



**FOREST SERVICE HANDBOOK  
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**FSH 2409.15 - TIMBER SALE ADMINISTRATION HANDBOOK**

**CHAPTER 30 - CHANGE IN STATUS OF CONTRACTS**

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**Approved:** TINA TERRELL  
Associate Deputy Chief, NFS

**Date Approved:** XX/XX/2020

**Posting Instructions:** Amendments are numbered consecutively by Handbook number and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document.

<b>New Document</b>	2409.15_30	85 Pages
<b>Superseded Document(s) by Issuance Number and Effective Date</b>	Amendment 2409.15-2015-1 03/16/2015	95 Pages

**Digest:**

30 – Revises chapter in its entirety. Makes minor corrections in spelling, punctuation, and style practices, and updates cross references to contracts and directives throughout the chapter. Removes references to obsolete contract forms FS-2400-6/6T dated 1973 and 7/01 throughout chapter. Substantive changes are as follows:

31.13 – Clarifies and provides additional detail on delay in use of processing facilities.

32.11 – Removes references to contract forms FS-2400-13/13T. Recodes extension procedures for those contract forms to section 32.11a.

32.11a – Establishes code, caption, and sets forth direction for “Sales Contract Form FS-2400-13/13T” extension procedures for contracts.

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**Digest Continued:**

32.15 – Clarifies when consent of surety is needed when extending or adjusting contract termination date. Clarifies when sale area boundaries can be modified. Clarifies when rates must be redetermined.

32.15 – Exhibit 02 – Added requirement for Purchaser to initial all pages of agreements to modify contracts to the sample letter.

33.2 – Added requirement for Purchasers to initial every page of a contract modification prior to Contracting Officer's approval. Clarifies procedure in case of a unilateral contract modification.

33.6 – Clarifies that the Purchaser may decide to terminate a contract rather than accepting a unilateral modification in cases of an environmental modification.

34.3 – Adds reference to new Forest Service Handbook 2409.18a, chapter 10 addressing suspension and debarment procedures.

34.51a – Clarifies that the Purchaser's signature is not required for a unilateral modification.

35.1 – Clarifies procedures for third-party agreement upon death of Purchaser.

35.2 – Clarifies procedures for releasing performance bond when accepting a third-party.

36 – Changes title from "Assignments in Trust" to "Assignment" and clarifies procedures for assignments.

37.1 – Adds requirement to notify surety in advance of an anticipated default.

38.1 – Adds link to Federal District Courts web site. Clarified distribution of assets in Chapter 7 bankruptcy.

38.34 – Adds link to Proof of Claims forms.

39.2 – Removes Exhibit 01 checklist forms and adds link to internal web site where the approved forms can be obtained.

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## **30 – CHANGES IN STATUS OF CONTRACTS**

The numbering system for contract provisions differs between FS-2400-6/6T contracts and September 2004 version of the FS-2400-13/13T contracts. Integrated Resource Contract forms FS-2400-13 and FS-2400-13T are timber sale contract forms used for stewardship end result projects where the value of products sold is greater than the cost of services performed (FSH 2409.19, sec. 62.11). For ease in reading this chapter, and unless noted otherwise, references to a FS-2400-6/6T contract provision apply to the corresponding provision with the same descriptive title in a FS-2400-13/13T contract. FS-2400-13/13T contracts with an issue date of (10/19) use the same division structure and provision numbers as the FS-2400-6/6T contracts.

## **31 - CONTRACT TERM ADJUSTMENT**

### **31.1 - Conditions Permitting Force Majeure Contract Term Adjustment**

Force majeure means “superior force,” an event or effect that cannot be anticipated or controlled. In the context of the timber sale contract it refers to factors beyond the Purchaser’s control such as acts of God; acts of the public enemy; and acts of the Government, labor disputes, fires, insurrections, or floods. Contracting Officers may adjust the termination date of timber sale and stewardship contracts containing provision B/BT8.21 or I/IT.2.1 when circumstances stated in those provisions occur. To qualify for this adjustment, the Purchaser shall give written notice of the lost time not later than 30 days after the end of the Normal Operating Season in which the time was lost and at least 10 days before the termination date. The intent of these deadlines is to allow Forest Service to investigate alleged causes of delay while the evidence is fresh and prior to the termination of a contract. When the Forest Service has actual, documented knowledge of the excusable cause and the lack of formal notice within the 30 days does not prejudice the Forest Service, the Forest Service may grant additional time despite the Purchaser’s failure to meet the notice requirement (Comp. Gen. Dec. B-167120, Aug. 1, 1969) available at: <https://www.gao.gov/products/429656#mt=e-report>. An example might be when flood or fire destroys a bridge or road, disrupting normal forest administration along with logging and other public traffic.

The Forest Service must respond promptly to a Purchaser's written notice as stated in the second paragraph of provisions B/BT8.21. The Contracting Officer shall sign all contract term adjustments. Document a contract term adjustment by certified letter to the Purchaser or by contract modification. Obtain consent of surety when a term adjustment results in a new termination date more than 1-year past either the original termination date or the termination date the last time consent of surety was obtained. Form FS-2400-0010 may be used when processing a contract term adjustment requiring consent of surety.

Rates in effect during the adjustment period must be those in effect at the original contract termination date, except where an environmental modification or catastrophic damage rate redetermination (FSH 2409.15, Sec. 43.3) indicates lower or higher rates. Quarterly stumpage rate adjustment provisions must be continued during the adjustment period.

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When processing a contract term adjustment any periodic payment dates that have not been reached must be adjusted by the same number of calendar days added to the contract termination date. Specified road completion dates in the contract that have not been reached should also be adjusted to reflect the number of calendar days added to the contract termination date.

Contracting Officers should check the termination dates on any bonds and Irrevocable Letters of Credit when processing term adjustments to verify that they will remain in effect for the full adjusted contract term plus the time needed to process sale closure (FSH 6509.11k, Ch. 80).

The general rule at 36 CFR 223.31 for contracts to not exceed 10 years in duration does not apply to contract term adjustments for delays beyond the control of the Purchaser (force majeure). Contracting Officers may authorize a force majeure contract term adjustment pursuant to B/BT8.21 that results in the total length of a contract exceeding 10 years.

### **31.11 - Delay or Interruption of Sale Area Operations**

Timber sale and stewardship contracts containing provision B/BT8.21 stipulate that to qualify for a contract term adjustment, an interruption or delay must stop or significantly reduce removal of included timber from the sale area through curtailment of a specific part of the operation that was scheduled to occur during the normal operating season pursuant to contract provision B/BT6.31.

The Purchaser shall make a written request for adjustment within a stipulated period of time, so that the Forest Service can verify the delay or interruption. As a general rule, deny late requests. Honor late requests when the Forest Service has actual, documented knowledge of the events causing the delay or interruption or from sources other than the Purchaser that can readily substantiate the delay. Do not grant adjustments for delays or interruptions that stop scheduled removal of included timber for less than 10 consecutive days except when the delay or interruption is at the request of the Forest Service (sec. 31.12). Disregard lost portions of days when computing time lost. Contracting Officers shall reply promptly in writing to each request, stating the number of days the adjustment is warranted and the adjusted termination date (sec. 31.1).

The Purchaser is not entitled to a contract term adjustment when the cause of a suspension is due to breach.

Contract term adjustment may not be granted to permit the Purchaser to operate on other than National Forest timber in urgent need of removal but the Purchaser may be eligible for an urgent removal extension in those situations. Refer to section 32.6.

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### **31.12 - Delay or Interruption at the Request of the Forest Service**

Under contract forms FS-2400-3S/3T/3P, FS-2400-6/6T, and FS-2400-13/13T contract term adjustment may be granted for delays of less than 10 days during the normal operating season when requested by the Contracting Officer under B/BT8.21(c)(i).

When the Purchaser cannot operate on National Forest timber already under contract by the termination date, and also operate on other timber that needs more urgent harvesting at the same time, grant additional time. However, only request a Purchaser to operate on timber in more urgent need of harvesting when the Forest Service's intent to use this arrangement is in the prospectus for the timber that needs urgent harvesting (FSH 2409.18, Ch. 50).

#### **31.12a - Delay for Fire Emergencies**

Contract forms FS-2400-3/3T/3P, FS-2400-6/6T, and FS-2400-13/13T specifically define fire emergency closures as Forest Service requests and permits contract term adjustment when the accumulated time lost by interruptions exceeds a stipulated amount of time. Total sale length can exceed 10 years as a result of such a contract term adjustment. The Forest Service Representative shall keep an accurate record of all such closures implemented during the season.

#### **31.12b - Procedures for Sales in Urgent Need of Harvesting**

During the preparation phase of National Forest System sales in urgent need of harvesting, the Responsible Official shall decide whether to grant early extension (sec. 32.5) or contract term adjustment on sales under contract to operators who purchase the urgent need sales. The decision to grant extensions or adjustments should be stated in the prospectus (FSH 2409.18, Ch. 50). Refer to section 32.6 for procedures on granting urgent removal contract term extensions to facilitate the rapid harvest of catastrophically damaged timber from non-National Forest System lands.

When the Purchaser submits a sale for consideration, the Contracting Officer shall check against the criteria listed in the prospectus. If the sale meets the criteria, the Contracting Officer generally should grant an early extension or contract term adjustment. When clear evidence exists demonstrating that the urgent harvesting does not impact the sale, no additional time or extension should be granted. The Purchaser must demonstrate the impacts on existing sales. Impacts should not be limited to physical limitations on log storage, or physical moving of personnel and equipment. Transfer of capital, inventory limitations established for fiscal purposes, and similar indirect impacts should also be considered.

If the submitted contract not in urgent need of harvesting does not qualify for additional time or an extension, the Contracting Officer should advise the Purchaser promptly. Because the Purchaser has the discretion to bid or not on a sale designated in urgent need of harvesting, delays in operating other sales are within their control and do not meet the definition of force

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majeure. Total sale length including the term adjustment must not exceed 10 years in these situations unless there is a finding by the Chief that better utilization of the various forest resources will result (36 CFR 223.31).

Contracting Officers should make Contract Term Adjustments granted pursuant to the provisions of contract forms FS-2400-3S/3T, FS-2400-6/6T, or FS-2400-13/13T only after the urgent harvesting is completed or at the conclusion of the normal operating season if the urgent harvesting will carry over into the following season.

### **31.12c - Delay in Award of Contract**

Grant additional time when Forest Service delays award of a contract for 10 or more days during the normal operating season for reasons included in contract provision B/BT8.33. Do not include time for conducting a Purchaser responsibility determination when calculating the eligible time. For example, litigation at the time of bid is not resolved for 150 days after the bid date and the high bidder has agreed to extend its firm offer past the 90 days allowed on the bid form. Following the bid, 75 days remain in the normal operating season. During the first 30 days, the Forest Service conducts a responsibility determination. Since the responsibility determination is a part of the normal award process, the litigation did not cause a delay in award during that 30-day period. The contract should receive 45 days of contract term adjustment at time of award for the time lost during the normal operating season. The Purchaser does not receive a term adjustment for the time the litigation was ongoing outside of the normal operating season.

### **31.13 - Delay in Use of Timber Processing Facilities**

Timber sale contract forms FS-2400-3S/3T/3P, FS-2400-6/6T, and FS-2400-13/13T authorize contract term adjustments when causes stated in B/BT8.21 affect the disposition or processing of included timber. One of the more common causes is a mill fire damaging or destroying the head rig or other primary processing equipment.

When a Purchaser requests a Contract Term Adjustment (CTA) for a delay or interruption for reasons relating to the use of the primary timber processing facilities, the Contracting Officer must determine if the delay affects the processing of the mill's primary product. For example, the loss of dry kilns as a result of a fire would substantially affect the processing of included timber if the mills' primary product is kiln dry lumber. To be eligible the affected facility must be out of production for at least 60 days regardless of when the time lost occurs in relation to the normal operating season (NOS). However, only production time lost during the NOS is eligible for a CTA. Using this example assume that the kilns were inoperable for 110 days during January-April. During that time logs in the mill yard could not be processed creating a backlog that will affect timber removal from sales at a later date. A sale with a December 31, 2020 termination date and a 5-month NOS from June 1 – October 31, would be eligible for 110 days of CTA to September 18, 2021. While not a constraint in this example, contract term adjustment

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is limited to 12 consecutive months under B/BT8.21, and may be adjusted up to a total of 24 consecutive months pursuant to B/BT8.211 if Purchaser demonstrates a diligent effort to replace primary processing facilities. The additional time is most likely to be needed when all or a substantial portion of the primary processing facility is damaged or lost.

When a Purchaser has multiple sales under contract, determining CTA for individual sales becomes more complicated. Paragraph (b) of B/BT8.21 uses the causes stated in paragraph (a) but does not use the conditions which state that the delay would only apply to contracts with active or scheduled operations during the NOS. Therefore, all contracts held by the Purchaser could be eligible including those that the Purchaser had not planned to operate on during the delay period. However, granting CTA for all sales in the same manner as addressed in the previous paragraph would be inequitable and contrary to the intent of the contract which is to simply make the Purchaser whole. When multiple sales are involved, the Contracting Officer will need to work with the Purchaser to address changes in operating plans caused by the temporary loss of processing facilities and lost production rates when allocating CTA to two or more sales. The results should be an equitable adjustment when considering all of the Purchaser's National Forest System contracts potentially affected.

The Contracting Officer shall reply promptly in writing to each request, stating the number of days of adjustment granted and the adjusted termination date (sec. 31.1). The letter should also request that the Purchaser provide written notice when the delay at the mill is resolved. Do not adjust a contract on any other contract form (for example, 2400-4) for such causes unless the Purchaser can show that it was not feasible to continue sale operations.

### **31.14 - Rates**

Rate redetermination and quarterly rate adjustment provisions in effect following a contract term adjustment must be the same as those in effect prior to the contract term adjustment. However the rates in effect during the adjustment period may be lower than those paid before that time. For example, rates for a sale with an emergency rate redetermination provision may be redetermined if the conditions for an emergency rate redetermination occur during the adjusted period. Thus, rates may be lowered if the appraisal justifies such a change and no other provision in the contract prevents it. In flat rate sales with no provision for rate redetermination, the bid rates are fixed and cannot be adjusted.

### **31.2 - Market-Related Contract Term Addition**

The rules at 36 CFR 223.52 set forth procedures for adding time to certain timber sale contracts when drastic wood product price reductions occur. Follow the procedures in the text of the rule as shown in Exhibit 01.

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**31.2 - Exhibit 01**

**36 CFR 223.52 - Market-related contract term additions**

(a) Contract provision.

(1) Except as provided in paragraph (a)(3) of this section, each timber sale contract exceeding one year in length shall contain a provision for the addition of time to the contract term, under the following conditions:

- (i) The Chief of the Forest Service has determined that adverse wood products market conditions have resulted in a drastic reduction in wood product prices applicable to the sale; and
- (ii) The Purchaser makes a written request for additional time to perform the contract.

(2) The contract term addition provision of the contract must specify the index to be applied to each sale. The Forest Supervisor shall determine and select from paragraph (b) of this section, the index to be used for each sale based on the species and product characteristics, by volume, being harvested on the sale. The index specified shall represent more than one-half of the advertised volume. If none of the indices in paragraph (b) of this section represent more than one-half of the advertised volume, the index specified shall represent the species product combination representing the highest percentage of volume for which there is an index. When the Forest Supervisor determines that the species and potential product characteristics are such that more than one index could be used, the prospectus will state that the Contracting Officer may, upon the Purchaser's written request, select an alternative index from paragraph (b) of this section, and may modify the contract by mutual agreement, at time of contract execution, to include an alternative index that the Contracting Officer has determined represents the highest percentage of products the Purchaser intends to produce or have produced from the sale. Purchasers seeking a change of index at time of award must substantiate the need for an alternative index by providing the Contracting Officer with a written request that includes a list of products by volume the Purchaser intends to produce or expects will be produced from the timber on that sale. In the event a mutual agreement to modify a contract to include an alternative index is not reached at time of contract execution, the index specified in the sample contract shall apply.

(3) A market-related contract term addition provision shall not be included in contracts where the primary management objective requires prompt removal of the timber, such as, timber is subject to rapid deterioration, timber in a wildland-urban interface area, or hazard trees adjacent to developed sites.

