SHAWN MONTEE, INC., dba SHAWN **MONTEE TIMBER COMPANY,**	)	**AGBCA Nos. 2004-153-R** **2004-154-R**
	)	**2004-155-R**
Appellant	)	**2004-156-R**
	)	**2004-157-R**
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RULING ON APPELLANT'S MOTION FOR PARTIAL RECONSIDERATION

October 6, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

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

BACKGROUND

These appeals involve 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 those suspensions. 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.

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.

On March 10, 2004, the Board issued a Ruling denying both motions. On April 12, 2004, Appellant filed a motion for partial reconsideration. The FS then filed a response and Appellant then responded to that filing. Thereafter, on July 12, 2004, Appellant filed a supplemental letter. The Board afforded the FS the opportunity to respond, which the FS did.

The Board will not here repeat the facts surrounding the appeal but rather refers the reader to the initial Ruling, Shawn Montee, Inc. dba Shawn Montee Timber, AGBCA No. 2003-132-1, et al., 04-1 BCA ¶ 32,564.

In denying Appellant's motion, we considered and applied both the language of C6.01 (which allows the government to suspend a contract as a result of a court order and limits recovery where the suspension was properly issued under that clause) and the obligation of the FS to meet its implied duty to cooperate and not hinder the contractor in the performance of its contract.

When we denied Appellant's motion, we relied upon reasoning in Scott Timber Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003), as well as upon other authority for guidance. We concluded that the rationale used by the court in Scott, which linked a finding of breach (of the duty to cooperate and not hinder) to actions lacking reasonableness, would also apply to the claimed breach of those same duties in this appeal. We came to that conclusion, recognizing that the suspension in Scott was caused by events after award, while the suspension here was caused by pre-award Government action. We also recognize that Scott concerned arguments dealing with the reasonableness of the length of the suspension and did not get into arguments regarding breach per se or reasonableness of the suspension act itself. To the extent that Appellant concluded that we read Scott to be directly on point with the facts, in this appeal, Appellant misunderstood the Ruling.

The Appellant, in its Motion for Partial Reconsideration, states that it seeks reconsideration of the Board's conclusion as to the test the Board used for a breach of the implied duty to cooperate and not hinder (stemming from a suspension caused by pre-award errors of the FS, held to have violated environmental laws). The Appellant argues that the legal standard is not whether the FS acted reasonably, as set out in our initial Ruling, but rather whether the suspension was caused

by a FS pre-award error and FS violation of environmental law. According to Appellant, it is black letter law that issuance of the court order, which is the basis for the suspension under C6.01 will not excuse the FS from its failure to perform (here to allow the timber sale to go forward) if the fault (here the environmental compliance and analysis) was due to actions of the FS and if the FS owed the Appellant the duty to properly complete and conduct those actions. The Appellant asserts in its motion that such fault is not limited to wilful wrongdoing, but includes any error or defect in judgment or conduct, as well as any deviation from prudence or duty or any shortcoming.

In its Reply to the Government's Response to Appellant's Motion for Partial Consideration, the Appellant clarified its position, as respects arguments made by the FS. In the Reply, it takes exception to how the FS has described Appellant's arguments. In its Reply, Appellant says that its argument that suspensions were unreasonable per se goes to the "inordinate duration of the suspension in this case, and not as the FS suggests to the fact that the Forest Service failure to abide by its own obligations under the environmental law caused the suspension." Appellant also denies that it argues that any unmet statutory obligation automatically constitutes breach of contract. Rather, Appellant asserts that "where as here, the primary cause of a suspension has been found to be government fault, the government cannot avail itself of the defense of impossibility of performance, etc. with respect to injunctions issued by the courts and, if the contract does not exculpate the government for causing the suspension (as this Board has found that C6.01 does not), and the contractor's operations were more than minimally disrupted by the suspension (as they clearly were here), then the government breached its implied duty to cooperate and not to hinder the contractor's performance."

Considering the wording of the Motion and the clarifications set out in response to the FS, it appears that Appellant is acknowledging that error does not always equal breach. However, reading Appellant's arguments together, it appears to say that absent C6.01 exculpating the FS from causing a fault based suspension (and the effect being significant), then the Government has breached its implied duties. As set out below, we do not find merit or legal support for that argument and stand by the test we set out in the earlier Ruling.

