31. On May 10, 1999, the parties reached an agreement to settle *ISC I*.[6] The parties agreed in pertinent part that:

[6] In an Order dated March 27, 2000, the court denied ISC's request for attorney fees under the Equal Access to Justice Act (EAJA) on the basis that ISC was not the prevailing party. The court held that ISC was not the prevailing party for the purposes of the Agency's first motion for summary judgment or the Plaintiffs' motion for preliminary

ISC would dismiss its claim. (AF 1326.)

(a) The FS would complete environmental documentation for the West Pine Skyline, Filly Creek, Rubicon, Fourmile, and North Round Valley timber sales in the form of supplemental information reports (SIRs) that would examine whether further environmental review and documentation is required and would do so by June 1, 1999.

(b) The FS would withdraw the Decision Notice for the Little Weiser Vegetation Management Project and ensure that no further action would take place in this area until a FEIS and Record of Decision is issued.

(c) The FS agreed that Boise-Cascade and "Evergreen (now known as Tamarack Mills, LLC)," will retain their status as the high bidder for the Anderson Creek and Cougar Basin timber sales. These sales are part of the Little Weiser Vegetation Management project. (AF 1327).

(d) The FS and defendant-interveners agreed that timber harvest on the West Pine Skyline, Filly Creek, and Rubicon timber sales will continue to be suspended until July 1, 1999. This provision did not apply to the removal of already cut logs in the road right-of-ways for the Filly Creek and Rubicon timber sales (AF 1328).

(AF 1324-32, 2475-83.)

32. On the basis of the settlement agreement, the Filly Creek and Rubicon timber sale contracts were modified, suspending timber operations until July 1, 1999. In addition, the termination dates of the sales contracts were changed to March 31, 2003 (AF 1039-40, 2186-87.)

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injunction. The court reminded ISC that its decision was upheld by the Court of Appeal for the Ninth Circuit. Therefore, because ISC was not determined to be a prevailing party on any of their claims in the suit, ISC's counsel's application for attorney fees under the EAJA was denied. (Exhibit 6).

33. Each SIR concluded that each proposal would not reduce old growth habitat in the affected woodpeckers' home ranges below the 2.5% forest plan old growth standard[7] (AF 14). Rather than prepare a new EIS as it had done for the Grade/Dukes area following the Ninth Circuit ruling in Neighbors, the FS instead elected to meet its environmental obligations by preparing SIRs for Filly Creek and Rubicon. The FS began preparing SIRs to update the EAs and EISs for the nine timber sales involved in the dispute.[8] (AF 1186-87, 2336-37.) The FS acknowledges in its response to Appellant's motion that the SIRs were designed to address the issues raised in Neighbors and therefore examined (1) the effect of the logging on the old growth habitat within the home ranges of the pileated woodpecker, and (2) the cumulative effects of other sales on that same old growth habitat. (AF 1207-20, 10-21, 22-34, 35-36.) The SIRs were completed in May 1999 and issued on May 28, 1999 (AF 10-22). Based on its issuance of the SIRs, on May 28, 1999, the FS lifted the suspension of Tamarack's operations on both Filly Creek and Rubicon, and Tamarack resumed harvesting the Filly Creek sale.

34. After the SIRs were issued on May 28, 1999, environmental plaintiffs, including ISC, filed a complaint dated June 7, 1999, challenging the SIRs for the Filly Creek, Rubicon, and West Pine Skyline projects and requesting that the district court issue a TRO against the FS permitting any harvesting to be conducted pursuant to the May 1999 SIR's. ISC v. Alexander, Civ. No. 99-0217-S-BLW (hereafter *ISC II*). The allegations in *ISC II* were identical to those filed in the *ISC I*. The

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[7] For each sale, the SIRs found that the original EA or EIS "adequately displayed the effects of the Selected Alternative on the environment." Nothing in the new information demonstrates that the project will affect the quality of the human environment in a significant manner or significant extent not already considered in the underlying documents." The SIRs all concluded that there was "no need to correct, supplement, or revise the environmental document or the decision." ISC v. Alexander, Civ. No. 99-0217-S-BLW (2000).

[8] SIRs are forms of documentation the FS uses to assess the relevance of new information to past decisions, as provided in the agency's NEPA Handbook (1909.15 Section 18.1).

matter contained the following allegations: (1) the FS failed to obtain quantitative inventory data on old growth-dependent species like the pileated woodpecker and great gray owl as required under the NFMA; (2) the FS is no longer insuring the viability of old growth species as required under NFMA; (3) the FS's decision to continue timber harvesting without obtaining the quantitative data violates NFMA; (4) the FS's failure to consider the cumulative impact of the Burnt Basin, Cougar Basin, and Anderson Creek cumulative impacts of the North Round Valley, Fourmile, Filly Creek, West Pine Skyline, Cow Camp, and Rubicon sales violates NFMA and NEPA. *Id.* (AF 10-22, 1187.)

35. The Intermountain Forest Industry Association, Boise Cascade Corporation, and Evergreen Forest Products, Inc. requested and were granted permission to intervene.