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**31.2 - Exhibit 01--Continued**

(b) Determination of drastic wood product price reduction

(1) The Forest Service shall monitor and use Producer Price Indices (PPI), as prepared by the U.S. Department of Labor, Bureau of Labor Statistics (BLS), adjusted to a constant dollar base, to determine if market-related contract term additions are warranted.

(i) The Forest Service shall monitor and use only the following indices:

Bureau of Labor Statistics Producer Price Index	Index Series	Index Code
Hardwood Lumber	Commodity	0812
Softwood Lumber	Commodity	0811
Wood Chips	Industry	3211135

(ii) Preliminary index values will be revised when final index values become available; however, determination of a qualifying quarter will not be revised when final index values become available.

(2) For PPI index codes 0811 and 0812, the Chief of the Forest Service shall determine that a drastic reduction in wood prices has occurred when, for any two or more consecutive qualifying quarters, the applicable adjusted price index is less than 88.5 percent of the average of such index for the four highest of the eight calendar quarters immediately prior to the qualifying quarter. A qualifying quarter is a quarter, following the contract award date, where the applicable adjusted index is more than 11.5 percent below the average of such index for the four highest of the previous eight calendar quarters. For PPI index code 3211135, the Chief of the Forest Service shall determine that a drastic reduction in wood prices has occurred when, for any two or more consecutive qualifying quarters, the adjusted price index is less than 85 percent of the average of such index for the four highest of the eight calendar quarters immediately prior to the qualifying quarter. A qualifying quarter is a quarter, following the contract award date, where the adjusted index is more than 15 percent below the average of such index for the four highest of the previous eight calendar quarters. Qualifying quarter determinations will be made using the PPI for the months of March, June, September, and December.

(3) A determination, made pursuant to paragraph (b)(2) of this section, that a drastic reduction in wood product prices has occurred, shall constitute a finding that the substantial overriding public interest justifies the contract term addition.

**31.2 - Exhibit 01--Continued**

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**31.2 - Exhibit 01--Continued**

(c) Granting market-related contract term additions. When the Chief of the Forest Service determines, pursuant to this section, that a drastic reduction in wood product prices has occurred, the Forest Service is to notify affected timber sale Purchasers.

For any contract which has been awarded and has not been terminated, the Forest Service, upon a Purchaser's written request, will add one year to the contract's terms, except as provided in paragraphs (c)(1) through (4) of this section. This 1-year addition includes time outside of the normal operating season.

(1) Additional contract time may not be granted for those portions of the contract:

- (i) With a required completion date;
- (ii) Where the Forest Service determines that the timber is in need of urgent removal;
- (iii) Where timber deterioration or resource damage may result from delay; or
- (iv) Where included timber is designated by diameter and delay may change the treatment as a result of trees growing into or out of the specified diameter range(s).

(2) For each additional consecutive quarter in which a contract qualifies for market-related contract term addition, the Forest Service will, upon the Purchaser's written request, add an additional three months during the normal operating season to the contract, except that no single 3-month addition shall extend the term of a contract by more than one year.

(3) No more than three years shall be added to a contract's term by market-related contract term addition unless the following conditions are met:

- (i) The sale was awarded after December 31, 2006;
- (ii) A drastic reduction in wood product prices occurred in at least ten of twelve consecutive quarters during the contract term, but not including the quarter in which the contract was awarded; and

(4) For each qualifying quarter meeting the criteria in paragraph (c)(3)(ii) of this section, the Forest Service will, upon the Purchaser's written request, add an additional three months during the normal operating season to the contract, except no single 3-month addition shall extend the term of a contract by more than one year.

(5) In no event shall a revised contract term exceed 10 years as a result of market-related contract term addition.

(d) Recalculation of periodic payments. Where a contract is lengthened as a result of market conditions, any subsequent periodic payment dates shall be delayed 1 month for each month added to the contract's term.

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The determination of which periodic payment dates are eligible for adjustment is dictated by the periodic payment date specified in the contract and not by the due date on a bill that has been issued for a periodic payment.

### **31.21- Producer Price Indices by Region**

Forest Supervisors shall select the appropriate index for each timber sale in accordance with 36 CFR 223.52(a), and may consider the following when determining which index is most appropriate when multiple species and/or products are included.

1. When over 50 percent of the sale volume is appraised as sawtimber, the lumber index representing the preponderance of the volume must be used, that is, either the softwood lumber or hardwood lumber index.
2. When over 50 percent of the sale volume is appraised as non-sawtimber and a local market exists for pulp (clean) chips, use the wood chips index, except for conditions described in this section.
3. When over 50 percent of the sale volume is appraised as non-sawtimber and a local market exists for oriented strand board chips; the softwood lumber index may be used.
4. When over 50 percent of the volume is appraised as non-sawtimber and the sale does not meet the conditions in paragraphs 2 or 3, Forest Supervisors should carefully consider the mix of material in the sale and local markets for that material. Select the index that most closely reflects sale and market conditions recognizing the intent of market related contract term addition (MRCTA) is to provide relief to Purchasers during a drastic decline in market conditions. For example, if over 50 percent of the volume is expected to be processed in a co-generation facility, but harvesting is dependent upon the profitability of the sawtimber component of the sale, one of the lumber indices may be most appropriate.
5. When conditions in paragraphs 3 or 4 exist, document the rationale for the index selected as most appropriate for the sale.

When the Forest Supervisor determines that the species and potential product characteristics are such that more than one index could be used, the prospectus should state that the Contracting Officer may, upon the Purchaser's written request, select an alternative index. Follow the procedures in 36 CFR 223.52(a)(2) when a change of index is considered. Do not modify contracts at a later time to change the index a second time even if it is subsequently determined that the majority of the volume is being processed as a different product.

### **31.3 - Waiver of Time Limit**

Contracting Officers shall use form FS-2400-0011, Waiver of Time Limit, when allowing additional time for the completion of slash disposal, erosion control, fire protection, presentation

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for scaling, or similar requirements. Contracting Officers shall not use a waiver of time limit to allow more time for removing included timber from the sale area. A waiver of time limit is considered a contract term adjustment for the purpose of Purchaser completing performance of obligations covered by such permission.

### **32 - CONTRACT TERM EXTENSION**

Contracting Officers shall not extend the contract term unless:

1. The Purchaser has diligently performed in accordance with contract provisions and an approved plan of operation; or
2. Extension would be in the substantial overriding public interest.

Prior to authorizing contract term extensions, determine if the contract is eligible for any of the forms of contract term adjustment (sec. 31). Process contract term adjustments prior to contract term extensions.

#### **32.1 - Extension for Diligent Performance**

Timber sale contracts for harvesting National Forest timber clearly establish the Purchaser's obligation to complete all contractual obligations within the time limits specified in the contract (FSM 2453.16).

Use the Purchaser's Plan of Operation to gauge progress and identify early on sales that the Purchaser is not making satisfactory progress on towards completing the contract by the termination date. Contracting Officers are not obligated to grant a contract term extension. To minimize the need for a contract term extension or the potential for default, notify the Purchaser when it becomes apparent that operations are lagging behind the approved plan and require the Purchaser to submit a revised Plan of Operation showing how the sale will be completed before the termination date.

Both parties must make decisions relating to an extension when the termination date of a contract is imminent, and the contract is not completed. Although it is not required by the contract, the Forest Service and Purchaser benefit if the Purchaser receives a written reminder of the contract termination date for sales over 1-year in length prior to the start of the last normal operating season. Emphasize work needed on sales where the Purchaser has fallen behind the Plan of Operation and/or Operating Schedule. This should provide the Purchaser with sufficient time to complete the sale or to request a contract term extension. Likewise, the Contracting Officer should provide notice to the Purchaser with sufficient time to complete the sale if there is an imminent termination date with harvesting incomplete and it is determined that an extension may not be appropriate.

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Contracting Officers may grant diligent performance contract term extensions consistent with direction in FSM 2453.16 and the following sections.

**32.11 - Sales on Contract Forms FS-2400-6/6T**

Contracting Officers may authorize contract term extensions only if the following conditions have been met.

1. At least 75 percent of the original estimated contract volume has been cut and removed from the sale area.
2. Specified roads needed by Purchaser for removal of included timber were constructed by Purchaser and accepted by the Forest Service prior to the applicable road completion date shown in the contract. (Not applicable when Forest Service assumes responsibility for constructing roads.)
3. Operations to date have been in reasonable compliance with contract terms and the approved plan of operations.
4. All contractual requirements, such as snag falling, erosion control, and slash disposal, have been met on area cutover at time of Purchaser's request, except for areas where logging is currently in progress. Purchaser's burning of current slash or grass seeding of disturbed areas may be waived as a prerequisite for extension if weather conditions or other factors have delayed these activities.
5. Extended rates must be redetermined rates or current contract rates, whichever are higher. For sales subject to stumpage rate adjustment, adjusted rates cannot be less than tentative rates established for the extension period.
6. All periodic payments have been made.
7. The initial extension deposit has been made.
8. A cash payment is required prior to executing an extension to cover increased costs to the Government caused by the delay in completing the sale, including, but not limited to, the following:
  - a. For scaled sales, interest on the value of timber remaining on the sale from termination date until the midpoint of the extension period or, for tree measurement sales, interest on the value of timber remaining and not paid for on the sale from termination date until midpoint of the extension period.
  - b. Increased regeneration costs, such as nursery stock carryover, loss, or replacement; site preparation; seeding; or planting.

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c. Costs of remarking timber to be cut or left on the area remaining to be cut over when marked before the extension.

Contracting Officers shall not authorize contract term extensions when the total length of the contract, including the extension, will exceed 10 years unless the Chief finds that better utilization of the various forest resources will result, or that there is an overriding public interest that justifies the extension.

**32.11a - Sales on Contract Forms FS-2400-13/13T**

Unless the Chief finds that there is a substantial overriding public interest that justifies the extension, Contracting Officers may authorize contract term extensions only if the following conditions have been met:

1. The Contracting Officer has determined that the Contractor has diligently performed under the terms of this contract and when such extension is determined to be in the best interest of the Forest Service.
2. The Contractor's Operations to date have been in reasonable compliance with contract terms and the approved Technical Proposal under G/GT.3.1.1.
3. All contractual requirements have been met by the Contractor and accepted by the Forest Service in active stewardship project areas and on areas cut over at time of the Contractor's request, except for areas where work is in progress at time of the Contractor's request.
4. Extended rates must be redetermined rates or current contract rates, whichever are higher. For sales subject to stumpage rate adjustment, adjusted rates cannot be less than tentative rates established for the extension period.
5. All periodic payments have been made.
6. The initial extension deposit required under E/ET.2.1.7 has been made. Earned stewardship credits may be used in lieu of cash to satisfy extension deposits.

Contracting Officers shall not authorize contract term extensions when the total length of the contract, including the extension, will exceed 10 years unless the contract meets the criteria for an initial term up to 20 years in length (FSH 2409.19 sec. 60.3) and the Chief finds that better utilization of the various forest resources will result, or that there is an overriding public interest that justifies the extension.

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### **32.12 - Sales on Contract Form FS-2400-2**

FS-2400-2 contracts do not include a provision for extending the term for diligent performance and may not be extended.

### **32.13 - Sales on Contract Form FS-2400-3**

FS-2400-3/3T/3P contract forms do not include a provision for extending the term for diligent performance and may not be extended.

### **32.14 - Sales on Contract Form FS-2400-4**

A time extension may be granted at the discretion of the Contracting Officer if the Purchaser has operated in a diligent manner but the total length of the contract including an extension shall not exceed 1-year (FSH 2409.18, sec. 52, Exhibit 01).

### **32.15 - General Diligent Performance Extension Procedures**

1. When a sale will not be completed by the termination date, the Contracting Officer should examine the file to determine if the contract entitles the Purchaser to an adjustment of termination date (sec. 31). If so, notify the Purchaser and grant the adjustment when requested in writing from the Purchaser. If no term adjustments are evident, or additional time will still be needed after all eligible term adjustments have been processed, an extension request may be considered.

2. Contracting Officers shall modify contracts for sale extensions. The modification will establish the new termination date, new payment rates when required under the terms of the contract (para. 4 below) and may include other changes (para. 3 below). Use form FS-2400-0010, Agreement to Extend and Modify Contract, if consent of surety is needed. The timber sale contract requires consent of surety each time the termination date is adjusted or extended by more than 1-year as the result of any single or combination of contract term adjustments and/or contract term extensions. Form FS-2400-0009 may be used if consent of surety is not required.

3. Contracting Officers may modify other contractual requirements regarding items such as slash disposal, erosion control, and fire prevention but shall not make changes in sale boundaries that add additional area to the sale except when necessary to add/include replacement timber under an environmental modification (sec. 33.6). Contracting Officers should only change logging methods or timber designations when the changes are essential for resource or environmental protection.

4. Except for early extensions (sec. 32.5) and urgent removal extensions (sec. 32.6), Contracting Officers shall make rate redeterminations (sec. 32.16) for all FS-2400-6/6T and FS-2400-13/13T contracts before granting an extension (FSM 2420). Refer to contract provision

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B/BT8.23 for direction on exceptions to the use of reappraised rates for diligent performance extensions.

5. Calculate interest on the value of timber remaining (or for tree measurement sales, timber remaining and not paid for) on the sale from the termination date to the midpoint of the extension period. Contracting Officers should use the best estimate available of timber remaining and should apply stumpage rates, by species that are in effect just before the extension to determine the total stumpage value as of termination date. The pays interest on this value in consideration for the extension. Interest is calculated using the Current Value of Funds Rate (CVFR) <https://www.fiscal.treasury.gov/reports-statements/cvfr/rates.html> on this stumpage value from the termination date to the midpoint of the extension period.

Use the rate of interest in effect on the termination date. The amount owed is the rate times the stumpage value for each month or portion thereof (see Exhibit 01).

6. Extension Deposits: Calculate extension deposits per the procedure specified in the following contract provisions:

- a. FS-2400-6/6T contracts dated 4/04 and 6/06: B/BT4.217 Extension Deposits.
- b. FS-2400-13/13T contracts dated 9/04: E/ET.2.1.7 Extension Deposits.

7. Expenses resulting from a contract extension not compensated by additional benefits could be disadvantageous to the United States. Examples include:

- a. Increased Regeneration Costs. Increased costs include the costs of site preparation, seeding or planting, and nursery stock carryover, loss, or replacement. Based on the Plan of Operations submitted with a Purchaser's extension request, Contracting Officers shall determine if there will be any delay in accomplishing regeneration work as originally planned for the sale. If there are any delays caused by the extension, list any losses or expenses resulting from such delays when it can be shown that they represent an actual increased cost to the Government.
- b. Cost of Remarketing Timber on Sale Area or Reestablishing Cutting Unit Boundaries. Contracting Officers should address this item under a collection agreement that is part of the extension agreement and, when the work is required before the extension, shall list the costs to the Government and shall expend total amount charged in the same manner.

8. Contracting Officers shall enter into cooperative agreements with the Purchaser to pay for such additional costs. Use form FS-2400-0016, Timber Purchaser's Request for Work. The total charges listed in this section are part of the package the Contracting Officer submits to the Purchaser for consideration when the extension is offered. Include a bill for these charges. As a condition of the extension the Purchaser shall agree to pay these charges plus the initial extension deposit by the termination date.

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9. Contracting Officers shall forward extension documents by certified mail and allow the Purchaser 30 days to consider the stumpage rates and other terms under which the Forest Service shall grant the extension. Use conditional extension procedures in section 32.4 as needed to provide the 30-day review period. The letter transmitting the extension documents specifies that granting the extension is contingent upon acceptance of the redetermined stumpage rates and other modifications that the Forest Service deems necessary. The Contracting Officer's letter should include a bill for all associated charges and deposits and require payment at the time the Purchaser returns the signed documents.

10. Both parties shall resolve questions about the extension procedures before the contract termination date during the 30-day period for consideration or during any subsequently granted additional consideration period. Contracting Officers shall not approve an agreement to extend or modify a contract signed under protest and shall return such agreements promptly to the Purchaser. Purchasers may receive an additional consideration period, not to exceed 15 days in such cases. The letter transmitting the modifications should follow a format like that in Exhibit 02.