DISCUSSION

In our initial Ruling, we found and we continue here to find, that Appellant's test to establish breach is too broad in the context of this contract and specifically given the inclusion in the contract of C6.01 (CT6.01 in Bead /Lodge). The clause provides that the purchaser agrees to interrupt or delay operations in whole or part upon the written request of the Contracting Officer (CO), "To comply with a court order issued by a court of competent jurisdiction." Additionally, it provides that the purchaser agrees to limits on its damages, if it is suspended under the clause. The suspension here was issued under C6.01 as the result of a court order.

In making its arguments for breach, Appellant essentially ignores the language of C6.01. It instead chooses to read C6.01 to cover only court orders that cannot be attributed to fault of the

FS. That construction, however, is not consistent with the language of the clause. The clause on its face is broad and inclusive. There is no exception for an order issued due to an error in judgment, or for conduct or due to "any deviation" from prudence or duty. The clause does not have to specifically say that it covers both fault and non-fault based suspensions in order to apply. To get to Appellant's reading requires us to add wording, which simply is not there.

In this Motion for Reconsideration, Appellant attempts to buttress its narrow reading of C6.01 by claiming that its principal understood the wording of C6.01 to only apply to suspensions that were not the result of a court order based on FS fault. It asserts that we should adopt its principal's interpretation. We are unpersuaded by Appellant's argument. We find that at a minimum, the argument as to Appellant's understanding of the clause at bid time raises questions of fact relating to contract interpretation. The facts surrounding interpretation are not adequately developed in the record and are premature for resolution at this time. Moreover, we find it logical that the Government would insert this type of clause to protect itself from a situation such as the one at issue here, particularly given the fact that environmental challenges to projects, such as this, are not at all uncommon and a fact of life on many timber sales. Additionally, it would not be unexpected for the Government to go back and make corrections or additions to environmental documents that the Government thought were complete and correct when issued. At this stage, and taking all reasonable inferences in favor of the FS, it is logical to read the clause such that it covers both fault and non-fault based suspensions. Thus, we continue to find that the clause covers the instant suspension.

While we recognized in our earlier Ruling that clause 6.01 broadly covers both fault and non-fault driven court orders, we also found, following the reasoning used by the courts in Scott and H.N. Wood Products v. United States, 59 Fed. Cl. 479 (2003), that despite the wide breath of its language, C6.01 does not provide an absolute bar to breach. We found Scott and H.N. Wood Products to hold that the broad coverage of C6.01 does not relieve the FS of its independent duty to cooperate and not to hinder the performance of the contractor. That duty, however, must be measured in the context of the overall contract.

As to this contract, error in completing its environmental responsibilities does not automatically equal a breach of the implied duty to cooperate and not hinder. Rather, in a contract containing a clause such as C6.01 (which defines the parties' rights as to a suspension), an Appellant that is attempting to establish breach by the FS must show that FS actions regarding the suspension lacked reasonableness. That is what the guidance of Scott and H.N. Wood Products provides. Appellant seeks a significantly lesser standard.

Determining whether the FS lacked reasonableness in carrying out its environmental duties and in issuing the suspension is not an analysis to be conducted in a vacuum. Rather, a tribunal must take into account the nature of the contract and the clauses agreed to by the parties. It must look to the "particular contract, its context and its surrounding circumstances." Commerce International Co. v. United States, 338 F. 2d 81 (Ct. Cl. 1964). In addition, various issues and defenses need to be analyzed and weighed in order to make that judgment. These issues include

what the FS knew or should have known and to what extent the Appellant was on notice of the forseeability of the suspension and its duration. On the evidence before us, we do not find that Appellant has established breach for purposes of summary judgment.

In an attempt to further support its claim of breach in this Motion for Reconsideration, the Appellant submitted a supplemental letter dated July 12, 2004, where it attempted to introduce an additional argument, that being that the Shawn Montee appeal needed to be governed by a different corollary of the implied duty to cooperate and not hinder, than what was applied in Scott. Appellant asserts that Scott did not involve any allegation or finding that the FS had failed to ensure that its authorization conformed with existing laws. According to Appellant, the sales in Scott were prepared and awarded pursuant to special statutory authority which exempted the FS's need to comply with numerous environmental laws. Thus, Appellant states that Scott involved a non- warranty situation, while, in contrast, in the instant appeal, the FS did warrant compliance. Appellant described the FS warranty as an implied warranty that it (FS) had done that which is necessary (based on available information) to assure that its authorization of the sale conformed with existing law and that the timber sale contract can be performed without any interruption due to failure to conform to the laws existent at the time of award. According to Appellant, the unreasonableness standard or test set out in Scott applies only to non-warranty situations, while here, failure to properly comply with the law is all that is needed for breach. To reach its conclusion as to the proffered warranty, the Appellant relies upon the FS regulation, set out in 69 Fed. Reg. 37243 (June 28, 2004). Appellant states that the statement has been periodically made by the FS since 1990. The wording provides:

> [It] takes every precaution before authorizing a particular activity on National Forest System land to ensure that its authorization conforms with existing laws and with existing conditions on the ground at the time of the authorization.