36. On June 11, 1999, the district court dismissed the complaint and incorporated the terms of the parties' Stipulation Settlement Agreement (AF 1186-87, 1207-20). Based on its issuance of the SIRs, on May 28, 1999 the FS lifted the suspension of Tamarack's operations on both Filly Creek and Rubicon, and Tamarack resumed harvesting the Filly Creek sale.

37. On July 12, 1999, the district court denied ISC's motion for a TRO in *ISC II*. On August 19, 1999, the district court denied ISC's motion for reconsideration and for a preliminary injunction.

38. Although the district court denied the environmental plaintiffs' request for a temporary restraining order, thereafter, on September 30, 1999, the Ninth Circuit granted the plaintiffs' emergency motion for an injunction pending a final determination of the plaintiffs' claims (AF 1333-34). In the wake of this order, the FS (on October 1, 1999) suspended Tamarack's operations on Filly Creek and Rubicon (AF 1051, 1187, 1333-34).

39. On October 13, 1999, the FS requested exceptions to the Ninth Circuit Order of September 30, 1999, that "stayed any action toward implementing the Filly Creek, Rubicon, West Pine Skyline, Fourth Gulch, North Round Valley and Fourmile timber sales." (AF 1224). Specifically, the FS requested the court issue an order clarifying that its earlier order did not forbid the Government from grass seeding and mulching of cut and fill slopes on newly constructed roads; cross-ditching and slash placement on skid trails; final road maintenance activities including final blading, shaping and cleaning of ditches; controlled burning activities; the removal of timber that had already been decked at the sites in question; and removal of felled timber not yet decked (AF 1224-26).

40. On October 15, 1999, the FS's Motion for exceptions was granted in part and denied in part. Specifically, the FS was permitted to:

> (a) conduct final road maintenance including blading, shaping, and cleaning of ditches, implement grass seeding and mulching of cut and fill slopes, and install gated closures for the Filly Creek and Rubicon timber sales.
>
> (b) conduct low-intensity and slash pile burning, including the construction of fire lines to control the spread of the fire, to prepare the site for planting and reduce hazardous fuels in the Filly Creek and West Pine Skyline timber sales.

(c) remove the 250 MBF of felled and decked timber in the Filly Creek and Rubicon timber sales.

However, the FS was not permitted to skid, deck or haul the 750 MBF of timber in the Filly Creek timber sale that had been felled, but not skidded. (AF 2372-73.)

41. On December 16, 1999, while the Ninth Circuit's stay pending its decision on the procedural propriety of using SIRs was still in place, the Idaho district court addressed the merits of the environmental plaintiffs' complaint. This was in the context of a decision on a requested injunction. The court ruled that several of the SIRs prepared by the FS, including the SIRs for the Filly Creek and Rubicon timber sales, clearly failed to satisfy the FS's substantive obligations under the environmental statutes. (AF 1335, 1354; Slip op. at 20). As a result of this, and in addition to the Ninth Circuit's ongoing injunction, the district court imposed its own injunction against the FS proceeding with the Filly Creek and Rubicon timber sales (AF 1353). The suspensions thereafter continued unabated through the winter of 1999-2000, and the spring and summer of 2000 (AF 1372-74).

42. On August 17, 2000, the Ninth Circuit ruled that the FS's use of SIRs, rather than an EA or an EIS, as the means of meeting its environmental obligations was not proper. Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562 (9th Cir. 2000). In so doing, the court specifically noted that, "[t]he Forest Service knew or should have known that it needed to provide this information and analysis at the time it prepared the original EAs and EISs and that "[i]t is inconsistent with NEPA for an agency to use a SIR, rather than a supplemental EA or EIS, to correct this type of lapse." *Id.* at 567. However, the Ninth Circuit did not rule on the adequacy or substance of the documents and remanded to the district court to determine whether the parties could stipulate to the use of SIRs to supplement NEPA documents and whether ISC and the Government did in fact do so in their agreement settling *ISC I*. The FS did not appeal or seek en banc review or a stay of the Ninth Circuit's ruling. Accordingly, the Ninth Circuit remanded the case to the district court with instructions to enter a preliminary injunction against the FS pending a final determination on the merits of the plaintiffs' claims. *Id.* The district court did so on September 18, 2000. (AF 1367-68.)

43. In *ISC II*, on March 26, 2001, the court had before it the environmental plaintiffs' motion for summary judgment on counts four and five. The Government agreed to the motions. The interveners objected. On motions for summary judgment, submitted by both the Government and plaintiffs, the district court again dismissed counts, one, two and three of the complaint with prejudice. Memorandum Decision, March 26, 2001, ISC v. Alexander, Civ. No. 99-027-S-BLW. As to counts four and five, the Government did not object to the court granting ISC summary judgment.[9] The court, therefore, found that the Government's concession mooted any controversy over the timber sales and granted ISC summary judgment on counts four and five. *Id.* at 2. (AF 1369.)

[9] The FS did not object to the court granting ISC summary judgment on procedural grounds, given that the appeals court had already enjoined the sales and that new NEPA analysis was already underway.