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**32.15 - Exhibit 01**

**Interest on Value of Remaining Timber Calculation**

a. Value of Remaining Timber (12/31/2013)

Species	Volume	Rate	Value
DF	300	\$250	\$75,000
H&O	200	150	30,000
Totals	500		\$105,000

b. Extended termination date: 12/31/2014

c. Midpoint of extension period (months) 6

d. Interest rate in effect on termination  
date (12/31/2013) TFM 6-8025-20 (3.125 %) .03125

e. Amount of interest due (a x c x d)/12 \$1,640.63

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**32.15 - Exhibit 02**

**Letter Transmitting Modification**

(date)

(Addressee)  
(Address)

Dear \_\_\_\_\_ :

Your request for Contract Term Extension for the (Name) Timber Sale, Contract Number \_\_\_\_\_, has been approved. The contract is hereby tentatively extended to (Date), contingent upon your execution and return of the enclosed (Timber Purchaser's Request for Work) (Agreement to Extend and Modify Contract) (Agreement to Modify Contract) (payment of the enclosed bill in the amount of \$ \_\_\_\_\_ for Timber Purchaser's Request for Work) (and payment of the Initial Extension Deposit in the amount of \$ \_\_\_\_\_). \$ \_\_\_\_\_ of your cash in the sale account shall be used to satisfy the balance of the Initial Extension Deposit Requirement not covered by the enclosed billing. The rates at which extension is granted are as follows:

(space for appropriate rates)

(It is the intent of the Forest Service that you have, after receipt of this letter, at least 30 days in which to decide whether or not you wish to accept extension of this contract at the terms and conditions under which it is offered (and to obtain consent of surety 2/). Upon your request, the Forest Service is willing to grant a conditional extension that will provide you at least that number of days for such consideration (and/or to obtain consent of surety 2/), provided that no timber cutting on the sale area or timber removal from the sale area will be permitted during such conditional extension period. 1/)

Please sign and execute both copies of (Agreement to Modify Contract) (Agreement to Extend and Modify Contract, obtain consent of surety 2/) (and Timber Purchaser's Request for Work) and return them to this office by no later than (Date). Please initial all pages of the modification prior to returning it. Unless this is done, (or a request for a conditional extension is received prior to (Date), the contract will terminate on (Date).

(Signature)  
CONTRACTING OFFICER

Enclosure

1/ Include this paragraph (phrase) if notification letter is sent less than 30 days prior to termination date.  
2/ Include when consent of surety is required. Consent of surety is required when the extended termination date listed in the first paragraph is more than 1-year later than the original termination date or last time consent of surety was obtained.

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### **32.16 - Rates**

Prior to granting a diligent performance contract term extension Contracting Officers shall redetermine rates following the methods and procedures specified in the contract and FSH 2409.18, section 44.67. In event rates so established would develop Current Contract Value immediately prior to such an extension that is less than Current Contract Value at that time, Flat Rates and Tentative Rates in effect immediately prior to extension must be retained for the extension period.

At times, the United States may benefit by terminating the rate adjustment provision and extending a sale at flat rates. Such flat rates must not be less than the adjusted rate in effect at the original expiration date.

### **32.2 - Extensions Under Substantial, Overriding Public Interest Authority**

The Chief may authorize extensions under the Substantial, Overriding Public Interest (SOPI) authority provided in 36 CFR 223.115. Instructions for processing a specific SOPI extension will be provided by the Washington Office, Director of Forest Management.

### **32.3 - Contract Modification for Extensions to Prevent Environmental or Resource Damage**

An early extension (sec. 32.5) may be necessary when a contract modification to prevent environmental or resource damage cannot be executed before the start of an operating period and before the Purchaser's operations are delayed. Use the following guidelines to determine the period of a contract extension:

1. Consider all factors relating to harvesting the timber involved in the environmental modification, including the procurement, scheduling, move-in, and use of equipment (types) other than that contemplated in the original sale. If the modification occurs after the midway date of a normal operating season, disregard the remainder of that logging season in establishing the time needed to harvest the timber involved in the environmental modification.
2. Include any changes in harvest methods that could reduce production rates below those used to establish the original contract term in the period of time needed to harvest the timber volume involved in the contract modification to prevent environmental or resource damage. Estimate the production rate for the harvest methods specified in the modification, considering volumes per acre to be cut, road construction, and any other variables affecting the establishment of a logical contract period.
3. Use the estimated production rates for the volume involved in the environmental modification and other considerations included in items 1 and 2 to calculate the time needed to harvest the timber involved in the modification.

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4. Using the period of time calculated in item 3, determine if sufficient time remains under the original contract term to harvest the timber involved in the environmental modification. If not, extend the contract term to fully provide for the changed conditions of the modified sale and for any time the Purchaser lost while the Forest Service was preparing the modification. Consult the Purchaser when estimating the time required for completing the sale.

### **32.4 - Conditional Extensions**

Conditional extensions may delay the expiration of timber sale contracts in a limited number of situations (FSM 2453.19). Contracting Officers have the authority to conditionally extend timber sale contracts under the following situations:

1. If there are less than 30 days for a timber sale Purchaser to consider the stumpage rates and other terms under which the Forest Service is offering an extension, Contracting Officers should grant a conditional extension for a period that allows the Purchaser 30 days to consider these conditions.
2. If a Purchaser returns an extension or modification agreement that indicates the Purchaser has signed under protest, Contracting Officers shall not execute the agreement. Return the unexecuted agreement promptly to the Purchaser, and if necessary, conditionally extend the contract to provide the Purchaser 15 days to decide whether to agree to the extension or modification terms as offered by the Forest Service.
3. If the Purchaser files a dispute or claim pursuant to the provisions of the contract and the Contract Disputes Act of 1978 (41 U.S.C. 7101, et seq.), and that dispute or claim is not resolved before the termination date of the contract, Contracting Officers may grant a conditional extension while making a final decision on the dispute or claim. But prior to offering a conditional extension Contracting Officers shall decide whether it is in the public interest to keep the contract open until issuing a final decision on the dispute or claim. Seek advice from the Office of General Counsel.
4. If there is an appeal before the Civilian Board of Contract Appeals or a case in Federal Court concerning a timber sale, and the Contracting Officer decides that it is in the public interest that the contract should not expire pending resolution of the appeal or court case, the Contracting Officer may grant a conditional extension pending resolution of the appeal or case. Seek advice from the Office of General Counsel.
5. If the Civilian Board of Contract Appeals or court acting within its jurisdiction orders that a contract should not terminate pending resolution of an appeal case, the Contracting Officer shall grant a conditional extension, if necessary, unless the board or court decrees some other form of termination date modification.

The Chief may authorize conditional extensions of certain timber sale contracts if it is in the public interest that certain timber sales should not expire before a specified time or event. An

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example of this is the authorization of conditional extensions for certain timber sale contracts that will expire before the due date for submitting a request for relief measures authorized by new legislation.

Conditional extensions occur through contract modification. The modification must specify the purpose and duration of the extension as well as the conditions involved. A Purchaser's failure to sign and return the modification prior to the termination date will result in the contract terminating naturally.

Conditional extensions shall not give the Purchaser or a group of Purchasers an advantage over other timber sale Purchasers. Neither must a conditional extension serve instead of a waiver of time limit (FSM 2453.12). Do not permit timber to be felled or removed from the sale area during a conditional extension.

If a contract with a conditional extension is subsequently extended under another authority (for example, diligent performance extension under 36 CFR 223.115) the starting date of that extension must coincide with the original termination date and disregard the conditional extension time. For example, the termination date of a contract is December 31, 2018. The Contracting Officer conditionally extends the sale to January 30, 2019, to allow the Purchaser 30 days to consider the terms of a 1-year contract term extension. Upon acceptance, the contract is extended to December 31, 2019.

### **32.5 - Early Extensions**

Contracting Officers may grant early extensions only for the following reasons:

1. When a contract will terminate prior to processing an environmental modification (sec. 32.3).
2. When in the interest of the United States to permit a Purchaser to interrupt or reduce operations on National Forest timber to log non-National Forest timber needing harvesting more urgently (sec. 32.6), and the contract will terminate before the Purchaser's salvage operations are completed on the qualifying non-National Forest System timber.
3. When it is desirable to permit a Purchaser to interrupt or reduce operations on National Forest timber not in need of urgent harvesting to log National Forest timber in urgent need of harvesting and the sale will terminate before it is known how much time will be granted for the urgent removal operations.

Contracting Officers should avoid either excessive or inadequate early extension time periods. Where necessary, it is reasonable to provide additional time in the extension period to cover

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unforeseen difficulties, such as lower production rates or greater than expected volume. Because specific situations vary widely, no hard and fast rules apply. Use the Purchaser's Plan of Operations as a guide.

Do not redetermine rates when processing an early extension.

### **32.6 - Procedure for Urgent Removal Extensions**

There may be substantial, overriding public interest in extending National Forest System timber sale contracts for undamaged (green) timber not requiring expeditious removal in order to facilitate the rapid harvest of catastrophically damaged timber requiring expeditious removal on private or other non-National Forest System lands (36 CFR 223.53). Such an extension may be granted when a specific catastrophic event beyond the control of the landowner occurs on non-National Forest System lands that poses a threat to general forest health, public safety, and property. Catastrophic events include, but are not limited to, severe wildfire, wind, floods, insects and disease infestation, and drought.

1. Regional Forester Determination: If the Regional Forester determines that adequate cause for urgent removal extensions exists, Contracting Officers may extend National Forest System timber sale contracts, up to a maximum of 1 year, for the estimated amount of time required to harvest and process the damaged timber on non-National Forest System lands. Contracting Officers may grant urgent removal extensions only when the Regional Forester verifies in writing that:

- a. A specific catastrophe occurred for which urgent removal extensions should be granted;
- b. The manufacturing facilities or logging equipment capacity available to Purchasers are insufficient to provide for both the rapid harvest of damaged non-National Forest System timber in need of expeditious removal and the continued harvest of undamaged (green) timber under contract with the Forest Service; and
- c. Failure to harvest the damaged non-National Forest System timber promptly could:
  - (1) Pose a threat to public safety;
  - (2) Create a threat of an insect or disease epidemic to National Forest System or other lands or resources; or
  - (3) Significant private or other public resource loss.

2. Purchaser Request: To obtain an urgent removal extension on a National Forest System timber sale contract, a Purchaser shall make a written request to the Contracting Officer, which includes the following:

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a. An explanation of why the harvest of undamaged (green) National Forest System timber within the term of the existing National Forest System contract(s) will prevent or otherwise impede the removal of damaged non-National Forest System timber in need of expeditious removal; and

b. Documentation that the manufacturing facilities and/or logging equipment capacity available to a Purchaser would be insufficient to provide for both the rapid salvage of damaged non-National Forest System timber in need of expeditious removal and continued harvest of undamaged (green) National Forest System timber under contract with the Forest Service.

3. Contracting Officer Actions: To grant an urgent removal extension, the timber sale Contracting Officer shall verify the following:

a. The same logging equipment and/or manufacturing facilities would probably be needed to process both undamaged (green) timber from National Forest System land and the damaged non-National Forest System timber from the area affected by the catastrophe;

b. The extension of the National Forest System contract will not be injurious to the United States and will protect, to the extent possible, the health of the National Forest System lands, including:

(1) An urgent removal extension does not adversely affect other resource management objectives to be implemented by the National Forest System timber sale being extended; and

(2) The National Forest System timber sale contract to be extended is not a sale containing damaged, dead, or dying timber subject to rapid deterioration.

c. The Purchaser has not been granted a previous urgent removal extension on the same National Forest System timber sale contract based on the current catastrophic event. Subsequent urgent removal extensions may be granted if there are subsequent Regional Forester determinations on other catastrophic events.

d. The revised National Forest System timber sale contract term will not exceed 10 years from the date the National Forest System contract was awarded; and

e. The Purchaser is not in breach of the National Forest System contract, and all work items, payments, and deposits are current.

4. Execution of Contract Extension: An urgent removal extension of a National Forest System timber sale contract is executed through a mutual agreement contract modification (B/BT8.3).

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- a. Use form FS-2400-0010 if consent of surety is needed or FS-2400-0009 if consent of surety is not needed.
- b. An agreement to modify a contract must identify the specific provision(s) of the contract being modified and must include the requirement that Purchasers make cash payment to cover the costs of remarking timber on the sale area or reestablishing cutting unit boundaries if the Contracting Officer determines such work is necessary (36 CFR 223.53(e).
- c. Do not redetermine rates for an urgent removal extension.
- d. Grant an early extension (sec. 32.5) if sale will terminate before Purchaser completes operations on the non-National Forest System timber in need of urgent removal.

5. Information collection. The information required of a Purchaser to request an extension of an National Forest System timber sale contract, as outlined in paragraph 2 of this section, constitutes an information collection requirement as defined in 5 CFR Part 1320 and has been assigned Office of Management and Budget control number 0596-0225.

### **33 - CONTRACT AGREEMENTS AND MODIFICATIONS**

#### **33.1 - Agreements**

The parties to Timber Sale and Integrated Resource Timber contracts may enter into agreements during performance of the contract, pursuant to the terms of the contract. Forest Service sale administration personnel may negotiate agreements with Purchasers and their representatives consistent with their individual delegations of authority when such agreements are permitted under the terms of the contract. Formal modifications are not necessary where the contracts permit changes or approvals by written agreement. Examples of these include minor adjustments in the timber individually marked for cutting and the approval of the location and size of landings. Oral agreements are discouraged as they can open the door to disagreements on contract interpretation between the two parties. In the rare instance that oral agreements are entered into they should be promptly documented in writing with a copy provided to the Purchaser, both parties should sign for concurrence.

When making agreements, consider the following criteria:

1. What contract provision authorizes the agreement?
2. Does the agreement meet the land management objective(s) and intent of the contract?  
An agreement may not contradict the contract.
3. Does the agreement protect or enhance the Government's interests as much as the original contract afforded?

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4. Are the agreement terms clear and measurable?
5. Are the parties readily entering into the agreement without force or coercion?
6. Is the agreement negotiated in a timely manner?
7. Is the agreement complete regarding who, what, when, where, and how?
8. Does the agreement carry the necessary signatures?
9. Do the signing parties carry the proper delegation of authority necessary for the particular agreement?
10. Was the Purchaser, Purchaser's representative, or field representative consulted when formulating the agreement?
11. Is the agreement reasonable?

Any agreement carrying the proper signatures becomes an enforceable part of the contract.

In areas where the contract requires a written agreement, such as substitute fire equipment or on-the-ground locations (landings, skid roads, and so forth), sale administration personnel should encourage the Purchaser to submit a written plan or on-the-ground layout before asking for Forest Service agreement.

When the Purchaser and sale administrator cannot reach agreement, the Forest Service Representative should promptly submit a written determination to the Purchaser's representative. The Purchaser may appeal the determination made by the Forest Service Representative to the Contracting Officer pursuant to the terms of the contract and/or the Contract Disputes Act of 1978 (41 U.S.C. 7101, et seq.) (FSH 2409.15, Ch. 70). But if the Purchaser wants to continue operating pending a decision by the Contracting Officer, operations must be in accord with the Forest Service Representative's determination.

### **33.2 - Contract Modifications**

The conditions of a sale are completely set forth in each contract. Unlike agreements, modifications change the terms of a contract and are tied to specific contract provisions or to some other authority or determination requiring a formal change to the contract. Forest Service timber sale and integrated resource timber contracts recognize that certain events can change conditions over time resulting in the need to modify the contract in order to protect the interests of both parties. The following sections address situations where the contract itself authorizes modification. Occasionally contracts may need to be modified for reasons not specifically addressed within the contract. For example, the 2008 Farm Bill authorized redetermining rates in certain sales in a manner different than provided by those contracts. When these situations

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occur, the Washington Officer, Director of Forest Management will provide instructions for processing such modifications.

Timber sale contracts may only be modified by written agreement between the two parties when the modification will apply to the unexecuted portions of the contract and will not be injurious to the United States (36 CFR 223.112). Except where specifically authorized otherwise, contracts can only be modified by mutual agreement and with compensating adjustments to provide for the exercise of any authority granted by law or regulation of the Secretary of Agriculture, if such authority is then being applied to Forest Service timber sale contracts and for any other contractual provision in general use by the Forest Service.

The authority to modify a timber sale or integrated resource timber contract is held only by the Contracting Officer approving the sale, by their successor, or by a superior with delegated Contracting Officer authority. All contract modifications must be in writing using either form FS-2400-0009 or, if consent of Surety is needed, form FS-2400-0010. Consent of Surety is required when a modification involves extending the termination date by more than 1-year beyond the original termination date or one year beyond the termination date the last time consent of Surety was obtained. Consider all forms of contract term adjustments and extensions when calculating whether consent of Surety is needed. Provide Surety with a copy of the approved modification.