We find that the Appellant overstates its contention that the regulation creates a warranty. What the FS says in the regulation is that it takes every precaution to ensure that its authorization conforms with existing laws and conditions on the ground. That adds nothing to what was before us on the initial motion. We have always operated on the basis that the FS has an obligation to pursue its environmental duties properly. That, however, does not guarantee that the pursuit will be error free, particularly taking into account C6.01, which on its face, warns the contractor that a suspension may occur due to a court order. As noted above, that notice, along with the nature of environmental litigation and compliance, makes it clear that error or failure to comply alone will not constitute a breach of either the clause or of the duty to cooperate and not hinder. Instead, as is reflected in Scott, when no specific warranty is breached, which we find to be the case here, the owner still has the responsibility to act reasonably. If it does not, then it runs the risk of breaching the duty to cooperate and not hinder.

In addition to Appellant's discussion of Scott in the July 12 letter, Appellant in its primary filing on this motion, also spent considerable time explaining its analysis of Scott and why in Appellant's view we misapplied it. As we noted at the outset of this Ruling, we recognize that

the Scott case is not directly on point in that it is factually distinguishable and focused on reasonableness related to the length of the suspension and not to the act of suspension itself. We also recognize that Scott did not involve a pre-award error. Nevertheless, Scott is applicable to this appeal for it establishes that there are limits to the extent to which we apply a clause such as C6.01. It also provides guidance as to the standard to be used in assessing breach of the duty to cooperate and not hinder. That the facts here are not identical with those in Scott, does not change our conclusion that the reasoning in the case is applicable here.

Finally, our Ruling is consistent with the position of the Court of Federal Claims in H.N. Wood Products. In that matter, the Court of Federal Claims dealt with whether the length of the suspension was of such duration as to constitute breach. There, as here, the environmental error occurred pre-bid. In discussing the relationship between C6.01 and the duty to cooperate and not hinder, the court stated the following:

> In summary, the Forest Service may have been authorized to suspend H.N. Wood's Contract under Clause CT6.01 in order to comply with the district court's order in Mark Donham, but the Forest Service did not have absolute authority to suspend the Contract with impunity. See id. Rather, the Forest Service's suspension authority was qualified by its implied obligations, including its duty to cooperate and not hinder H.N. Wood's performance. See id. While the Contract vested the Forest Service with discretion to suspend H.N.Wood's contract, it was required to exercise reasonable discretion and not to act arbitrarily or capriciously. See Precision Pine, 50 Fed. Cl. At 64, see also Wetsell-Oviatt, slip op. at 6. The Forest Service was not authorized to suspend H.N. Wood's contract indefinitely in order to comply with a court order if its own unreasonable or wrongful actions cause the court order to be imposed in the first place, or if it unreasonably delayed in remedying the offending circumstances. See id. at 61, 64-65, Wetsel-Oviatt, slip op. At 6-7.

As set out in H.N. Wood Products, where a contract provides for the suspension of work due to court orders involving environmental litigation, the breach of the duty to cooperate and not hinder only comes into play, if and/or when the suspension becomes unreasonable. Whether an actionable unreasonable action occurs on the date of the initial suspension or some later time is a matter to be determined based on the facts. But what is particularly important, and has been consistently ignored by Appellant in both this motion and the earlier one, is that because the contract addresses suspensions even due to FS fault and includes compensation (albeit not necessarily what Appellant wants), any claim of breach of the duty to cooperate and not hinder will arise only where the FS actions as to C6.01 become actionably unreasonable. Otherwise, the FS is simply enforcing its contract rights.