44. The court explained that its ruling, granting summary judgment on counts four and five in favor of plaintiffs, was based on the fact that the Government did not object to the motion. Specifically, the court stated, "The court rejects ISC's argument that the court should reaffirm its statement that the original NEPA documents were insufficient. That statement was made in the context of ruling on a motion for temporary restraining order and thus not a final holding of any kind." The court determined that the "government's concession makes it unnecessary to resolve any issue regarding the original NEPA documents." *Id.* The court did not review the merits of the claims nor did it make any final determination. (AF 1370.)

45. On remand, the environmental plaintiffs moved for summary judgment on the basis that the SIRs for the Filly Creek and Rubicon sales were substantively and procedurally inadequate. In response, rather than defend its use of SIRs, the FS simply filed a "non-opposition" to plaintiffs' motion for summary judgment in which it took the position of "request[ing] that the Court enter summary judgment for plaintiffs on their fourth and fifth claims on the straightforward basis that plaintiffs have moved for summary judgment and federal defendants do not oppose it." FS's Non-Opposition at 2. On March 26, 2001, the court ruled that "[b]ecause the Government's concession has mooted the controversy over the timber sales, summary judgment is appropriate on counts four and five." (AF 1370, Memorandum Op. at 2). The suspension of the Filly Creek and Rubicon contracts, therefore, remained in place. According to the Government the plaintiffs filed an appeal and the Ninth Circuit affirmed the district court ruling. No citation, however, is given as to that determination.

46. After the Filly Creek and Rubicon timber sale contracts were suspended, Appellant submitted multiple requests to the FS for reimbursement under C6.01. The Government reimbursed Appellant for out-of-pocket expenses incurred as a result of the court ordered suspension.[10] (AF 1192, 1194, 2342, 2344). The Government has reimbursed Appellant a total of $45,066.45 for out-of-pocket expenses.[11] The Government also reduced Appellant's down payment by 2%, released the 5% retention on completed purchaser road credit items, released all payment guarantee requirements under contract provision B45.3, and decreased the blanket payment bond. (AF 1077, 2227.)

[10] C6.01 provides that out-of-pocket expenses "do not include lost profits, attorney's fees, replacement cost of timber, or any other anticipatory losses suffered by the Purchaser." (AF 413).

[11] $35,764.88 for the Filly Creek contract and $9,301.57 for the Rubicon Contract.

47. On February 2, 2001, Appellant submitted its claim for reimbursement and a request for the Government to either move forward with environmental analysis or to terminate the sales under C8.2, Termination and compensate Appellant for all expenses incurred from the work stoppage (AF 1098). On March 29, 2001, the FS informed Appellant that there was no plan to unilaterally cancel the contracts, but the Government would consider mutual cancellation of the contracts. The Government requested a response from Appellant within 30 days on whether Appellant was interested in mutual cancellation. (AF 1134.) According to the FS, Appellant failed to respond to this request.

48. By letter of February 2, 2001, Tamarack sought compensation in the amount of $901,942.30 for the increased costs of replacement timber and several other items of damages incurred as a result of the FS alleged improper suspension of the Filly Creek and Rubicon timber sale contracts (AF 1098-1131). On April 29, 2001, the FS disputed Tamarack's entitlement to the increased costs of replacement volume, as well as a number of the other items for which Tamarack had sought compensation (AF 1132-34).

49. On July 2, 2001, the Government sent another letter to Appellant requesting a response regarding the issue of mutual cancellation. The Government informed Appellant that it was awaiting Appellant's response before it proceeded with environmental analysis. (AF 1143.) On July 11, 2001, Appellant indicated that it was interested in discussing mutual cancellation of the Filly Creek and Rubicon contracts (AF 1148). For the next 4 months, the Government and Appellant engaged unsuccessfully in negotiations to mutually cancel the Filly Creek and Rubicon contracts (AF 1143-53). On October 8, 2001, Tamarack informed the Government that it had decided to keep both of the sales and requested the Government to proceed with its environmental analysis for the projects (AF 1154).

50. In January 2002, the Government developed a contract solicitation for a new NEPA analysis for the Filly Creek and Rubicon timber sales. The combined project was named Gaylord North, and on April 22, 2002, the FS published the Gaylord North EIS Notice of Intent in the Federal Register. On April 25, 2002, the FS awarded a service contract to prepare the "Gaylord North Timber Sale EIS and Roads Analysis Process" to Foster Wheeler Environmental Corporation, a professional consultant company. (AF 1189, 2339.) This analysis is intended to allow the contract work to proceed.

51. On May 2, 2002, Tamarack submitted a supplemental claim letter with regard to each contract. In those claim letters Tamarack sought $l,150,473.95 for outstanding damages on Filly Creek and $2,243,818.25 for Rubicon. (AF 1164-83.) In two separate final decisions dated September 6, 2002, the CO determined that the suspensions and delay of the contracts were both authorized and reasonable (AF 1184-1247, 2334-98). The CO denied virtually all of the $3,394,000 which Tamarack had claimed. He did award Tamarack $137.63 for unpaid interest on deposits and $935.78 for unpaid costs of maintaining the performance bond for the Filly Creek timber sale. (AF 1194.) He also awarded $107.02 for unpaid interest on deposits and $1,003.51 for unpaid costs of maintaining the performance bond for the Rubicon timber sale (AF 2344).