Grant a conditional extension (sec. 32.4) when necessary to provide time to process a modification prior to the termination date. Do not permit cutting or removal of timber during the period of a conditional extension.

When the modification involves major changes throughout the contract, the preferred procedure is to attach an entirely new contract to form FS-2400-0009, or form FS-2400-0010, making the document easier to use. The modified contract must be on the same contract form as the original contract to avoid changes in sale conditions that are unrelated to the modification's purpose (for example, when modifying a FS-2400-6T (4/04) contract the "new" contract must use the FS-2400-6T (4/04) form). If the modification involves a time extension, the policy in FSM 2453.16 applies.

When modifying a contract, include a place on every page of the modification for the Purchaser's initials and verify that every modified page has been initialed before the Contracting Officer approves the modification. This can eliminate disputes by assuring that the Purchaser received every page of the modification and that the modification was not subsequently altered without the Purchaser's knowledge.

In cases of a unilateral modification the Purchaser's signature is not required. Strike through the signature block on the FS-2400-0009, or FS-2400-0010 prior to sending the form. Document within the modification the specifics of the changes and the fact that it is a unilateral modification.

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### **33.3 - Rate Redetermination Modifications**

Contracts must be modified using form FS-2400-0009 or FS-2400-0010 whenever new rates are established following a rate redetermination. Follow the procedures stated in the contracts and in FSH 2409.15, chapter 40 for establishing redetermined rates. Contract forms FS-2400-2 and FS-2400-4 do not include provisions for redetermining rates. Rates may be redetermined in other contract forms for the following reasons:

1. Rate Redetermination for Environmental Modification.

a. FS-2400-3S/3T/3P contract forms dated 6/06 and later contain standard provision B/BT/BP3.31 for redetermining rates as a part of an environmental modification.

b. FS-2400-13/13T contract forms dated 9/04 contain standard provision D/DT.3.1 for redetermining rates as a part of an environmental modification.

c. FS-2400-6/6T contract forms dated 4/04 and 6/06 contain standard provision B/BT3.31 for redetermining rates as a part of an environmental modification.

2. Scheduled Rate Redetermination: New rates established following a scheduled rate redetermination are implemented with a unilateral modification signed by the Contracting Officer. Send an executed FS-2400-0009 to the Purchaser via certified mail with a copy to Surety.

a. FS-2400-13/13T contract forms dated 9/04 requires adding a special provision for scheduled rate redeterminations for contracts 5 years and longer in length.

b. FS-2400-6/6T contract forms dated 4/04 and 6/06 exceeding seven years in duration and sales of shorter duration to the extent found desirable by the Approving Officer will provide for the redetermination of rates for stumpage and required deposits of intervals of not more than five years, exclusive of any period allowed for the construction of improvements. Consider including scheduled rate redetermination(s) for contracts over three years in length that do not include stumpage rate adjustment procedures.

3. Rate Redetermination after Catastrophic Damage:

a. FS-2400-13/13T contract forms dated 9/04 contain standard provision D/DT.3.2 for redetermining rates following catastrophic damage.

b. FS-2400-6/6T contract forms dated 4/04 and 6/06 contain standard provision B/BT3.32 for redetermining rates following catastrophic damage.

Pursuant to B/BT3.32 Contracting Officers shall make an appraisal to determine for each species the catastrophe-caused differences between the appraised unit value of included timber

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immediately prior to the catastrophe and the appraised unit value immediately after the catastrophe. Tentative and flat rates in effect at the time of catastrophe must be adjusted by the differences in these appraisals to become the redetermined rates for a contract modification. The redetermined rates must apply to all included timber removed after the rate redetermination.

4. Rate Redetermination for Market Change:

a. FS-2400-6/6T contract forms dated 4/04 and 6/06 contain standard provision B/BT 3.33 for redetermining rates when Forest Service orders a suspension or delay pursuant to B/BT8.33 lasting 90 days or longer.

b. FS-2400-13/13T contract forms dated 9/04 contain a standard provision D/DT.3.3 for redetermining rates when Forest Service orders a suspension or delay pursuant to I/IT.3.3 lasting 90 days or longer.

5. Emergency Rate Redetermination:

a. FS-2400-6/6T contract forms dated 4/04 and 6/06 contain standard provision B/BT3.34 for procedures for redetermining rates if the producer price index specified in the contract declines by more than 25 percent since the award date or the last emergency rate redetermination.

b. FS-2400-13/13T contract forms dated 9/04 contain standard provision D/DT.3.4 for procedures for redetermining rates if the producer price index specified in the contract declines by more than 25 percent since the award date or since the last emergency rate redetermination.

During periods of market declines the Washington Office Forest Management staff provides monthly notices to the Regions with the calculations showing trigger months, if any. Contracting Officers shall promptly notify Purchasers of contracts that become eligible for an emergency rate redetermination.

### **33.4 - Changed Condition Modification**

The following contract forms contain a standard provision for modifying the contract when it is agreed that the completion of certain work or other requirements would no longer serve the purpose intended because of substantial change in the physical conditions of sale area or included timber since the date of the contract.

FS-2400-3S/3T/3P:

FS-2400-6/6T versions 4/04 and 6/06:

FS-2400-13/13T version 9/04:

B/BT/BP8.31 Changed Conditions

B/BT8.31 Changed Conditions

I/IT.3.1 Changed Conditions

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An example of this is the deletion of a unit after the access road washed out, when the threshold for catastrophic damage was not met, and the road could not be repaired through a contract modification or by the Forest Service prior to the contract termination. In addition to removing the unit and associated volume from the contract, Contracting Officers shall determine if a rate redetermination or any other changes to the contract are needed when processing a changed condition modification.

### **33.5 - Modification for Catastrophe**

FS-2400-6/6T contract forms dated 4/04 and 6/06 contain standard provision B/BT8.32 for modifying contracts when catastrophic damage occurs.

FS-2400-13/13T contract forms dated 9/04 contain standard provision I/IT.3.2 for modifying contracts when catastrophic damage occurs.

The wording in the FS-2400-13/13T contract forms mirrors that in the 4/04 and 6/06 FS-2400-6/6T contracts.

None of the contract versions above entitle Purchasers to a “right of first refusal” to catastrophically damaged timber. Changes in wording beginning with the 4/04 contracts were made to clarify this condition. However, all the contract versions do require the Forest Service to work closely with the Purchaser in determining what catastrophically affected timber should be logged with the timber designated prior to the catastrophic event. But the final decision on which timber to include in a modification for catastrophe rests with the Forest Service. Different alternatives can be considered, but if an agreement cannot be reached with a Purchaser, Contracting Officers shall prepare a contract modification for the Purchaser’s consideration, taking into account, to the extent possible, the Purchaser’s interests and assuring that the best interests of the Government are protected.

The first step is to determine if the damage meets the contractual definition of damage by catastrophe. Catastrophic damage is defined in contract provisions B/BT2.133 as a major change in timber included on sale area (contract area), to sale area (contract area), to access to sale area (contract area), or a combination thereof:

1. Caused by forces, or a combination of forces, beyond control of Purchaser, occurring within a 12-month period, including but not limited to wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon, and
2. Affecting the value of any trees or products meeting utilization standards within the sale area (contract area) and estimated to total either:
  - a. More than half the estimated timber volume stated in A/AT2 or

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b. More than two hundred thousand cubic feet (2000 CCF) or equivalent.

Catastrophic damage does not include changes caused by forest pest epidemics or foreseeable deterioration if included timber was sold for salvage or pest control.

It can be difficult to determine when damage caused by a forest pest epidemic is sufficient to meet the volume criteria for a 12-month period unless annual surveys are conducted to assess changes in mortality from one year to the next. Upon the first signs of significant mortality on sales with 2 or more years remaining, Contracting Officers should decide whether surveys will be needed to determine if catastrophic damage has or may occur. Purchasers may claim catastrophic damage, but data will be needed to affirm or deny any such claim. The decision whether catastrophic damage has occurred or not rests with the Contracting Officer.

Upon a determination that catastrophic damage has occurred, the contracts require the Forest Service, in consultation with the Purchaser, to outline on the sale or contract area map:

1. Any area of catastrophe-affected live and dead timber meeting utilization standards and having undesignated timber so situated that it should be logged with the designated timber;
2. If needed, any such areas where the damaged undesignated timber can reasonably be logged separately; and
3. Areas of affected or unaffected timber that are to be eliminated from the sale or contract area.

Conduct environmental analysis on catastrophically damaged contracts to assess the effects of the catastrophic event. Follow the procedures in FSH 1909.15, section 18 on new information and changed conditions. Contracting Officers shall request or order a Purchaser to delay or interrupt operations while Forest Service conducts the environmental analysis. This can be done either through B/BT8.21 Contract Term Adjustment, or in the 4/04 and later versions of the contract, B/BT8.33 (I/IT.3.3) Contract Suspension and Modification depending on the circumstances. In determining which method to use, the Forest Service shall consider how much of the sale or contract area was affected by the damage, and whether the Purchaser will be permitted to operate in areas not directly damaged prior to completing the environmental analysis. The preferred method is to use B/BT8.21 Contract Term Adjustment because ordering the Purchaser to delay or interrupt operations pursuant to B/BT8.33 Contract Suspension and Modification, subjects the Forest Service to additional liability that may be inappropriate when the root cause for the delay was an event unforeseen by either party. However, if the Forest Service wants the Purchaser to delay or interrupt operations on portions of the sale or contract area that were not directly damaged, ordering a suspension under B/BT8.33 may be appropriate. Do not order a suspension or grant additional contract time unless ongoing operations are interrupted, or planned operations will be delayed.

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When identifying areas in paragraph (a), consult the Purchaser and consider the following:

1. Is the catastrophe-affected timber so situated that it should be logged with the designated timber?
2. Can the current Purchaser harvest the timber more rapidly than a new Purchaser and prevent serious deterioration? If the contract holder already has a high volume of damaged timber under contract, consider whether a new Purchaser may harvest the damaged timber more rapidly.
3. Could the timber be harvested by another Purchaser without interfering with the current Purchaser's harvesting and hauling operations?
4. Would there be competition if the catastrophe-affected timber were put into a new sale? Are there mills that are out of timber or have an inadequate supply?
5. Would the redetermined contract rates be below the rates that would be expected if the damaged timber was advertised?
6. Is the quantity of timber significant? Adding a relatively small amount in comparison with the sale program is quite different than adding 5 or 10 million CCF. If the quantity of damaged timber proposed to be added to the contract is large, re-examine the proposal to determine if some of the proposed additional timber can reasonably be logged separately from included timber.

Do not add any catastrophically damaged timber in a subdivision, payment unit, or sale that has been completed, or where there is no more included timber remaining. Upon acceptance of all contractual work in a subdivision or payment unit under B/BT6.36, the contract requires the subdivision or payment unit be eliminated from the sale or contract area. Prompt elimination of completed subdivisions or payment units will avoid potential disputes over whether subsequent catastrophically damaged timber within a completed subdivision or payment unit should be included in a modification for catastrophe.

When there is agreement on the timber to be included in the catastrophic damage modification, assure that contract modifications implement any mitigation or resource protection measures provided in the environmental documentation. A rate redetermination will be necessary to determine any increase or decrease in contract rates (sec. 33.3 and FSH 2409.18, Ch. 40). Redetermined rates must apply to all included timber removed after the rate redetermination. For tree measurement sales with units that were released prior to the catastrophe, the modification must establish new units showing the total post modification volume and the volumes in the original units must be revised to reflect the volumes removed prior to the modification. For example, the volume of payment unit 4 of the original sale is 1000 CCF of which the Purchaser removes 200 CCF prior to the catastrophe. The post catastrophe cruise shows 1600 CCF in the payment unit. Revise the volume of payment unit 4 to 200 CCF to

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reflect the volume removed prior to the catastrophe. That volume is paid for at the original contract rates as adjusted for escalation if other than flat rates. Establish a new payment unit 4a with a volume of 1600 CCF which will be paid at the redetermined rates as adjusted for escalation if other than flat rates.

An operating schedule should be developed and incorporated into the contract for salvage units unless the contract termination date requires the Purchaser to complete operations on the entire sale before significant deterioration is likely to occur. As a rule of thumb, the Purchaser should be required to have the capability to complete salvage harvest within one year or less of the contract modification.

A modification for catastrophe is a modification by mutual agreement. The proposed modification sent to the Purchaser can be changed following additional input or discussions with the Purchaser. The catastrophic damage modification is binding when both parties sign it.

Contract forms FS-2400-2, FS-2400-3S/3T/3P, and FS-2400-4 do not contain provisions similar to those in the FS-2400-6/6T contracts addressing modification for catastrophe. In event of catastrophic damage, the preferred procedure for those contracts is termination. The FS-2400-3 contracts may be terminated under provision B/BT/BP8.22, and the FS-2400-4 contracts may be terminated under General Condition 13. Catastrophic damage under a FS-2400-2 contract must be addressed using the Liability for Loss General Condition.

### **33.6 - Environmental Modifications**

Environmental modifications are generally accompanied by an interruption or delay of the Purchaser's operations, a rate redetermination, and may also include replacement timber and a partial termination of the contract. Each of these actions may involve several interrelated contract provisions which must be considered together. The processes for suspending, modifying, and terminating contracts for environmental reasons differ by the date of the contract form and/or the special provisions included in a particular contract. Contracting Officers should refer to the official contract file when processing an environmental modification to assure that the proper set of provisions is being used.

Timber sale and integrated resource timber contracts may need to be modified:

1. To prevent environmental degradation or resource damage including, but not limited to, harm to habitat, plants, animals, cultural resources, or cave resources;
2. To ensure consistency with land and resource management plans or other documents prepared pursuant to the National Environmental Policy Act of 1969, 42 USC 4311-4347;
3. To conduct environmental analysis including, but not limited to, engaging in consultation pursuant to the Endangered Species Act of 1973, 16 USC 1531, et seq.; or

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4. To comply with a court order regardless of whether the contract is named in such proceeding.

Procedures and contract provisions for suspending, modifying, and cancelling contracts for any of the reasons listed above have evolved over the years. Contracting Officers shall meticulously follow the procedures specified in the provision of the specific contract at issue when suspending or modifying a contract. The process also requires close coordination between the Contracting Officer and the responsible Line Officer to assure that neither infringes upon the delegated authority of the other (FSM 2404).

If mutual agreement cannot be reached on a modification, including replacement timber, the Forest Supervisor shall submit a request through the Regional Forester for the Washington Office, Director of Forest Management to cancel or partially cancel a contract (sec. 34.5). When the Contracting Officer makes a decision under B/BT8.33 to unilaterally order a modification, the Purchaser may decide to terminate the contract prior to the acceptance of the terms of the modification (sec. 34.51b).

### **33.61 - Contract Forms FS-2400-6/6T Dated 6/06**

Contract forms FS-2400-6/6T dated 6/06 include provision B/BT8.33 Contract Suspension and Modification. Contract Officers may, by written order, delay or interrupt operations under the contract and modify the contract for any of the reasons (a)-(d) listed above. A decision to initiate a contract modification that goes beyond the original premise of a sale deserves careful consideration. Major modifications are time consuming and expensive. It is not feasible to continually update all contracts. Therefore, it is essential to distinguish between those situations where unacceptable environmental or resource damage is likely to occur and those situations where the sale simply does not meet current standards, such as the size of clearcutting units. A decision to modify the contract to meet current standards should be based on the degree to which the standards are exceeded, the consequences of operating the sale as is, and the costs and benefits of a modification relating to the resources available for accomplishing the overall Forest program.

Where the need for change affecting the current operating area is discovered immediately before or during the operating season, alternatives to a delay or interruption should be considered. The best arrangement is for the Purchaser to shift operations to another sale for the balance of the operating season. If the Purchaser does not or cannot, the next best solution is to attempt to find and delineate portions of the sale area on which the season's operations can continue under the existing contract. If neither alternative is practicable, Contracting Officers may order a Purchaser to interrupt or delay operations. Do not order a Purchaser to interrupt or delay operations when any of the following conditions exist:

1. The Purchaser is not operating.

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2. The Purchaser's approved plan of operation does not support intent to operate during the period when operations would be suspended.
3. The Purchaser would not be able to operate for reasons listed in B/BT8.21.
4. The contract prohibits operations during the period when operations would be suspended. For this to apply the contract must specify the reasons for prohibiting operations and the applicable dates.