Here the FS, notwithstanding Appellant's characterization to the contrary, is not defending on the basis that it was impossible for it to perform its sale obligations. Rather, as we understand it, the FS is contending that the suspension falls under C6.01, which defines the compensation to be

paid as a result of a suspension, and that the FS actions in conducting the environmental process did not breach the FS duty to cooperate and not hinder. We have determined that given C6.01 and the overall context and process involved in environmental review, there should not have been an expectation that the process would necessarily be error free. There should not have been an expectation that a suspension due to environmental litigation (even if the FS was at fault) could not occur on this contract and be covered by C6.01. The Appellant had the right to expect that the FS would handle the environmental reviews and the suspension in a reasonable manner. To the extent that the FS actions crossed over the line and became unreasonable, then the Appellant might recover. Taking all inferences in favor of the FS, the Appellant has not established that the FS crossed the line.

Finally, turning to the Appellant's reliance on Superior Timber Co., Inc., IBCA No. 3459, 97-1 BCA ¶ 28,736 and Precision Pine, 50 Fed. Cl. 35, 63 (2001), we point out that the contract in Superior Timber did not contain a clause comparable to C6.01. Moreover, in Superior Timber the Board found that the adverse Rulings against the Government, prior to award, put the Government on notice that the Government's environmental assessment was insufficient before the Government awarded the contract. Similarly, in Precision Pine v. United States, the court determined there was no reasonable basis not to perform certain required environmental assessments after the Ninth Circuit decision put the agency on notice that it was required to perform the assessments. In this case, we have made no comparable findings that the FS had before it a clear direction similar to that apparently ignored in the other two cases. The matter of what the FS knew, should have known, and why it proceeded as it did, are all clearly at issue in this case and will be significant factors as to our ultimate conclusion. Similar questions must be resolved regarding the purchaser, as well.

LOSS OF VALUE

The Appellant has also argued that the Board failed in its initial Ruling to address Appellant's argument that there was breach because the suspensions were unreasonably long and the timber became worthless during the protracted suspensions. The Board did consider the argument in its initial Ruling. We continue to find that loss of value alone does not establish that the suspension was unreasonable, so as to allow breach damages. The Appellant has provided no new arguments in its motion for reconsideration as to this issue. The Board position stands. We do agree with the point made by the dissent in the initial Ruling that the condition of the timber is one of the factors that can be considered in determining reasonableness. We further note that we will independently look at the suspension and its length and the FS actions as to reasonableness in continuing the suspension. An independent review of the length of the suspension and its impact will be conducted irrespective of whether the FS knew, or should have known, of the defects in the environmental documents at the time of the award and bid. What the FS knew, and when it knew, will be considered in assessing the reasonableness of the duration, as well as the initial imposition of the suspension.

RULING

The Motion for Partial Reconsideration is denied.

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HOWARD A. POLLACK
Administrative Judge

Concurring:

_____
ANNE W. WESTBROOK
Administrative Judge

Administrative Judge VERGILIO, concurring.
Shawn Montee Timber Company, the purchaser, sought summary judgment on the question of liability on each of two counts of its complaints. In count I, the purchaser asserts that the underlying suspensions of the contracts were not authorized under the Interruption or Delay of Operations clauses (C6.01 or CT6.01, as applicable) because the injunctions were caused by the pre-award failures of the Forest Service to satisfy its environmental obligations. In count II, the purchaser contends that the Government breached the contracts because the suspensions were of unreasonable duration. The Board denied both the purchaser's motion and the Government's motion for summary judgment on each count. As noted in my separate opinion, unlike the majority, I would grant the Government's motion for summary judgment on count I. Shawn Montee, AGBCA No. 2003-132-1, et al., 04-1 BCA ¶ 32,564.

The purchaser has filed what it styles as a motion for partial reconsideration, as it alleges that the Board misinterpreted and misapplied law (Scott Timber Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003)), and failed to address an independent ground raised for summary judgment (that the suspensions were unreasonably long under the circumstances so as to constitute a breach of contract). I conclude, as does the majority, that the purchaser should not prevail on its motion for reconsideration, as it reargues its position, with different emphasis and specificity, but raises nothing meriting reconsideration. A disagreement with the Board's legal conclusions does not constitute a basis warranting the submission of a motion for reconsideration. Thorco, Inc., AGBCA No. 2003-157-R, 03-2 BCA ¶ 32,281 ("Reconsideration is not intended to permit a party to reargue its position or to present additional arguments that could have been presented originally."). Decisions of the Court of Federal Claims, e.g., Precision Pine & Timber, Inc. v.