52. On October 4, 2002, Tamarack filed these timely appeals with the U. S. Department of Agriculture Board of Contract Appeals (AF 2415-34.)

53. On December 13, 2002, a Notice of Availability of the Gaylord North Draft EIS was published in the Federal Register, and the FS distributed the documents to the public and agencies for the 45-day review.

54 . As of the date of filing the motion, to the best of the Board's knowledge, the suspensions which had begun on October 1, 1999, continued as the FS was still proceeding with complying with the environmental obligations.

DISCUSSION

LEGAL STANDARD

These appeals involve two timber sale contracts, Filly Creek, awarded on September 30, 1997, and Rubicon awarded on November 14, 1997. Both were initially awarded to Evergreen Forest Products and were later transferred to Appellant by a third party agreement dated September 24, 1998. The contracts each had a termination date of March 31, 2002, and both were suspended by the FS on October 1, 1999. The FS has taken the position that any compensation due as a result of the suspension is limited to that under C6.01. Appellant challenges that and asks for the Board to find the suspensions to be a breach.

This matter is before us on a Motion for Summary Judgment filed by Appellant. In its motion, Appellant asks the Board to rule in its favor on the issue of whether the FS breached its duty to cooperate and not to hinder Appellant's performance. Appellant further asks that we find that the suspension of the timber sale contracts in issue, Filly Creek and Rubicon, were unreasonable per se (due to length), or alternatively were unreasonable in length under the circumstances. The FS filed an Opposition to Appellant's motion.

Summary judgment as to a party's liability is appropriate where there are no genuine issues of material fact in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); American Growers Ins. Co., AGBCA No. 98-200-F, 00-2 BCA ¶ 30,980. 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 non-movant

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 court to grant summary judgment where there are "unexplained gaps" in the movant's evidence, Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2, 90 S. Ct. 1598, 26 L.Ed.2d 142 (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). 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. Appellant argues that the only question before the Board is what Appellant characterizes as the legal conclusion to be drawn from those undisputed facts, which Appellant says is proper for resolution here 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 extensive evidentiary record as to whether or not the FS was reasonable in suspending and reasonable as to the length of the suspension. The deciding question before us, of reasonableness, is a factual one. To decide it, we need to 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 and we must move forward on the merits. As discussed below, here, taking all inference in favor of the non-moving party, there is sufficient evidence which could support a finding either way.

BREACH

These appeals (as was the case in the appeals of Shawn Montee Timber Co., AGBCA Nos. 2003-132-1 through 2003-136-1, decided on March 10, 2004, by this Board) were filed prior to the decision of the Court of Appeals for the Federal Circuit in Scott Timber, Inc. v. United States, 333 F.3d 1358 (Fed. Cir. 2003). In Scott the court addressed the matter of breach due to a suspension and how an unreasonable suspension would interplay with clause 6.01 of the FS contract, which allows for suspension by the FS due to court order and which limits recovery to specified costs.

In Scott, the court determined that clause 6.01 will not serve to protect the Government from breach, where it is found that the suspension or the length of the suspension was not reasonable. The court was clear in stating that the matter was factually intensive, and a matter that had to be viewed on a case-by-case basis. The fact that a court found the FS to be arbitrary and capricious in an APA review does not necessarily lead to a finding of breach as to a contract affected by the FS errors. See Shawn Montee, AGBCA Nos. 2003-132-1 thru 2003-136-1. Accordingly, to find in favor of Appellant, we need to find that the FS did not act reasonably either as to the suspension itself or as to the length of the suspension. That requires us to look at and weigh facts relating to the

surrounding circumstances and draw from those facts an ultimate factual conclusion as to reasonableness. If there are sufficient facts which a trier of fact could conclude that the FS acted reasonably as to the suspension and duration, we cannot find in favor of Appellant on summary judgment.

For further discussion on Scott and other cases, Appellant is referred to this Board's discussion of Scott in Shawn Montee, supra.

In these appeals as to the Filly Creek and Rubicon sales, Appellant argues in its motion that the suspensions had their roots in the Ninth Circuit ruling in favor of the plaintiffs in Neighbors of Cuddy Mountain v. United States Forest Service, 137 F. 3d 1372 (9th Cir. 1998). In that suit, plaintiffs had asked the court to enjoin the Grade/Dukes timber sale in the Cuddy Mountain area of Payette NF. In its decision enjoining the sale, the court concluded that despite the FS preparation of an EIS for the Grade/Dukes sale, the FS had failed to meet various obligations under both NEPA and NFMA. Essentially, the EIS did not properly address all of the points needed to be addressed as required under the Acts.