When Contracting Officers order a Purchaser to delay or interrupt operations while the Forest Service evaluates the need and/or terms for an environmental modification, the Purchaser may be eligible for remedies specified in B/BT8.33 as follows:

1. Contract term adjustment pursuant to B/BT8.21.
2. Reimbursement for out-of-pocket expenses (sec. 34.71) pursuant to B/BT8.35. The 06/06 contracts specify specific expenses that will not be reimbursed as out-of-pocket expenses as well as specific out-of-pocket expenses that may be reimbursable.
3. Rate redetermination pursuant to B/BT3.33, to measure any decline in the market.
4. Temporary reduction in down payment pursuant to B/BT4.22.
5. Temporary credit for unamortized specified road construction pursuant to B/BT5.27, but the amount credited is limited to the stumpage paid above base rates at the time of the ordered delay or interruption.
6. Temporary reduction of the performance bond pursuant to B/BT9.13.

The reasons for each proposed modification must be fully documented in a supplemental impact report (SIR), environmental assessment (EA), or environmental impact statement (EIS) following the procedures in FSH 1909.15. The analysis must evaluate the effects of operating the sale under current contract provisions, under the proposed changes, and under other alternatives. The analysis must answer specific questions including: what specific problems cannot be solved under the present contract such as adverse visual impact, erosion, wildlife, water quality, silvicultural, or regeneration problems. Following identification of each specific item involved, a subject matter specialist should quantify the damages associated with no change versus the benefits associated with a change in economic terms.

The purpose of analyzing and evaluating each identified item is to provide the factual reasons for changing the current contract and to measure the costs and benefits considered in the alternative courses of action available to prevent damage to other resources or the environment. The analysis must identify and carefully evaluate alternatives considered to determine why the proposed change is an improvement and must make a positive finding that the realizable benefits

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at least equal the costs resulting from monetary loss or other adverse effects. The responsible Line Officer is the Deciding Official (FSM 2404.21) but Contracting Officers should be actively involved in the process as it will be the Contracting Officer's responsibility to prepare the contract modification resulting from the decision.

Modifications under B/BT8.33 must be by mutual agreement including rates redetermined pursuant to B/BT3.31. If the two parties cannot reach agreement on a modification, the Chief or the Chief's designee may unilaterally terminate the contract in whole or in part (sec. 34). But prior to requesting termination or partial termination, the 06/06 contracts require the Forest Service and Purchaser to make good faith effort to identify replacement timber of similar volume, quality, access, and topography within the sale area. If suitable replacement timber cannot be found within the sale area, the contract specifies expanding the search to the administrative National Forest in which the sale is located. Replacement timber must be fully NEPA compliant (that is, not subject to appeal) at the time it is considered. If the Forest Service and Purchaser agree upon suitable replacement timber and applicable stumpage prices, then the contract shall not be terminated and instead must be modified and shall remain in force with respect to such replacement timber and, in the case of a partial termination, any remaining included timber.

**33.62 - Contract Forms FS-2400-6/6T Dated 4/04**

The environmental modification procedures described above for FS-2400-6/6T contract forms dated 06/06 applies to FS-2400-6/6T contract forms dated 4/04 with the following exceptions:

1. When the Contracting Officer orders a delay or interruption while the Forest Service evaluates the need and/or terms for an environmental modification, B/BT8.35 lists reimbursable out-of-pocket expenses, but does not list expenses that will not be considered for reimbursement. Despite this difference between the two contract forms, Contracting Officers should deny requests for reimbursement of expenses listed in the 06/06 contract as non-reimbursable when approving reimbursement for out-of-pocket expenses in a 04/04 contract.
2. Contract provision B/BT8.34 limits the search for replacement timber to the individual sale area. However, on October 19, 2007, the Forest Service adopted a final rule (36 CFR 223.85) allowing Forest Officers to provide replacement timber from outside the contract area provided it comes from within the same National Forest as the original contract. Notwithstanding the language in the 4/04 contracts, the rule allows Contracting Officers to provide replacement timber from outside the contract area provided it comes from within the same National Forest as the original contract. Notwithstanding the language in the 4/04 contracts, the rule allows Contracting Officers to provide replacement timber from outside the original contract area consistent with the procedures described above for the FS-2400-6/6T contract forms dated 6/06.

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### **33.63 - Contract Forms FS-2400-13/13T Dated 9/04**

The environmental modification procedures described above for FS-2400-6/6T contract forms dated 04/04 apply to FS-2400-13/13T contract forms.

### **33.7 - Modifications of Sale Boundaries**

Forest Service policy is to not modify or change sale area boundaries except when providing replacement timber pursuant to 36 CFR 223.85(c).

## **34 - CANCELLATION OF CONTRACT**

The terms “cancellation” and “termination” as used in this section and in timber sale and integrated resource timber contracts are synonymous and may be used interchangeably. The term “cancellation” means the elimination of all contractual requirements remaining at the time of cancellation. The term “partial cancellation” means the elimination of one or more, but not all, of the identifiable units from a contract. Within the context of this section the term Purchaser applies to the legal entity holding a timber sale or integrated resource timber contract.

Any timber sale or integrated resource timber contract that contains identified units may be partially canceled. When a timber sale or integrated resource timber contract is partially canceled, the Purchaser retains the duty to perform the remaining portions of the contract, unless the Contracting Officer determines, based upon evidence provided by the Purchaser, that it would be uneconomical for the Purchaser to perform the remaining portion of the contract. In such situation the contract should be terminated rather than partially cancelled.

Contracts may be cancelled or partially cancelled for a variety of reasons addressed in a specific contract and/or for the reasons stated in 36 CFR 223.116, Cancellation, or 36 CFR 223.40, Cancellation for Environmental Protection or Inconsistency with Plans. Procedures for effecting cancellation vary depending on the reason for the cancellation and the contract form used. In most situations, cancellation only occurs after attempts to modify the contract (sec. 33.2) fail. Contracting Officers shall follow the procedures in the contract provision(s) for the specific contract being cancelled and the appropriate CFR. When considering contract cancellation cases, both the Contracting Officer and responsible Line Officer (FSM 2404.21) shall thoroughly analyze the advantages and disadvantages to the United States. This analysis may require on-the-ground examination to determine the condition of the sale area and the status of compliance with the terms of the contract. The Contracting Officer shall determine any outstanding damages and contract obligations. Agreement on settling any outstanding claims and on completing contractual requirements is prerequisite to an agreement to cancel the contract.

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### **34.1 - Termination for Catastrophe**

The Contracting Officer, with concurrence of the Regional Forester, may cancel or partially cancel timber sales, upon application of the Purchaser or by notice of the Contracting Officer, when catastrophic damage to the included timber on the sale area, to the sale area or impaired access to the sale area which materially decreases the value of the timber remaining to be cut. When terminating a contract for catastrophe, neither party receives compensation from the other. The rationale for this is that since neither party had control over the catastrophic event neither party is liable for the losses suffered by the other. In terminating the contract, both parties agree to bear the burden of their losses independently. The procedures for terminating a contract for catastrophe vary depending on the contract form.

#### **34.11 - FS-2400-2 Contracts**

FS-2400-2 contracts do not include a termination for catastrophe condition. Termination for catastrophe must be done by mutual agreement pursuant to 36 CFR 223.116(a)(3).

#### **34.12 - FS-2400-3S/3T/3P Contracts**

In FS-2400-3S/3T/3P contracts the definition of catastrophic damage and contractual authority to terminate for catastrophe is in provision B/BT/BP8.22. Unlike the FS-2400-6/6T contracts, the FS-2400-3S/3T/3P contracts do not identify separate procedures for termination by the Forest Service and termination by the Purchaser. Contracting Officers should accept a Purchaser's request to terminate upon a determination that catastrophic damage has occurred as defined in B/BT/BP8.22.

#### **34.13 - FS-2400-4 Contracts**

FS-2400-4 contracts do not include a specific termination for catastrophe condition. Termination for catastrophe must be by mutual agreement pursuant to 36 CFR 223.116(a)(3), or for the convenience of the Government pursuant to General Condition 13. If terminating under General Condition 13, Contracting Officers shall send the Purchaser a certified letter stating that as a result of the catastrophic damage to the sale the contract is being terminated pursuant to General Condition 13. Contracting Officers should accept a Purchaser's request to terminate upon a determination that catastrophic damage has occurred.

#### **34.14 - FS-2400-6/6T Contracts**

In all versions of the FS-2400-6/6T contracts catastrophic damage is defined in provision B/BT2.133. Upon a determination that catastrophic damage has occurred, the Forest Service and Purchaser must consult to determine if a mutual agreement to modify the contract for catastrophe can be reached pursuant to B/BT8.32 (sec. 33.5).

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After exploring options for modifying a contract following catastrophic damage, either party may seek termination. The conditions for the Forest Service terminating the contract pursuant to B/BT8.222 are as follows:

FS-2400-6/6T contract forms 4/04 and 6/06: The contract may be terminated by written notice from the Contracting Officer, if there is catastrophic damage and Purchaser does not agree within 30 days of receipt from the Contracting Officer of contract modifications proposed to permit the harvest of catastrophe-affected timber. When terminating a contract under B/BT8.222, the Purchaser is not entitled to replacement timber, liquidated damages, or any other compensation. The contract may be terminated upon election and written notice by Purchaser if the rate redetermination after catastrophic damage results in rates being reduced by an amount equal to or greater than specified in B/BT8.221 of all versions of the contract form.

Following catastrophic damage, the Forest Service must conduct an environmental analysis to determine the effects of the catastrophe (sec. 33.5). Based on this analysis the Forest Service may propose a modification for catastrophe and/or an environmental modification, and either one or both of these may lead to terminating the contract. It is important to understand the differences between these modifications and how they would be applied. For example, a fire kills most of the timber within a sale area including six uncut units but two other uncut units are undamaged by the fire. Based on the environmental analysis following the fire the Forest Service offers a modification that: (1) drops one burned unit deemed to have no salvage value, (2) salvages damaged timber in the remaining five burned units, (3) salvages damaged timber between the original units, and (4) changes the timber designated for cutting in the two undamaged units. The Purchaser agrees with (1) dropping the unit deemed to have no salvage value, (2) the changes to the remaining five damaged units, and (3) the addition of the damaged timber between the units, but (4) will only agree to the changed marking in one of the undamaged units if compensated for the reduction in volume, and (5) insists on harvesting the remaining undamaged unit per the original terms of the contract. Under this scenario, the Forest Service and Purchaser can proceed with a catastrophic modification addressing the damaged timber. Concurrently process an environmental modification (sec. 33.6) changing the marking in the one undamaged unit and delete the remaining undamaged unit via partial termination to prevent environmental damage (sec. 34.5). The Purchaser would not be entitled to compensation for any catastrophically damaged timber eliminated under the catastrophic modification (for example, the unit deemed uneconomical to log). The Purchaser would be entitled to compensation in the form of a rate redetermination on the timber in the undamaged unit, and replacement timber or liquidated damages for the designated timber deleted in the partial termination to prevent environmental damage. Recognize that this scenario could play out several alternative ways depending on the actual conditions on the ground and the disposition of the Purchaser.

Contracting Officers must be extremely careful when processing a termination for catastrophe to consider all related contract provisions which vary depending on the version of contract involved.

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### **34.2 - Cancellation for Breach**

The following contract provisions or conditions address terminating a contract for breach:

1. FS-2400-2 contracts: These contracts do not include a termination for breach condition. Termination for breach must be done pursuant to 36 CFR 223.116(a)(4).
2. FS-2400-3S/3T/3P contracts: B/BT/BP9.3.
3. FS-2400-4 contracts: General Condition 12 authorizes Contracting Officers to terminate the contract for the Purchaser's serious or continued violations of its terms.
4. FS-2400-13/13T contracts: J/JT.3.1.

Documenting the basis for terminating a contract for breach is essential. Regardless of the contract form or provision used, Contracting Officers shall obtain approval from the Regional Forester prior to terminating a contract for breach (FSM 2453.82). Contracting Officers shall submit a complete report to the Forest Supervisor as the basis for such action by the Regional Forester or Chief. The report must include:

1. A complete description of the contract violation(s), including substantiating evidence.
2. A complete record of Forest Service action, including copies of pertinent correspondence.
3. Copies of the timber sale contract and other pertinent documents.
4. An evaluation of the possibility of securing contract compliance if a Purchaser is allowed to continue.
5. An estimate of any damages to the United States.
6. An evaluation of the social and economic consequences of cancellation on both the Purchaser and the community.

Prior to requesting approval from the Regional Forester to terminate a contract for breach, Contracting Officers should send a certified letter to the Purchaser, with a copy to Surety, stating intent to seek approval to terminate the contract. The letter must provide the Purchaser with a specific date and time to respond with reasons why the contract should not be cancelled. If the Purchaser subsequently remedies the breach, document the results and either defer requesting approval to terminate or proceed with the request if it is based on a history of breach. If the Purchaser still does not remedy the breach, include the results of this effort in the request to terminate. Include the Purchaser's response to the notice of intent to seek approval to terminate the contract. Send a copy of the letter requesting approval to terminate to the Surety.

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Upon approval from the Regional Forester to terminate for breach, prepare a Contracting Officer's decision (FSH 2409.15 sec. 72) to terminate the contract and send this to the Purchaser by certified mail. Upon cancelling a contract for breach Contracting Officers shall determine damages (sec. 37) and initiate a debarment referral following the procedures in FSH 2409.18a. The Purchaser shall not receive any compensation when the contract is canceled for breach.

Send a cancellation notification to the Purchaser by certified mail, return receipt requested. Surety on the performance bond and payment bond, if applicable, also shall receive notification of the action by certified mail. Notification of cancellation for breach must specify the nature of the breach and the specific contract provision breached.

### **34.3 - Cancellation for Conviction of Environmental Law Violation**

Timber sale contracts may be cancelled pursuant to 36 CFR 223.116(a)(4) for conviction of violation of criminal statutes or, following final agency or judicial determination, of violation of civil standards, orders, permits, or other regulations for the protection of environmental quality issued by a Federal agency, State agency, or political subdivision thereof, in conduct of operations thereunder, on National Forest System land, unless compliance with such laws or regulations would preclude performance of other contractual requirements.

This authority is applicable only for serious violations. An example of this is conviction for killing an endangered species somewhere on National Forest System lands. Contracting Officers shall obtain approval from the Regional Forester prior to cancelling a contract under this authority.

If the violation results from failure to comply with the contract, action may precede under the termination for breach provision of the contract (sec. 34.2). An example of this is damaging or destroying an endangered species nest tree on a timber sale where the nest site was identified in the contract for protection. If appropriate, such action may include cancellation.

Conviction of an environmental law violation is a cause for debarment and the Purchaser shall be referred for debarment (FSH 2409.18a, Ch. 10) regardless of whether the conviction results in cancelling a contract or not.

If the law or regulation applies to National Forest land and conflicts with or precludes contractual compliance, an attempt must be made to mutually modify the contract so as to permit operations in compliance with the law or regulation. Follow the procedures for environmental modification (sec. 33.6).

Enforcing Federal, State, and local laws and regulations other than those specifically relating to National Forest management is the responsibility of law enforcement and regulatory agencies. Primary responsibility might remain with these agencies. The purpose of 36 CFR 223.116(a)(4) is to ensure that timber sale contract operations meet national environmental goals, required by Executive Order 11514.

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### **34.4 - Cancellation by Mutual Agreement**

Timber sale contracts may be cancelled or partially cancelled by mutual agreement pursuant to 36 CFR 223.116(a)(2) upon application, or with consent of the Purchaser, when such action is of advantage to the United States or not prejudicial to its interests (FSM 2453.83). This authority is most commonly used to address environmental problems arising after a sale has been awarded. An example is dropping a unit from a sale following the discovery of a new nest tree occupied by a Threatened and Endangered (T&E) species. Contractual procedures should be fully exhausted prior to using this authority (sec. 33.6). Document for the record the reasons for the cancellation or partial cancellation including the analysis showing why the action is advantageous to the United States or not prejudicial to its interests. The authority to cancel contracts pursuant to 36 CFR 223.116(a)(2) has been delegated to the Regional Foresters (FSM 2404.24).

