

CHAPTER 28

Dealing with Environmental Contingencies in Public and Private Timber Sale Contracts

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§ 28.01. Introduction and Background.

[1]--General Statement of the Problem.

Since at least the late 1960's, public controversy over the use and conservation of natural resources has been a major theme in litigation and legislation directly affecting natural resource industries. In many respects, the United States timber industry and the public and private timber sale contracts that are a vital source of supply for that industry are at the center of this controversy. Every year hundreds of millions of dollars of timber sale contracts are performed by public and private entities. These contracts typically provide, in detail, for how timber is to be harvested, how logging roads are to be constructed and maintained, and how wildlife and water quality, as well as scenic and recreational values, are to be protected during harvest operations. Despite the frequent inclusion in these contracts of detailed requirements and specifications dealing with these environmental concerns, contract performance is increasingly interrupted by the occurrence of environmental contingencies, such as the discovery of threatened or endangered species or wetlands in the sale area. These events often lead to substantial modification, or even cancellation, of the contract, with significant adverse impacts on both purchasers and sellers. This Chapter addresses the ways in

which private and governmental parties can deal with environmental contingencies, with particular emphasis on the modern excuse doctrines of mutual mistake, impossibility, frustration of purpose, and commercial impracticability.

[2]--The United States Timber Industry.

Although some wood products companies own significant amounts of commercial timber land and can satisfy all or a substantial portion of their timber supply needs internally, public and private timber sales remain a principal source of supply for most of these businesses. For example, approximately 28% of the timber used in manufacturing lumber comes from National Forest System lands administered by the United States Forest Service of the Department of Agriculture.⁽¹⁾ Historically, the Forest Service has annually offered about 4,000 timber sales for commercial harvest.⁽²⁾ Other public owners, including federal agencies other than the Forest Service, states, counties, and municipalities account for an additional 12% of the national timber supply.⁽³⁾ Not surprisingly, the Forest Service is the largest seller of timber, public or private, in the United States. For purposes of analyzing the impact of environmental contingencies on public timber sales, this Chapter will focus on Forest Service policy and practice. Although no statistics are generally available on the volume of timber sold from private lands, over 46% of the timber in the United States is privately owned by individuals or businesses not involved in the manufacturing of wood products. Consequently, a substantial number of private timber sales occur every year. Public and private timber sales, therefore, play a critical role in our nation's timber supply.

[3]--The Form and Function of Timber Sale Contracts – A

Starting Point for Risk Allocation Analysis.

When the performance of a timber sale contract is abruptly interrupted by the occurrence of an environmental contingency, the first step in ascertaining the rights and obligations of the parties is an analysis of whether the contract implicitly or explicitly allocates the risk of that contingency. The starting point for this analysis is a basic understanding of the form and function of timber sale transactions.

[a]--General Rights and Obligations of Purchasers

and Sellers Under Timber Sale Contracts.

Timber sale contracts involve considerably more than the mere delivery of, and payment for, logs. The typical timber sale involves timber harvesting, road construction, and numerous other performance obligations. A timber sale is more akin to a construction project than to the sale of goods. The landowner/seller generally has the initial responsibility of designating a specific sale area on the property and drawing up specifications for the timber to be harvested. Next the seller must provide the purchaser with access to the sale area. Ordinarily this involves permission for the purchaser to build a road or use and maintain an existing road on the seller's land. In Forest Service and other public timber sales, the road location and design are usually determined by the public seller who also provides detailed road building or maintenance specifications for the purchaser to follow.

During logging operations the purchaser must cut and remove all of the designated timber in accordance with the contract's logging specifications. The purchaser must transport the timber, normally by truck, to the purchaser's mill. Most public and private sellers intend to reforest their land after the timber is harvested. Therefore, the seller often includes additional requirements in the contract to assure that sound silvicultural methods are used for logging and hauling, and that these methods will not impede the regeneration of trees. In addition, public contracts include specific provisions for the protection of wildlife, water quality, and recreation/scenic values. From the seller's initial obligation to provide access to the sale area through the