Appellant further points out that in Neighbors, the Ninth Circuit held that the FS knew, or should have known, that analyses it made in the course of preparing the Grade/Dukes timber sale were inadequate. Appellant has noted that the Grade/Dukes sale was on the same NF as the Filly Creek and Rubicon. Appellant attempts to have us connect the Neighbors decision to the Filly Creek and Rubicon sales, stating that environmental plaintiffs sought to apply the same principles at issue in Neighbors (Appellant calling it a "virtually identical environmental analysis.") to other sales in the Payette NF, including Filly Creek and Rubicon. The fact that the sales are on the same forest, however, does not necessarily create a sufficient parallel to equate the sales. There may be substantial differences, both as to the sale details (size and scope) and environmental impact of the specific locations within the same NF. Those factual matters have not been developed in the record before us and are factors that must go into any analysis of reasonableness.

Still regarding Neighbors, Appellant says that the ruling in Neighbors led the FS to agree to settle *ISC I* on April 30, 1999 (the underlying action which involved both Filly Creek and Rubicon had been filed on June 7, 1998), so that the FS could complete the additional environmental analysis and documentation for Filly Creek and Rubicon sales. Further, Appellant points out that as part of that lawsuit, on February 5, 1999, at the request of FS (and before the April 30 settlement), Appellant agreed to suspend its operations on Filly Creek and Rubicon to July 1, 1999, so that the FS could go back and complete an additional environmental review. Appellant characterizes the environmental review as "ostensibly to ensure that the sales complied with NEPA and the Ninth Circuit ruling in Neighbors."

In urging the Board to rule in its favor as to breach due to hindrance and failure to cooperate, Appellant contrasts the way the FS managed the Grade/Dukes sale following injunction with management of the Filly Creek and Rubicon sales. In Grade/Dukes, the FS prepared a supplemental EIS completing that statement in 16 months. In contrast, as to Filly Creek and Rubicon, the FS did not prepare a supplemental EIS or EA but rather opted to use an SIR. Appellant contends that NEPA

and its implementing regulations and even the FS's own handbook are clear that where changes to an existing environmental document are needed, a revised EA or EIS (not a SIR) should be prepared. There is no disagreement that a central point in the lawsuit (*ISC II*), which ultimately led to the suspension in issue in this appeal, was the use of an SIR rather than use of a supplemental EA or EIS to address environmental review shortcomings.

In addition to the above, Appellant also notes that 10 days after the FS released the SIR (May 28, 1999), the FS was challenged in *ISC II,* filed on June 7, 1999. That case brought on many of the same issues raised in *ISC I* and specifically called into question the use of SIR's in lieu of a supplemental EIS or EA.

Thereafter, an initial attempt at a TRO on *ISC II* was denied by the district court. The FS then lifted the suspension. However, environmental plaintiffs then returned to court, and as a result, on September 30, 1999, the Ninth Circuit entered an emergency motion for an injunction pending appeal on the issue of whether the SIRs were procedurally proper under NEPA. In wake of that order, the contract was suspended again on both contracts. Thereafter, the district court imposed an injunction on December 16, 1999, even though the matter still had a stay in place from the Ninth Circuit. The injunction and suspension continued through spring and summer 2000.

Appellant is basically arguing that the above evidence establishes that the FS erred and that the FS should have known of the potential of those errors. Appellant has further contended that because of that knowledge, the FS committed breach. While what Appellant has provided would be sufficient for a trier of fact to find in its favor on the merits, what Appellant has presented is not sufficient to prevail on summary judgment, once one considers the FS defenses.

The FS points out that a determination as to breach requires factual inquiry into the extent of FS pre- bid knowledge of environmental deficiencies and into the effect of the absence of pre-bid judicial rulings warning of environmental deficiencies. The FS asserts that at the time of the awards there was no legal action environmentally challenging either the Filly Creek or Rubicon sales. In fact, no action was filed until a year after the contracts had been awarded. Further, the FS notes that once legal action was filed, it prevailed in both the district court and at the Ninth Circuit as to motions for TRO's and for preliminary injunction in *ISC I.* Moreover, as to *ISC II*, the FS initially prevailed in the district court. While the FS acknowledges that the Ninth Circuit granted the environmental plaintiffs' motion for a preliminary injunction pending disposition of the case, that injunction was not issued until October 1, 1999, nearly 2 years after the award of the contracts. At that point, there still had not been a decision on the merits.

It was not until August 2000 that the Ninth Circuit ruled that SIRs were improper documents to cure a defect in an environmental document. The court ruled that only a supplement to the EA or EIS was recognized. Even then however, the Ninth Circuit remanded the matter back to the district court for that court to determine if the parties could stipulate to use of SIRs to supplement NEPA documents, and whether ISC and the FS had in fact stipulated to the use of SIRs (that referring back to the agreement of May 10, 1999 in *ISC I*, where the parties had agreed to suspend the work and

perform additional environmental analysis). Finally, the August 2000 decision was still in the context of a preliminary injunction and thus still not a final decision on the merits.

An issue put forward by the FS, which it contends must be considered in assessing reasonableness, is the effect of the transfer in interest to Appellant from its predecessor, Evergreen, and more important, what knowledge Appellant had at the time it took over the contracts. Appellant acquired the assets of Evergreen on July 31, 1998**.** The Neighbors suit had been decided on March 4, 1998. On May 10. 1999, there was an agreement reached as to *ISC I*. In that agreement, the FS and parties (including Appellant) agreed that the FS would be doing an SIR. What happened there and the role of Appellant raises questions as to the current challenges relating to use of the SIR.