Some of the conditions that justify such cancellation follow:

1. Operation of the sale will result in significant environment damage.
2. Substantial fire damage, insect activity, or other conditions on the sale area change the harvest priorities or the rate of logging and the Purchaser is unable or unwilling to accommodate the changes.
3. The remaining timber should remain uncut to serve some better use.
4. Circumstances over which the Purchaser has no control make it impossible for the Purchaser to continue operations.

Loss of market is generally not a justification for cancellation. However, in certain cases, such as in experimental sales of marginal value material, conditions may change such that no practical way exists to utilize the material within the contract period. Similarly, loss of manufacturing facilities is also not grounds for cancellation., Even though a Purchaser may prefer to operate differently, a Purchaser must consider whether to sell included timber to other processing facilities when possible.

Consult with the Office of the General Counsel prior to cancellation. Compensation to either party shall be based on the terms included in the written agreement between the parties.

See Exhibit 01 for a sample format and approved wording for an agreement to cancel contract.

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**34.4 - Exhibit 01**

**AGREEMENT TO CANCEL CONTRACT**

1. It is agreed that the above designated timber sale contract, signed by \_\_\_\_\_ (name) \_\_\_\_\_ (title) \_\_\_\_\_, on behalf of (Purchaser name <sup>1</sup>), (the Purchaser), and by (name) \_\_\_\_\_ (title) \_\_\_\_\_ for the United States of America as of the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, be cancelled effective the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, for the following reasons:  
\_\_\_\_\_.

2. Pursuant to this agreement, the Purchaser agrees to (Outline responsibility and dates for completion of any contractual requirements on areas cut over such as road construction, settlement of claims, and removal of equipment.) and to release the United States from all further liability there under.

3. Pursuant to this agreement and subject to Purchaser's compliance with paragraph 2, above, the United States agrees to relieve the Purchaser from any further liability there under.

Signed the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_  
UNITED STATES OF AMERICA

By \_\_\_\_\_  
(Signature of Contracting Officer or  
Regional Forester)

Two witnesses: <sup>2</sup>

\_\_\_\_\_  
(Title)

<sup>3</sup>  
\_\_\_\_\_  
(Name) (Purchaser)

<sup>1</sup> If Purchaser is a corporation, state "a corporation organized and existing under the laws of the State of \_\_\_\_\_" and specify the State; if Purchaser is a partnership, state "a partnership consisting of \_\_\_\_\_" and specify the names of each partner; and if Purchaser is a sole doing business under an assumed name, state "an individual doing business under the name of \_\_\_\_\_ City of \_\_\_\_\_, State of \_\_\_\_\_.

<sup>2</sup> The signature and addresses of two witnesses are required.

<sup>3</sup> If Purchaser is a co-partnership, the signatures should be: XYZ Company, by John Doe, a member of the firm. If Purchaser is a corporation, form of signature should be: XYZ Company, by John Doe, President (or other officer or agent) and the seal of the corporation must be impressed or indicated, unless time is of the essence and there is a corporate resolution on file that authorizes the named individual to sign

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**34.4 - Exhibit 01--Continued**

**AGREEMENT TO CANCEL CONTRACT**

By \_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Name)

(Title)

\_\_\_\_\_  
(Address)

(Purchaser's business address)

I, <sup>4</sup> \_\_\_\_\_, certify that I am the Secretary of the corporation named as Purchaser herein; that \_\_\_\_\_ who signed this agreement on behalf of the Purchaser, was then \_\_\_\_\_ of said corporation, that said agreement was duly signed for and in behalf of said corporate powers.

\_\_\_\_\_  
<sup>4</sup> The certificate must be completed if Purchaser is a corporation.

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### **34.5 - Cancellation to Prevent Environmental Damage**

When timber sale contract operations may cause serious degradation of the environment or resource damage, and when the Forest Service and Purchaser cannot mutually agree to the terms of an environmental modification (sec. 33.6), the contract may be cancelled or partially cancelled by the Forest Service pursuant to 36 CFR 223.40 and/or 36 CFR 223.116(a)(5). Cancellation will be by the Chief or Chief's designee (FSM 2453.81). Contract forms FS-2400-6/6T dated 4/04 and 6/06, and contract forms FS-2400-13/13T dated 9/04 also include procedures for the Purchaser terminating the contract when the Contracting Officer orders a delay or interruption to prevent environmental degradation or resource damage (sec. 34.51b).

Cancelling or partially cancelling contracts is one of the most complex procedures Contracting Officers will encounter. Most cancellations or partial cancellations include interrupting or delaying operations, environmental modifications, rate redeterminations, contract term adjustments, and methods for compensating Purchasers for delays and loss of timber. Because the contract provisions pertaining to cancellation have evolved over the years, cancellation procedures and remedies available to the Purchaser vary by contract. This section of the handbook is intended to provide a general guide to the cancellation procedures, but Contracting Officers shall follow all of the pertinent provisions in the contract being cancelled and should seek assistance from their Regional Office and the Regional Attorney when considering a contract cancellation or partial cancellation.

The Chief or the Chief's designee may cancel or partially cancel timber sale contracts and permits:

1. To prevent environmental degradation or resource damage, including, but not limited to, harm to habitat, plants, animals, cultural resources, or cave resources;
2. To ensure consistency with land and resource management plans or other documents prepared pursuant to the National Environmental Policy Act (42 USC 4321, et seq.);
3. To conduct environmental analysis, including, but not limited to, engaging in consultation pursuant to the Endangered Species Act (16 USC 1531, et seq.); or
4. Due to administrative appeal or litigation, regardless of whether the Contracting Officer's request is required by a court order or this contract is named in such a proceeding.

To avoid charges of being arbitrary or capricious, the basis for a decision to cancel a contract to protect the environment must be fully documented. Regardless of the contract form the documentation must include the following:

1. Identification of the reason(s) why contract operations may cause serious degradation of the environment or resource damage. This may include but is not limited to the addition of a species to the endangered species list, new information about the habitat requirements of a

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listed species, a court order or decision even if the specific sale was not named in the order or decision, or the discovery of an archeological site not found when the sale was prepared.

2. An analysis of the environmental impacts expected from operating under the contract. When appropriate, this should represent the results of interdisciplinary review. The analysis should list impacts and estimate the impact's duration. An environmental assessment or environmental impact statement must be supplemented, revised, or prepared. The decision must be signed by the appropriate Line Officer (FSM 2404.21).
3. A discussion of alternatives considered and the reasons for rejecting them. Environmental impacts of the alternatives should be discussed where appropriate. The Contracting Officer should be consulted during this process to help minimize impacts to the contract and reduce the Government's liability for damages.
4. A summary of discussions with the Purchaser, including the Purchaser's response to a request to mutually agree to modify the contract and/or to cancel the contract by mutual agreement.
5. Copies of the contract and other pertinent documents.
6. A list of the status of sale operations, such as volume logged to date, volume remaining, roads constructed, and status of contractual obligations on areas logged to date.
7. An analysis of the social and economic consequences.

If the Regional Forester concurs with a Forest Supervisor's cancellation recommendation, the Regional Forester shall request approval from the Washington Office, Director, of Forest Management to terminate or partially terminate a contract (FSM 2404.23). A request to cancel or partially cancel a contract to prevent environmental damage must include:

1. A history of the project up to the point of requesting contract cancellation.
2. Any relevant information noted above providing clarity on the recommendation to terminate or partially terminate the contract.
3. Efforts to modify the contract in a manner that would prevent the environmental damage.
4. Efforts to find suitable replacement timber.
5. The source of funds for paying damages including out-of-pocket expenses and liquidated damages.

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After making a determination whether to terminate or partially terminate a contract, the Chief or the Chief's designee may authorize the Contracting Officer, in writing, to be the Chief's designee for the purpose of terminating or partially terminating a specific named contract.

Prior to terminating or partially terminating a contract, determine whether the Purchaser entered into a Pre-Award Waiver, Release, and Limitation of Liability Agreement or similar instrument limiting the Government's liability (FSM 2432.31b) on the proposed cancellation. If yes, follow the terms of the agreement when terminating the contract and determining the Government's liability.

Upon completing the preceding steps, the process for terminating or partially terminating a contract varies by the different contract forms as described in the following sections.

**34.51 - FS-2400-6/6T Contracts Dated 6/06**

Contract provision B/BT8.33 addresses the reasons that a Contracting Officer shall order a delay or interruption to prevent environmental degradation or resource damage. This initiates processes that may result in either the Forest Service or the Purchaser terminating or partially terminating the contract provided the basis for the delay or interruption was not caused by wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon. Contracting Officers should not order an interruption unless the Purchaser is currently operating and should not order a delay unless the Purchaser has indicated intent to start operations during a period of the year when operations may occur under the terms of the contract.

**34.51a - Termination by Forest Service**

When continued operation might result in serious environmental or resource damage, an attempt must be made to reach agreement on an environmental modification (sec. 33.6) to prevent the damage. Only if an acceptable modification cannot be achieved should termination or partial termination be considered.

Contract provision B/BT8.341 addresses termination by Forest Service as follows:

- a. The Chief or the Chief's designee may unilaterally terminate this contract, in whole or in part, for any of the reasons set forth in paragraph (a) of B/BT8.33.
- b. Purchaser's compensation for termination of this contract under this Item should be:
  - (i) Refund or release of advanced deposits for timber cut but not removed,
  - (ii) Reimbursement for Out-of-Pocket Expenses, and
  - (iii) Replacement timber under subparagraph (c), and/or liquidated damages under subparagraph (d); provided that liquidated damages shall be available if, and only if, after

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good faith efforts, the Parties (1) cannot locate replacement timber or agree upon the applicable stumpage price, or (2) the volume of deleted timber exceeds the volume of any replacement timber.

c. Subject to applicable laws, regulations, and policies, Forest Service and Purchaser shall make good faith efforts to identify replacement timber of similar volume, quality, access, and topography within Sale Area. If suitable replacement timber cannot be located within Sale Area, the parties shall expand the search to the National Forest in which the Sale Area is located. Stumpage price shall be adjusted under B/BT3.31 to account for differences between replacement timber and deleted timber. If Forest Service and Purchaser agree upon suitable replacement timber and the applicable stumpage price, then this contract shall not terminate and instead must be modified pursuant to 36 CFR 223.85(c) and shall remain in force with respect to such replacement timber and, in the case of partial termination, any remaining Included Timber. If the parties cannot agree on suitable replacement timber or the applicable stumpage price of such timber, either party may end the search and Purchaser shall be compensated under subparagraph (d).

d. Forest Service shall pay as fixed, agreed, and liquidated damages an amount equivalent to 15 percent of the estimated delivered log value of the volume of timber not harvested due to the termination or partial termination. Estimated delivered log value and volume of timber not harvested shall be determined by the Contracting Officer as of Termination Date, using Forest Service methods in use as of the Termination Date.

e. In any instance of partial termination, in which the Forest Service deletes one or more cutting units from the Sale Area, Purchaser's sole and exclusive remedy regarding remaining units shall be a rate redetermination pursuant to B/BT3.31. Purchaser shall be required to complete Contract Operations with regard to remaining units and any obligations pertaining to cessation of operations on deleted units, including without limit erosion control, brush disposal, and road maintenance. If Purchaser fails to fulfill any such duty or obligation, then Contracting Officer may make deductions from compensation due Purchaser, including without limit costs and expenses of completing such work.

The contract requires the Forest Service and Purchaser to make a good faith effort to identify and agree upon replacement timber for any timber that the Purchaser would be unable to harvest due to a termination or partial termination of the contract. The results of those efforts may lead to different outcomes as follows:

a. The Purchaser may agree to a modification including the units being deleted and replacement timber, if any, which is being added. The modification must include the rates redetermined to reflect the changes. If the modification does not fully replace the timber being deleted, it must state that the modification constitutes full compensation for the timber that is being deleted from the contract. The modification occurs pursuant to B/BT8.33, and there is no termination or partial termination of the contract under B/BT8.341. Upon signing

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the modification, the Purchaser forgoes claiming liquidated damages under paragraph (d) of the provision. The Purchaser may be entitled to compensation pursuant to B/BT8.33 for delays caused by the process.

b. If the Purchaser demands replacement in full for timber that cannot be harvested and only some replacement timber can be agreed upon, two modifications are required. The first modification is by mutual agreement adding the replacement timber pursuant to B/BT8.33. Send the modification to the Purchaser with a cover letter explaining the Forest Service's intent to partially cancel the remaining contract removing the units that the Purchaser will not be permitted to harvest. The letter should require the Purchaser to return the signed modification within 30 days and state that failure to do so will be considered a rejection of the modification. Upon receipt of the signed modification or expiration of the 30 days for its return, prepare a unilateral modification partially terminating the contract pursuant to B/BT8.341. Do not consider the replacement timber if the Purchaser failed to sign and return that modification. Both modifications require a separate rate redetermination reflecting the changes. The Chief or Chief's designee then executes the second modification and sends it to the Purchaser with a certified letter stating that it is a unilateral modification partially terminating the contract pursuant to B/BT8.341 and explaining the Purchaser's right to request liquidated damages pursuant to B/BT8.341(d). As the second modification is the unilateral decision to partially terminate the contract, note on the FS-2400-9 form that it is a unilateral modification and the Purchaser's signature is not required. Strike through the Purchaser's signature block prior to sending the form (sec. 33.2). Return an executed copy of the first modification with the letter transmitting the second modification.

c. If no replacement timber can be identified or agreed upon and the sale includes units that are not subject to deletion, prepare a unilateral modification partially terminating the contract pursuant to B/BT8.341. The Purchaser's sole and exclusive remedy with regard to the remaining units shall be a rate redetermination (sec. 33.3). The Chief or Chief's designee executes the modification and sends it with a certified letter to the Purchaser stating that it is a unilateral modification partially terminating the contract pursuant to B/BT8.341 and explaining the Purchaser's right to request liquidated damages pursuant to B/BT8.341(d).

d. If no replacement timber can be identified or agreed upon and the Purchaser will not be permitted to harvest any of the remaining units, terminate the contract. The Chief or Chief's designee sends the Purchaser a certified letter stating that the contract is terminated pursuant to B/BT8.341 and explaining the Purchaser's right to request liquidated damages pursuant to B/BT8.341(d).

The Purchaser may be entitled to compensation when a contract is cancelled or partially cancelled. Section 34.71 describes the procedures for reimbursing Purchaser for out-of-pocket expenses, and section 34.72 describes the procedures for calculating liquidated damages.

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### **34.51b - Termination by Purchaser**

Contract provision B/BT8.342 states:

- a. Purchaser may, by written notice, terminate this Contract, in whole or in part, as described herein,
  - (i) in the event of an order delaying or interrupting its operations pursuant to B/BT8.33, or
  - (ii) in the event of an order modifying this Contract pursuant to B/BT8.33, if Purchaser decides to reject the terms of the modification prior to its acceptance. Purchaser shall have the right to terminate this Contract in whole only when the Contracting Officer's order under B/BT8.33 applies to all cutting units within the Sale Area. When the order affects only a portion of the cutting units, Purchaser shall have the right to terminate this Contract in part, by deleting one or more of the units covered by the Contracting Officer's order. The foregoing right of termination, in whole or in part, shall not exist when the delay, interruption, or modification arises from wind, flood, landslide, fire, forest pest epidemic, or other major natural phenomenon.
- b. Purchaser's compensation for termination of this Contract, in whole or in part, under this Item shall be:
  - (i) refund or release of advanced deposits for timber cut but not removed,
  - (ii) reimbursement for Out-of-Pocket Expenses, and
  - (iii) if the duration of the delay or interruption exceeds either six months of Normal Operating Season time, or one calendar year from the date of the order, then: replacement timber as provided under (c) and/or liquidated damages under (d); provided that liquidated damages shall be available if, and only if, after good faith efforts, the Parties (1) cannot locate replacement timber or agree upon the applicable stumpage price, or (2) the volume of deleted timber exceeds the volume of any replacement timber.
- c. Subject to applicable laws, regulations and policies, Forest Service and Purchaser shall make good faith efforts to identify replacement timber of similar volume, quality, access, and topography within Sale Area. If suitable replacement timber cannot be located within Sale Area, the parties shall expand the search to the National Forest in which the Sale Area is located. Stumpage price shall be adjusted under B/BT3.31 to account for differences between replacement timber and deleted timber. If Forest Service and Purchaser agree upon suitable replacement timber and the applicable stumpage price, then this contract shall not terminate and instead shall be modified pursuant to 36 CFR 223.85(c) and shall remain in force with respect to such replacement timber and, in the case of partial termination, any

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remaining Included Timber. If the parties cannot agree on suitable replacement timber or the applicable stumpage price of such timber, either party may end the search and Purchaser shall be compensated under subparagraph (d).

d. Forest Service shall pay as fixed, agreed, and liquidated damages an amount equivalent to 15 percent of the estimated delivered log value of the volume of timber not harvested due to the termination or partial termination. Estimated delivered log value and volume of timber not harvested shall be determined by the Contracting Officer as of Termination Date, using Forest Service methods in use as of the Termination Date.

e. In any instance of partial termination, in which Purchaser deletes one or more cutting units from Sale Area, Purchaser's sole and exclusive remedy with regard to remaining units shall be a rate redetermination pursuant to B/BT3.31. Purchaser shall be required to complete Contract Operations with regard to remaining units and any obligations pertaining to cessation of operations on deleted units, including without limit, erosion control, brush disposal, and road maintenance. If Purchaser fails to fulfill any such duty or obligation, then Contracting Officer may make deductions from compensation due Purchaser, including without limit costs and expenses of completing such work.