United States, 50 Fed. Cl. 35 (2001), and of the Department of Interior Board of Contract Appeals, e.g., Scott Timber Co., IBCA No. 3771-97, 01-1 BCA ¶ 30,760 , do not establish binding legal precedent before this Board. The Board is bound by decisions of the Federal Circuit and its predecessor; such decisions, as well as the contracts and other facts at issue, guide the results of the Board. The Board may opt to adopt or reject a rationale offered by a party or utilized by another forum, just as the Board may choose or not to extend to other situations holdings of the Federal Circuit. I write separately, because I continue to interpret the contract clauses and obligations of the Government, and limitations upon the remedies available to the purchaser, in a manner that is contrary to the interpretation urged by the purchaser. Two matters merit particular comment.

First, as here applicable, clauses C6.01 and CT6.01 state that the purchaser agrees to interrupt or delay operations under the contract, upon the written request of the contracting officer, to comply with a court order, issued by a court of competent jurisdiction. The clause also specifies the sole and exclusive remedy available to the purchaser in the event of an interruption or delay of operations under the provision.

The purchaser maintains that because of improper action and inaction prior to award the Government breached its implied obligations to cooperate and not hinder the purchaser's performance, and that such action and inaction preclude reliance upon clauses C6.01 and CT6.01. By asserting implied obligations, the purchaser has not identified any specific obligations found in or incorporated into the contract. As indicated in my earlier decision, I find that the guidance in Scott Timber, at 1369, compels the conclusion that such violations, even if assumed or proven, do not constitute a breach of the contract:

> 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.

Because the given clauses provide the Government with the authority to suspend performance, what remains for record development and analysis is the reasonableness of the length of the suspension, not the fact that the suspensions occurred in accordance with the contract (that is, pursuant to court order and subsequent written directives of the contracting officer). Thus, even assuming that implied duties to cooperate and not hinder performance arise with respect to actions that are preconditions to a contract, and before the parties entered into a contractual relationship, the implied duties do not invalidate the use and application of clauses C6.01 or CT6.01.

Second, in its motion for summary judgment, the purchaser requested that the Board resolve the following question:

> 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?

I specifically addressed this in rejecting the notion:

> 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.

In the present motion, the purchaser notes that "the dissent indicates that the condition of the timber is only one factor to be considered in a reasonableness analysis. With all due respect, that position simply does not withstand scrutiny." The purchaser concludes, "Simply put, irrespective of any contractual suspension authority that the Forest Service had, it **must** be held responsible for any suspension of such a length that the timber became valueless during its term." (Purchaser's Memorandum at 18-19.)

The purchaser fails to appreciate the express risk allocation aspect of the Interruption or Delay of Operations clauses; accepted contract interpretation principles do not favor allocating risk without regard to contractual provisions. The purchaser has not identified why the purported interpretation by one of its principals is material or relevant given the express language of the clause.

The incorrectness of the purchaser's proffered interpretation is readily evident. Assume that after an initial injunction (issued by a district or circuit court) and suspension (issued by a contracting officer pursuant to clause C6.01 or CT6.01), the Government prevails in the litigation, such that logging can commence. The clause dictates the limits of the purchaser's recovery and the Government's liability. To suggest that the Government "must" be held responsible, without regard to the clause, simply because the timber became valueless ignores the specific language of the clause.

Further, even in lawsuits in which the Government does not fully prevail, the Government may require time to complete an analysis or other actions mandated by a court. Timber may be deteriorating or may have deteriorated (or simply have lost value) during an initial suspension (while the matter remained before a court(s)). Timber may continue to deteriorate or lose value subsequently, while actions are within the control of the Government. The purchaser has not demonstrated that regardless of the circumstances surrounding the suspension and a purchaser's knowledge of and involvement in pre-award or post-award activities, the Government must be held responsible for the suspension, so as to make relief available to the contractor outside of the

contract clauses. The loss of timber value during a suspension does not constitute a breach of contract by the Government, thereby automatically entitling the purchaser to relief.

In summary, the purchaser persists in asserting positions that are not consistent with the language of its contracts. Clauses C6.01and CT6.01 permit the Government to suspend operations under the contracts; however, such a suspension may become unreasonable in length so as to be deemed a breach. While I agree with the purchaser that the majority has misapplied the law and misinterpreted the contracts regarding count I, unlike the purchaser, I would deny count I at this stage of the proceedings. However, the purchaser has not raised a basis meriting reconsideration, such that I deny the motion.

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JOSEPH A. VERGILIO
Administrative Judge

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