According to the FS, the transfer of assets took place almost 2 months after ISC filed its first environmental challenge (June 7, 1998) on these projects. Further, the FS has presented evidence that Appellant took part in the *ISC I* litigation with Appellant informing the court that it would not be conducting operations until 1999 and therefore a TRO was not necessary. At the time when Appellant entered into the settlement agreement with FS in May 1999, it knew that the FS would be attempting to correct the environmental issues by use of an SIR. We have no evidence of an objection being raised at that time. FS asserts that Appellant took the contracts with the knowledge that the contracts could be delayed as a result of litigation. The FS cites the Board to Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333, 336 (1991). There the court held that where delays were foreseeable, and expected, it is the contractor, and not the Government, which assumes the risk of delay.

As we have pointed out in Shawn Montee, citing Precision Pine & Timber Inc. v. United States, 50 Fed. Cl. 35, 63 (2001), it is impossible to formulate rigid rules as to which provisions of a Government contract the implied duty to cooperate is to apply or as to the scope of implied duties. The scope must be resolved on a case-by-case basis. That requires us to look at the full context of the parties' actions. When we do that here, on the record before us, and taking all inferences in favor of the FS, we cannot conclude that the FS was not reasonable.

Appellant has asserted that Tamarack was not a successor in interest and that even if it was, the determination would have no bearing on summary judgment. Appellant has gone into a legal analysis as to assignment and legal liability to a successor under law. We need not address Appellant's discussion as to whether this constituted an assignment or successor status under law. The point is that the FS has presented evidence of a relationship and that evidence in a light most favorable to the FS shows some knowledge of possible risk. This evidence raises questions as to the reasonableness of the FS actions in using an SIR and as to the length of the suspension. These are relevant to this dispute and are factors to be considered and create matters of contested material fact that cannot be resolved on summary judgment.

In summary, in assessing the reasonableness of the FS action, as set out by Scott Timber, we have evidence before us from which a trier of fact could decide that the FS acted reasonably. Among that evidence are (1) a number of favorable judicial rulings, (2) the fact that the choice of an SIR was set out in the agreement as to *ISC I*, (3) indications that the FS start of an EA or EIS was affected by

representations and negotiations with Appellant as to the close of the project. Further, we need to look at the full context surrounding the FS decisions which caused the suspension in order to determine whether the FS proceeded with due diligence. While the above and additional matters not listed are sufficient for the FS to prevail at this stage, we do note that applying the same standard to Appellant as we do to the FS, there would also be sufficient evidence from which one could find in Appellant's favor.

The duration of the suspensions was *per se* unreasonable.

Appellant has argued that consistent with the obligation to suspend reasonably, even if the suspensions were not the FS's fault, where a delay lasts so long that a contractor cannot reasonably be expected to bear the risk and cost of the delay, the delay is per se unreasonable. Merritt-Chapman & Scott Corp. v. United States, 429 F.2d 431, 432 (Ct. Cl. 1970); see also Beaver Contracting and Grading Co., AGBCA No. 84-236-1 et al., 88-3 BCA ¶ 21,180; Frontier Contracting Co., ASBCA No. 33658, 89-2 BCA ¶ 21,595. As the court in Merritt-Chapman stated "a delay due to a non-fault suspension by the Government can obviously be so protracted that it would be unreasonable to expect the contractor to shoulder the added expense himself." There the count held that the Government's 419-day delay of a contract which was originally scheduled to last three and one-half years was per se unreasonable. *Id.*

As noted earlier in our discussion as to the suspension itself and as more fully addressed in Shawn Montee, supra, the matter of reasonableness of the delay is intensely factual and must take into account a myriad of factors. The cases cited by Appellant involve very different factual situations. Moreover, it needs to be noted that environmental errors and delays are not something that are rare when the FS issues timber sales. Environmental litigation is a fact of life. At what point the risk falls fully on the FS is one of degree. In determining whether the duration of a suspension is reasonable, the Board must look at all surrounding circumstances. Superior Timber Co. , IBCA No. 3459, 97-1 BCA ¶ 28,736 (1996). There the Board stated, "The amount of delay deemed to be unreasonable is relative and varies from case to case." In determining the reasonableness of a suspension, the court must make a factual inquiry of "whether the Government used reasonable diligence and good faith in attempting to avoid or in mitigating the delay or whether the delay was unreasonable under the circumstances." Superior Timber, supra. As the Court of Federal Claims pointed out in H. N. Wood Products, Inc., 2003 U.S. Claims LEXIS 3866 (December 24, 2003) citing Scott and Precision Pine, "The Federal Circuit instructed that trial courts must scrutinize the factual record in determining whether a suspension is reasonable and cautioned that this determination can only be made after an intensely factual inquiry. The amount of delay deemed to be unreasonable is relative and varies from case to case." Even where facts, if substantiated, would likely compel a finding in Appellant's favor, the Government, under the theories before us in this appeal, must be permitted to offer evidence that demonstrates its good faith and diligence in administering the contract or evidence that otherwise mitigates Appellant's allegations relating to the length and extent of the delay. H. N. Wood Products, Inc., supra.