The Purchaser may terminate or partially terminate a contract pursuant to the conditions set forth in the provision. The ability to terminate the contract under B/BT8.342 begins immediately upon receipt of the Contracting Officer's order under B/BT8.33 and continues until the Contracting Officer notifies the Purchaser in writing that operations may resume. The right to terminate the contract in whole only applies if the Contracting Officer's order applies to all units within the sale area. When the order affects only a portion of the cutting units, the Purchaser may terminate the contract in part by deleting one or more of the units covered by the Contracting Officer's order. The principal difference between Termination by Forest Service under B/BT8.341 and Termination by Purchaser under B/BT8.342 concerns the compensation owed for the termination. Under B/BT8.342, the Purchaser is only entitled to replacement timber and/or liquidated damages if the duration of the delay or interruption under B/BT8.33 exceeds either six months of normal operating time or one calendar-year from the date of the order. So, if the Purchaser terminates the contract prior to one of those thresholds, compensation is limited to a refund or release of advanced deposits for timber cut but not removed, out-of-pocket expenses (sec. 34.71), and for a partial termination a rate redetermination pursuant to B/BT3.31.

In event of a Contracting Officer's order under B/BT8.33 delaying or interrupting operations for 90 days or more, the Purchaser may also terminate the contract under B/BT8.36 Termination for Market Change. Damages caused by termination under this provision are limited to out-of-pocket expenses. Given the limit on damages and the broad authority for the Purchaser to terminate under B/BT8.242 without specifying a reason, there is no apparent advantage to terminating a contract under B/BT8.36.

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**34.52 - FS-2400-6/6T Contracts Dated 4/04**

Contract provision B/BT8.33 addresses the reasons a Contracting Officer shall order a delay or interruption to prevent environmental degradation or resource damage provided the basis for the delay or interruption was not caused by wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon. This initiates processes that may result in either the Forest Service or the Purchaser terminating or partially terminating the contract. Contracting Officers should not order an interruption unless the Purchaser is currently operating and should not order a delay unless the Purchaser has indicated intent to start operations during a period of the year when operations may occur under the terms of the contract.

When continued operation might result in serious environmental or resource damage, an attempt must be made to reach agreement on an environmental modification (sec. 33.6) to prevent the damage. Only if an acceptable modification cannot be achieved should termination or partial termination be considered.

In the 4/04 version of the contract termination by the Forest Service and termination by the Purchaser is addressed in a single provision B/BT8.34 Contract Termination as follows:

**B/BT8.34 Contract Termination.** (a) The Chief or the Chief's designee may unilaterally terminate this contract, in whole or in part, for any of the reasons set forth in paragraph (a) of B/BT8.33. (b) Purchaser agrees that compensation for termination of this contract, in whole or in part, under this Subsection shall be: (i) refund or release of advanced deposits under B/BT4.212 for timber cut but not removed, (ii) reimbursement for Out-of-Pocket Expenses, and (iii) one of the following: replacement volume under subparagraph (c) or liquidated damages under subparagraph (d). (c) Forest Service and Purchaser shall make good faith efforts to identify within Sale Area replacement timber of similar volume, quality, access, and topography. Stumpage price shall be adjusted under B/BT3.31 to account for differences between replacement timber and timber deleted. If Forest Service and Purchaser cannot reach agreement on satisfactory replacement volume or the proper stumpage of such timber, either party may opt to end the search and Purchaser shall be compensated under paragraph (d) of this Subsection. (d) Forest Service shall pay as fixed, agreed, and liquidated damages an amount equivalent to 15 percent of the estimated delivered log value of the volume of timber not harvested due to the termination or partial termination. Estimated delivered log value and volume of timber not harvested shall be determined by Contracting Officer as of Termination Date, using Forest Service methods in use as of Termination Date. (e) When Purchaser elects termination under this Subsection as a remedy for a delay or interruption pursuant to B/BT8.33, Purchaser shall only be entitled to damages pursuant to subparagraph (d) if the B/BT8.33 delay or interruption is greater than one year, and the delay or interruption was not initially caused by wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon. (f) In cases of partial termination under this Subsection, Purchaser's sole and exclusive remedy for the remaining volume shall be a rate redetermination pursuant to B/BT3.31. (g) The applicability of this Subsection shall be

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unaffected by a finding during administrative appeal or litigation that this sale, or a similarly situated sale, was awarded or operated without properly complying with any statute, regulation, or policy. (h) Purchaser is required to fulfill all contract obligations not affected by a termination or partial termination under this Subsection. To the extent Purchaser is unable to fulfill such obligations; any compensation due to Purchaser will be reduced by the cost of completing the unfulfilled obligations, as determined by Contracting Officer.

**34.52a - Termination by Forest Service**

Follow the procedures outlined in section 34.51a but change references to contract provisions to match the 4/04 contract. Also, although B/BT8.34 limits the search for replacement timber to within the sale area, Contracting Officers may expand the search to the same National Forest as the original contract pursuant to 36 CFR 223.85(c). Follow the procedures in section 34.51a.

**34.52b - Termination by Purchaser**

The Purchaser may terminate or partially terminate a contract pursuant to the conditions set forth in B/BT8.34. The ability to terminate the contract begins immediately upon receipt of the Contracting Officer's order under B/BT8.33 and continues until the Contracting Officer notifies the Purchaser in writing that operations may resume. The right to terminate the contract in whole only applies if the Contracting Officer's order applies to all units within the sale area. When the order affects only a portion of the cutting units, the Purchaser may terminate the contract in part by deleting one or more of the units covered by the Contracting Officer's order. The principal difference between Termination by Forest Service and Termination by Purchaser is in compensation. Contracting Officers should also note that the differences between the 4/04 and 6/06 contracts regarding the length of a delay or interruption before the Purchaser can seek replacement timber or liquidated damages. When the Purchaser terminates a 4/04 contract, the Purchaser is only entitled to replacement timber and/or liquidated damages if the duration of the delay or interruption under B/BT8.33 is greater than one year from the date of the order. If the Purchaser terminates a contract prior to that threshold, compensation is limited to a refund or release of advanced deposits for timber cut but not removed, out-of-pocket expenses (sec. 34.71), and for a partial termination a rate redetermination pursuant to B/BT3.31.

In event of a Contracting Officer's order under B/BT8.33 delaying or interrupting operations for 90 days or more, the Purchaser may also terminate the contract under B/BT8.36 Termination for Market Change. Damages caused by termination under this provision are limited to out-of-pocket expenses. Given the limit on damages and the broad authority for the Purchaser to terminate under B/BT8.242 without specifying a reason, there is no apparent advantage to terminating a contract under B/BT8.36.

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**34.53 - FS-2400-13/13T Contracts Dated 9/04**

Contract provision I/IT.3.3 Contract Suspension and Modification addresses the reasons that Contracting Officers may order a delay or interruption to prevent environmental degradation or resource damage provided the basis for the delay or interruption was not caused by wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural phenomenon. This initiates processes that may result in either the Forest Service or the contractor terminating or partially terminating the contract. Contracting Officers should not order an interruption unless the contractor is currently operating and should not order a delay unless the contractor has indicated intent to start operations during a period of the year when operations may occur under the terms of the contract.

When continued operation might result in serious environmental or resource damage, an attempt must be made to reach agreement on an environmental modification (sec. 33.6) to prevent the damage. Only if an acceptable modification cannot be achieved should termination or partial termination be considered.

In the 9/04 version of the contract termination by the Forest Service and termination by the Contractor is addressed in a single provision I/IT.3.4 Contract Termination as follows:

**I/IT.3.4 Contract Termination.** (a) The Chief or the Chief's designee may unilaterally terminate this contract, in whole or in part, for any of the reasons set forth in paragraph (a) of I/IT.3.3. (b) Contractor agrees that compensation for termination of this contract, in whole or in part, under this Subsection shall be: (i) refund or release of advanced deposits under E/ET.2.1.2 for timber cut but not removed, (ii) reimbursement for Out-of-Pocket Expenses, and (iii) one of the following, except when termination, pursuant to I/IT.3.3(v), is based upon a change of law which is public and general in nature: replacement volume under subparagraph (c) or liquidated damages under subparagraph (d). (c) Forest Service and the Contractor shall make good faith efforts to identify within Contract Area replacement timber of similar volume, quality, access, and topography. Stumpage price shall be adjusted under D/DT.3.1 to account for differences between replacement timber and timber deleted. If Forest Service and the Contractor cannot reach agreement on satisfactory replacement volume or the proper stumpage of such timber, either party may opt to end the search and the Contractor shall be compensated under paragraph (d) of this Subsection. (d) Forest Service shall pay as fixed, agreed, and liquidated damages an amount equivalent to 15 percent of the estimated delivered log value of the volume of timber not harvested due to the termination or partial termination. Estimated delivered log value and volume of timber not harvested shall be determined by the Contracting Officer as of Termination Date, using Forest Service methods in use as of Termination Date. (e) When the Contractor elects termination under this Subsection as a remedy for a delay or interruption pursuant to I/IT.3.3, the Contractor shall only be entitled to damages pursuant to subparagraph (d) if the I/IT.3.3 delay or interruption is greater than one year, and the delay or interruption was not initially caused by wind, flood, earthquake, landslide, fire, forest pest epidemic, or other major natural

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phenomenon. (f) In cases of partial termination under this Subsection, the Contractor's sole and exclusive remedy for the remaining volume shall be a rate redetermination pursuant to D/DT.3.1. (g) The applicability of this Subsection shall be unaffected by a finding during administrative appeal or litigation that this sale, or a similarly situated sale, was awarded or operated without properly complying with any statute, regulation, or policy. (h) Contractor is required to fulfill all contract obligations not affected by a termination or partial termination under this Subsection. To the extent the Contractor is unable to fulfill such obligations; any compensation due to the Contractor will be reduced by the cost of completing the unfulfilled obligations, as determined by Contracting Officer.

**34.53a - Termination by Forest Service**

Follow the procedures in section 34.51a, except compensation for termination shall not include replacement volume or liquidated damages if the cause for termination is a change in law; and performance of the contract, as determined by the Forest Service, would not comply, in whole or in part, with such law.

**34.53b - Termination by Contractor**

The Contractor may terminate or partially terminate a contract pursuant to the conditions set forth in the provision. The ability to terminate the contract begins immediately upon receipt of the Contracting Officer's order under I/IT.3.3 Contract Suspension and Modification and continues until the Contracting Officer notifies the Contractor in writing that operations may resume. The right to terminate the contract in whole only applies if the Contracting Officer's order applies to all units within the sale area. When the order affects only a portion of the cutting or service work units the Contractor may terminate the contract in part by deleting one or more of the units covered by the Contracting Officer's order. The principal difference between Termination by Forest Service and Termination by the contractor is in compensation. When the Contractor terminates a contract, the Contractor is only entitled to replacement timber and/or liquidated damages if the duration of the delay or interruption under I/IT.3.3 is greater than one year from the date of the order. If the Contractor terminates a contract prior to that threshold, compensation is limited to a refund or release of advanced deposits for timber cut but not removed, out-of-pocket expenses (sec. 34.71), and for a partial termination a rate redetermination pursuant to D/DT.3.1 Rate Redetermination for Environmental Modification.

In event of a Contracting Officer's order under I/IT.3.3 delaying or interrupting operations for 90 days or more, the Contractor may also terminate the contract under I/IT.3.6 Termination for Market Change. Damages caused by termination under this provision are limited to out-of-pocket expenses. Given the limit on damages and the broad authority for the Contractor to terminate under I/IT.3.4 Contract Termination without specifying a reason, there is no apparent advantage to terminating a contract under I/IT.3.6 Termination for Market Change.

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### **34.6 - Cancellation Within Disaster Areas**

Upon application of the Purchaser, the Contracting Officer, with concurrence of the Regional Forester, may cancel timber sale contracts within disaster areas declared by the President when the Chief determines that damage to specified roads where construction work has not been accepted by the Forest Service is so great that restoration, reconstruction, or construction is not practical (FSM 2453.85).

### **34.7 - Calculating Damages**

#### **34.71 - Out-of-Pocket Expenses**

Out-of-pocket expenses are expenditures arising directly from performing the contract that were rendered unrecovered due to delay, interruption, or termination of a contract. An expenditure is unrecovered when the Purchaser was precluded from gaining the benefit of the expenditure during a given period because operations were not permitted. An out-of-pocket expense is one that involves an actual outlay or “expenditure” of money. Out-of-pocket expenses do not include lost profits, attorney's fees, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. If a cost would have been incurred regardless of the interruption, delay, or termination, then it is not reimbursable. Indirect or consequential damages are not recoverable.

The Purchaser shall submit all claims for out-of-pocket expenses along with supporting documentation to the Contracting Officer pursuant to the Contract Disputes Act of 1978 (41 U.S.C. 7101, *et seq.*). Supporting documentation should include receipts or other documentation clearly identifying and verifying actual expenditures. Contracting Officers shall prepare a claim decision (FSH 2409.15, sec. 72.3). Under this approach, Contracting Officers should conduct an item-by-item analysis to determine if a cost falls within the scope of the provision. Purchasers are also required to make reasonable efforts to minimize out-of-pocket expenses. When evaluating claims for out-of-pocket expenses, Contracting Officers should discount amounts where Purchaser failed to minimize their expenses. If a Purchaser seeks compensation for both a delay or interruption, and a termination or partial termination Contracting Officers shall reject duplicative claim items.

The different versions of the contract include lists or examples of out-of-pocket expenses that may be reimbursable and/or lists or examples of expenses that are not reimbursable. Use the contract as a guide when considering which contract provisions authorize reimbursing out-of-pocket expenses and which expenses to accept or reject. When authorized under the contract, the Forest Service may reimburse a Purchaser for the following out-of-pocket expenses:

1. Maintenance of the timber sale performance and payment bonds during the period when operations were delayed or interrupted or, if terminated, from the date operations were halted until the expiration of the bonds. When evaluating out-of-pocket expenses for bonds,

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Contracting Officers must consider the type of bond, how it is secured, whether the contract was operated, and efforts the Purchaser made to minimize expenses.

The performance bond may be temporarily reduced during an ordered delay or interruption pursuant to the following contract provisions:

- a. FS-2400-6/6T contract version 6/06: B/BT9.13 for a delay or interruption of more than 30 days when operations would be occurring but for the order.
- b. FS-2400-13/13T contract version 9/04: J/JT.1.3 for a delay or interruption of more than 90 days.
- c. FS-2400-6/6T contract version 4/04: B/BT9.13 for a delay or interruption of more than 90 days.
- d. Payment bonds on all contract forms should be reduced or reallocated during an ordered delay or interruption.

Surety bonds are similar to insurance policies in that the cost (premium) to the Purchaser is based on the value and length of the bond. The Purchaser may be required to pay the entire cost for the bond in a single, upfront payment or may be required to make scheduled payments during the life of the bond. Consequently, it may be difficult for a Purchaser to temporarily reduce a surety bond. Contracting Officers shall consider this when determining whether a Purchaser took appropriate measures to reduce out-of-pocket expenses.