According to Appellant, in the ensuing years (from the start of the suspension) the FS has remained unable or unwilling to meet its environmental obligations and to date the suspensions have remained

in place (at the time of filing of the motion) for 3½ years with no end in sight. Appellant contends that such actions demonstrate that, as a matter of law, the suspensions are unreasonably long under the circumstances here present. The FS has defended. It says that a number of facts bear on whether the length of the suspension was unreasonable. The initial suspension was issued October 1999, and litigation continued until March 26, 2001. During that time, the FS requested exceptions to the stay, which were granted in part. In addition, the FS successfully defended in district court the adequacy of the use of SIRs. At the conclusion of the litigation, Appellant's contracts had been suspended for approximately 1 year and 5 months. However, the suspension, as pointed out by Appellant, continued beyond that.

Appellant characterizes the suspension, and alternatively its length, as unreasonable actions on the part of the FS. The FS points to what it characterizes as "protracted negotiations to mutually cancel the contracts" and its due diligence in proceeding as it did. Additionally, the FS charges that Appellant failed to promptly respond to offers to close out the contract. The FS points out that it was not until October 8, 2001, that Appellant informed the FS that it intended to keep both sales and requested the Government to proceed with an environmental analysis for the projects. It was then that FS arranged for a third party contract to conduct the NEPA analysis.

Clearly, there is a question as to not only the initial suspension, but as to the activities of the parties after the Ninth Circuit decision in Idaho Sporting Congress v. Alexander, 222 F.3d 562 (9th Cir. 2000). Once that decision was rendered and the responsibility of the FS was clearly defined, it appears the parties were in control and not the courts. Whether the continuation of the suspension after that date provides a separate basis for finding a lack of reasonableness, is a matter that will have to be resolved on the basis of contested evidence as to the roles played by both parties and the reasons for various decisions.

Regarding the concurrence, the comments as to damages raise matters outside the scope of the motion and as such are premature. The remainder of the concurrence simply restates what has already been addressed, does not materially add to or detract from the majority opinion and as such merits no further comment.

RULING

Appellant's Motion for Summary Judgment is denied.

_____

HOWARD A. POLLACK
Administrative Judge

Concurring:

ANNE W. WESTBROOK
Administrative Judge

Administrative Judge VERGILIO, concurring.

I agree with the majority that the motion for summary judgment in these appeals must be denied. I write separately because I conclude that the issues presented can be addressed succinctly when considering the contracts and law. The majority makes findings and delves into areas that I find unnecessary to resolve the specific matters raised.

Scott Timber Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003), is instructive and permits a ready resolution of the issues raised in these appeals as presented in the motion for summary judgment.[1] In light of Scott, the claims rest on incorrect legal principles. Tamarack Mills is not entitled to summary judgment. See Shawn Montee Timber Co., AGBCA Nos. 2003-132-1 et al. (Mar. 10, 2004) (relying upon Scott, this Board denied similar motions for summary judgment).

Tamarack filed these appeals concerning two contracts with the U.S. Department of Agriculture, Forest Service, the Filly Creek timber sale (contract number 005308; AGBCA No. 2003-115-1) and the Rubicon timber sale (contract number 005332; AGBCA No. 2003-116-1). Evergreen Forest Products, Inc. was the original purchaser under each contract. Tamarack entered into a third-party agreement with Evergreen, thereby assuming all of the obligations of Evergreen and receiving the rights and benefits under the contract. The Government recognized and approved the agreements on September 24, 1998.

Each of the underlying contracts contains clause C6.01, Interruption or Delay of Operations (10/96), 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." After the award of the contracts, but prior to the third-party agreements, lawsuits were filed alleging that the Government had failed to comply with environmental obligations concerning the contracted projects. Evergreen intervened in the suits. Subsequent to the third-party agreements, Tamarack agreed to finite suspensions of the contracts. After the suspensions were over, other lawsuits were filed. On September 30, 1999, the Ninth Circuit granted a motion for an injunction pending appeal, which directly affected these contracts. On October 1, 1999, because of the injunction, the Government suspended Tamarack's performance under each contract. In subsequent decisions, courts have held that the Government

[1] Tamarack's motion for summary judgment and the Government's response pre-date Scott; Tamarack's reply is dated one day after the issuance of the opinion. Although Tamarack submitted a district court opinion issued in the interim since the record on the motion closed, neither party has sought to submit discussion regarding Scott.

awarded the contracts without having fulfilled environmental obligations arising under statute. The contracts remain suspended; performance under the contracts cannot resume because the Government has yet to complete its environmental obligations as directed by court orders.

In its complaint, Tamarack asserts that the Government breached its implied duties to cooperate and not to hinder the operations on each contract (counts I and III):

> [A.] Notwithstanding this provision [i.e., clause C6.01], it is well established, however, that where, as here, the Forest Service's own failure to meet its pre-award environmental obligations causes the court order to be entered, the Forest Service has breached its duty to cooperate and not to hinder a purchaser's operations.
>
> [B.] Because the Forest Service's adjudicated failure to meet its environmental obligations was the cause of the court ordered injunctions in this instance, and because the Forest Service did not bargain for the contractual right to absolve itself from liability for court orders that its actions caused to be entered, the Forest Service's suspension breached the [given] contract.

(Complaint at 11 (¶¶ 45, 46), 14-15 (¶¶ 63, 64)) (citations omitted.) For ease of reference, these aspects of the complaint are denoted as issues A and B.[2]

In counts II and IV of its complaint, Tamarack maintains that the suspensions have continued for an unreasonable period of time, such that the suspensions constitute breaches of the contracts. It maintains that each suspension occurred on October 1, 1999, and "[w]ithout more, the suspension is unreasonably long." Further, it understands that the suspensions will cover at least four years, if not longer. Tamarack contends the "Forest Service's ongoing and unreasonably long suspension of the [given] timber sale breached the Forest Service's implied contractual duties to cooperate and not hinder Tamarack's operations." (Complaint at 12-13 (¶¶ 51-55), 15-16 (¶¶ 69-73).) For ease of reference, these aspects of the complaint are denoted as issue C.[3]

Issue A

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[2] Tamarack formulates these issues presented in its motion for summary judgment as follows:

> Whether, despite the Forest Service's putative authority contained in contract clause C6.01 to suspend Tamarack's operations in order "[t]o comply with a court order," the Forest Service's October 1, 1999 suspensions breached its implied duty to cooperate and not to hinder Tamarack'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?

(Memorandum at 1-2.)

[3] Tamarack formulates these issues presented in its motion for summary judgment as follows: "Regardless of the Forest Service's suspension authority, whether the Forest Service's suspension was for a *per se* unreasonable duration?" (Memorandum 2.)

In issue A, the purchaser incorrectly states the law. When a suspension arises under a court order because of a Government failure to correctly complete its statutory obligations, the resulting suspension does not automatically constitute a breach of an implied warranty to cooperate and not to hinder performance.

Specific guidance from Scott 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 at 1369. The court did not conclude that the Government's failure to satisfy statutory obligations entitled the purchaser to summary relief regarding a duty to cooperate and not hinder performance. I find that the evidence of the record established for resolving the motion for summary judgment does not compel a result in favor of the purchaser. Scott at 1369-70. The particulars of the litigation pre-dating and post-dating the contract awards, the interventions, the third-party agreements (and knowledge of Evergreen and Tamarack), and the specific actions of Government personnel and Evergreen and Tamarack, before and after the awards, and in response to the suspensions, need not be itemized here. Facts must be established and weighed in order to resolve the issues of reasonableness in these cases, without the constraints of a motion for summary judgment. The undisputed facts relied upon by the purchaser reveal but an incomplete picture of the situation.

Other undisputed facts preclude summary judgment in favor of Tamarack. The environmental assessments are incomplete, with the results unknown. At this time, the suspensions remain in place, and the contracts are still in existence. The Government asserts in its answer: "Since Appellant retains the right to complete the contracts once the Forest Service completes its environmental analysis any award of compensation above and beyond that permitted under C6.01 would result in a windfall to Appellant." (Answer at 9-10.) The environmental analyses may result in the conclusion that performance cannot resume, in whole or in part. However, should the suspensions end and performance be permitted to resume, Tamarack may have contracts more valuable than it does at the present or at the time of award. With the environmental analyses yet incomplete, Tamarack's entitlement to (and the quantum of any) relief could be affected by the outcome.

Issue B

Under issue B, Tamarack contends that the contracts do not permit the Government "to absolve itself from liability for court orders that its actions caused to be entered," such that the suspensions breached the contracts. Tamarack asserts a breach of contract premised solely on violations of statute, although it has not asserted that the underlying statutory obligations are incorporated into the underlying contracts. The teaching of Scott 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 at 1369.

Clause C6.01 provides 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 circumstances. See Scott 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.")

Under issue A, Tamarack may pursue the allegation that the Government's suspensions were unreasonable in terms of duration or a breach of implied duties. To pursue issue B, Tamarack must demonstrate that the contract incorporated an underlying statutory obligation. The violations of statutory provisions, not incorporated into the contract, by themselves do not constitute a breach. Thus, the purchaser has yet to demonstrate that issue B constitutes a claim for which it can successfully obtain relief.

Issue C

By asserting that the passage of time since the October 1, 1999, suspensions, without more, makes the suspensions unreasonably long, or is per se unreasonable, Tamarack seeks a determination without regard to surrounding, and perhaps, mitigating circumstances and factors, as raised by the Government with support to withstand a motion for summary judgment. Scott at 1369 (reasonableness issue is intensely factual). The Board cannot find that a suspension is unreasonable by considering only the element of time, to the exclusion of all other factors.

_____

JOSEPH A. VERGILIO
Administrative Judge

Issued in Washington, D.C.
March 31, 2004