2. Maintenance of the down payment or other cash deposits during the period when operations were delayed or interrupted or, if terminated, from the date operations were halted until the cash is returned to the Purchaser. The down payment may be temporarily reduced during an ordered delay or interruption pursuant to the following contract provisions:

- a. FS-2400-6/6T contract version 6/06: B/BT4.22.
- b. FS-2400-13/13T contract version 9/04: E/ET.2.3, but most contracts on this form do not require down payment.
- c. FS-2400-6/6T contract version 4/04: B/BT4.22.

3. For an ordered interruption, the lesser of move-out and move-in, or leaving equipment and/or logging camps on site, if the Purchaser and Contracting Officer agree to leave equipment and/or logging camps on site in lieu of move-out and move-in. The agreement to leave equipment and/or logging camps on site must be documented. The costs associated with this may include such things as special measures needed to protect equipment and/or logging camps from the elements or vandalism that would not have been incurred but for the ordered interruption.

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Depending on the length of the interruption and when the Purchaser submits a claim, two different approaches may be used to determine out-of-pocket moving costs as follows:

- a. The interruption of ongoing operations occurs within a single “operating period” which for this purpose is considered to be the time between the beginning and ending dates shown on the Purchaser’s annual operating schedule. In this scenario, the Purchaser was operating, moves out at the beginning of an ordered suspension, and moves back in following the end of the ordered suspension but during the same operating period. Out-of-pocket expenses would be based on the Purchaser’s actual costs for move-out and following move-in.
- b. The interruption begins in one operating period forcing the Purchaser to move out and the Purchaser does not move back in during the same operating period. Rather than leaving an out-of-pocket expense claim open until it is determined whether an interruption caused an additional move-in/move-out it may be preferable to calculate the amount of the move-in/move-out costs that were unamortized. The Purchaser expected to amortize the costs of move-in/move-out over the period of time between moving in and either the completion of a planned amount of work or when forced to leave due to weather or a contractually specified date. The interruption caused by an ordered interruption resulted in the Purchaser moving out sooner than planned; consequently, the Purchaser did not gain the full benefit of its move-in/move-out expenditure because contract operations were not permitted.

To calculate the unamortized move-in/move-out costs it is first necessary to determine the length of time the Purchaser would have been able to operate had there been no ordered interruption. The start date is the date Purchaser moved in but establishing the ending date may not be so clear. If the Purchaser’s annual operating schedule showed a specific date when operations would cease, use that date. If the annual operating schedule was not date specific but rather referred to things such as: upon completion of certain units, until weathered out, and so forth, then the Contracting Office will have to determine an end date. This can be based on a variety of factors such as: (1) Purchaser’s production rates up to the time of the interruption, (2) end of the normal operating season (NOS), (3) a date when operations normally have to cease in the area based on historical data, (4) actual date when operations would have been forced to stop for weather conditions if known at time claim is being processed, and so forth. Clearly document the rationale for end date. Apply the ratio based on the amount of time the Purchaser was able to operate to the amount of time the Purchaser would have been able to operate but for the ordered interruption to the Purchaser’s move-in/move-out costs to determine how much of those costs were unamortized.

When the Forest Service orders an interruption and the contract is subsequently terminated without a resumption of operations, the Purchaser did not gain the full benefit of its move-in/move-out expenditure, because contract operations were not permitted.

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Use the method described above for calculating the amount of move-in/move-out costs that were unamortized.

- c. Felling, bucking, lopping, skidding, yarding, and decking any products so processed, but not removed from sale area because: (1) the sale was terminated, or (2) the products no longer meet Utilization Standards because of delay or interruption.
- d. If terminated, in whole or in part, unamortized temporary roads, road maintenance, dust abatement, and improvements authorized under B/BT6.2;
- e. Investment in specified roads during the period when operations were delayed or interrupted or, if terminated in whole or in part, unamortized specified road construction and reconstruction; and
- f. If terminated, in whole or in part, bid preparation, including review of sale offering.

Claims for out-of-pocket expenses for the following items should be denied:

1. Attorney fees: Most of the contract versions either list attorney fees as a non-compensable out-of-pocket expense or do not identify them in a list of compensable expenses. Consult with Office of General Counsel for attorney fees on contracts not meeting either of those conditions.
2. Overhead, General and Administrative Costs (for example, salaries and wages, advertising, bank charges, depreciation, dues and subscriptions, insurance, repairs and maintenance, supplies, payroll and other taxes, utilities, and so forth): Such costs are generally not recoverable, as these expenses are incurred regardless of whether there is a Forest Service-caused delay or interruption; that is, they are not the “direct result” of a suspension.
3. Costs and expenses of operating a sawmill or other processing facility including employee wages and equipment depreciation. These costs are generally not recoverable, because they are not the direct result of a delay, interruption, or termination.
4. Expectancy damages: Expectancy damages do not involve an actual outlay or expenditure of money and as such do not meet the definition of an out-of-pocket expense.
5. Interest on loans or debt: These expenses are not recoverable because they are not the direct result of an interruption, delay, or termination. Unlike performance bond expenses, incurring debt is not a necessary element of operating a timber sale contract, so paying interest on such debt is not necessarily tied to the contract or its suspension.
6. Foregone interest: Foregone interest does not involve an actual outlay or expenditure of money and as such does not meet the definition of an out-of-pocket expense.

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7. Manufacturing inefficiencies: Manufacturing inefficiencies attributed to processing “replacement” timber of a lesser quality than would have been obtained but for a delay, interruption, or termination do not involve an actual outlay or expenditure of money and as such do not meet the definition of an out-of-pocket expense.

8. Replacement cost of timber: Each of the contract forms provides for liquidated damages and/or replacement timber. Purchasers are compensated in that manner for timber that cannot be harvested due to a cancellation or partial cancellation.

9. Anticipatory or lost profits: Anticipatory or lost profits are speculative, do not involve an actual outlay or expenditure of money, and as such do not meet the definition of an out-of-pocket expense.

Additional information and examples of calculating out-of-pocket expenses can be found on the Forest Management intranet at: <http://fsweb.wo.fs.fed.us/fm/products/saleadmin.shtml>

### **34.72 - Liquidated Damages**

Liquidated damages stipulated in the contract are intended to compensate the Purchaser for the timber that cannot be harvested from a sale due to a cancellation or partial cancellation. By specifying the procedure for determining the amount of liquidated damages in the contract both parties have agreed to the measure of damages the Purchaser is entitled to receive in event of a cancellation or partial cancellation. The procedures for calculating liquidated damages differ by contract.

#### **34.72a - FS-2400-6/6T Contracts (4/04 and 6/06), and FS-2400-13/13T Contracts (9/04)**

Liquidated damages are based on 15 percent of the estimated delivered log value for the volume of timber not harvested due to a termination or partial termination. These contracts specify that the estimated delivered log value and volume of timber not harvested must be determined by the Contracting Officer as of termination date using Forest Service methods in use as of termination date. Estimated delivered log values can be obtained from a variety of sources including but not limited to:

1. Contacting local mills for current prices paid for delivered logs;
2. Contacting independent loggers for prices they are receiving from mills for delivered logs;
3. Obtaining prices from trade journals covering the local market area;
4. Obtaining prices from State Forest Service organizations that track prices.

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Contracting Officers should begin gathering data on delivered log prices as soon as it is apparent that a contract may have to be cancelled or partially cancelled. Failure to obtain this information in a timely manner increases the potential for disputes over the accuracy of the data.

### **35 - THIRD-PARTY AGREEMENTS**

This section discusses the circumstances when Third-Party Agreements pursuant to 36 CFR 223.114 may be considered and addresses the rights and obligations of the parties to the contract. Third-party agreements are only permitted for contracts on forms FS-2400-6/6T and FS-2400-13/13T.

#### **35.1 - When to Consider an Agreement between a Purchaser and Third-Party**

A third-party agreement may be entered into when the Purchaser is a corporation or Limited Liability Company (LLC) and the entire business is sold or merges with another firm resulting in a legal change of ownership. A third party agreement may only be entered into when it is in the interest of the Forest Service and the third party is acceptable to the Forest Service. If unsure, Contracting Officers should seek advice from the Office of General Counsel (OGC) to determine whether the facts and circumstances concerning a successor in interest warrant use of a third-party agreement. Third -party agreement should also be entered into when a successor in interest to the Purchaser's business is assuming the original Purchaser's contracts.

The term "successor" means, ordinarily in the case of a corporation, another corporation which by a process of amalgamation (for example, merger or consolidation), or duly authorized legal succession has become invested with the rights and has assumed the burdens of the first corporation. In the case of a Forest Service timber sale, a successor in interest retains all the rights and obligations under the contract that the original Purchaser had.

When only a change in the Purchaser's name is involved and the Government's and Purchaser's rights and obligations remain unaffected, the parties may enter into an agreement to affect the name change (sec. 35.5) rather than a third-party agreement. Contracting Officers should seek advice from the Regional Attorney when a Purchaser requests a name change.

In addition to changes in legal ownership, as discussed above, consider third-party agreements for timber sale and integrated resource timber contracts when any of the following circumstances apply:

1. The Purchaser sells transfers or ceases its business operations in the area necessary to perform the contract and can no longer process the timber as contemplated at the time of purchase.
2. The Purchaser provides satisfactory evidence to the Contracting Officer that it cannot successfully complete the contract because of a change in its financial circumstances since the time of purchase. Entering a Chapter 7 bankruptcy or rejecting a contract under a

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Chapter 11 bankruptcy is sufficient evidence of such a change in financial circumstances. The Contracting Officer should seek assistance from OGC when evaluating other factors. In such circumstances, the party involved is ineligible for award of other sales until new evidence of financial ability is verified (sec. 38).

3. The Purchaser becomes unable to complete the contract, and surety requests third-party operation of the sale as a means of mitigating liability.

4. The death of a Purchaser does not remove the responsibility for completing the contract. When an individual Purchaser dies, the estate remains responsible for performance of the contract by the executor or, when the deceased Purchaser's estate is small, by the successor to the estate and such rights may be transferred to a third-party in the process of estate liquidation. However, transfer is subject to the provisions of 36 CFR 223.114 that require the continuing responsibility of the estate and the acceptability of its transferee. In seeking a third-party agreement, the estate must provide written documentation of its inability to complete the contract. Based on the information provided, and in consultation with OGC, the Contracting Officer shall determine whether entering into a third-party agreement is in the best interest of the Government. A State probate court must honor the transferring limitations imposed by Federal regulations.

5. The Contracting Officer determines that such approval may expedite the removal of timber needing urgent harvesting.

6. When Purchasers file for bankruptcy or are placed in receivership (sec. 38), Contracting Officers shall request advice from the Regional Attorney about the need for a third-party agreement. The action of the court determines the procedure the Contracting Officer shall follow.

### **35.2 - Acceptance of a Third-Party**

After receiving an application from a Purchaser and a third-party, Contracting Officers shall determine the acceptability of the third-party. Contracting Officers may approve an application if the parties meet the following conditions:

1. The third-party specifically agrees to complete all obligations under the terms of the contract.
2. Prior to approving a third-party agreement, the Contracting Officer shall audit the sale to verify that all timber and associated charges to date have been properly billed, all payments are current, all refunds of unencumbered cash have been processed, and all breaches have either been fully remedied or the third-party specifically agrees to remedy any outstanding breach.

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3. The third-party is acceptable as a National Forest Timber Purchaser; that is, the transferee's responsibility and eligibility for award in accordance with 36 CFR 223.101, and 2 CFR parts 180 and 417 has been verified.
4. If the timber was reserved for small business, the third-party has certified its status as a small business.
5. If the Purchaser elected Government construction of specified roads under section 14(i) of the National Forest Management Act, the third-party certifies its status as a small business according to applicable contract conditions.
6. If the remaining current contract value plus required deposits exceeds \$10,000, the third-party shall comply with all provisions of Executive Order 11246 as amended, and by the rules, regulations, and orders of the Secretary of Labor.
7. The third-party provides an acceptable plan of operations showing how it proposes to complete operations during the remainder of the sale period.
8. The third-party provides a new performance bond or Consent of Surety to continue the existing bond in the name of the third-party. Follow the procedures in FSM 2456.15 for releasing the original performance bond if a new performance bond is tendered.
9. The third-party provides a new payment bond, or Consent of Surety to continue the existing bond in the name of the third-party, if advanced deposits for timber that has not been cut and removed are covered with a Surety bond.

Contracting Officers may not approve third-party assignments to large business firms for set-aside sales or sales where the Purchaser elected Government road construction under section 14(i) of the National Forest Management Act. Except, a large business successor in interest (sec. 35.1) to the Purchaser's business may assume such contracts when the successor agrees to assume all obligations, including those related to timber manufacture subject to preferential award.

### **35.3 - Procedure for Processing Third-Party Agreements**

Contracting Officers may approve a third-party agreement on form FS-2400-0012 for an uncompleted timber sale contract.

Signing and approving of form FS-2400-0012, Third-Party Agreement, is sufficient in most cases to allow third-party contract operation. Form FS-2400-0012 combines in one document the agreement between the Purchaser and the third-party under which the third-party agrees to complete the timber sale contract and Forest Service recognition and approval of the agreement. Do not accept a Third-Party Agreement with any changes to the wording on the FS-2400-0012 or on some other form provided by the Purchaser or third-party.

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Assigning an uncompleted timber sale contract to a third-party does not relieve the original Purchaser of liability to the United States for contract performance (36 CFR 223.114). Contracting Officers shall notify the original Purchaser when a third-party agreement is approved but may not make a statement that the original Purchaser is relieved of responsibility for damages.

After approving a third-party agreement, the Forest Service conducts all business associated with the contract directly with the third-party and without notice to the original Purchaser in all matters pertaining to the contract. Ordinarily the only time the Forest Service would contact the original Purchaser would be to seek damages if the third-party failed to complete the contract.

### **35.4 - Application by Subsequent Party**

When the Forest Service receives an application to operate an uncompleted timber sale contract by a fourth or subsequent party, that application must receive the same consideration as third-party applications. All actions involving operating uncompleted contracts by a fourth-party must be on form FS-2400-0012, with the following changes:

1. The agreement is changed to read; "The Purchaser and previous third-party (insert name of previous third-party) shall not, by reason of the requested recognition and approval, be released from any obligations to the United States of America under the aforesaid timber sale contract."
2. In part 2b of the agreement, the words "and previous third-party" are added after "Purchaser."
3. Space is provided for the signature of the previous third-party, its witnesses, and the date.

### **35.5 - Acceptance of a Name Change**

If only a change of the Purchaser's name is involved and the Government's and Purchaser's rights and obligations remain unaffected, the parties may, upon the written request of the Purchaser and satisfaction of the conditions below, execute an agreement to reflect the name change. Contracting Officers shall seek clearance by the Regional Attorney prior to executing a Change-of-Name Agreement. The Purchaser shall forward to the responsible Contracting Officer(s) three signed copies of the FS-2400-0080 Change-of-Name Agreement, and one copy each of the following:

1. The document effecting the name change; authenticated by a proper official of the State having jurisdiction.
2. The opinion of the Purchaser's legal counsel stating that the change of name was properly affected under applicable law and showing the effective date.

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3. A list of all affected contracts remaining unsettled between the Purchaser and the Government, showing for each the contract number, contract name, and name and address of the Contracting Officer.
4. Consent of Surety for any Surety bonds.
5. A new or amended Irrevocable Letter of Credit reflecting the name change for any contract(s) where bonds are secured with a letter of credit.

Use form FS-2400-0080 available on the forms portal for processing a name change (FSH 2409.15, Zero Code).

### **36 - ASSIGNMENT**

Assignment is a procedure whereby a Purchaser (Assignor) assigns all of its interests and rights to amounts due under the contract, including all of Assignor's interest in and rights to any balance on deposit with the United States, to a bank, trust company, Federal lending agency, or other financing institution (Assignee), as collateral for indebtedness (for example loan, letter of credit, and so forth). Assignments are authorized under the Assignment of Claims Act of 1940, as amended, ([31 U.S.C. 3727](#), [41 U.S.C. 6305](#)), 36 CFR 223.114(b) and contract provisions B/BT8.4 and I/IT.4. Assignments are only permitted for contracts on forms FS-2400-6/6T and FS-2400-13/13T. Since assignments are an agreement between the Assignor and Assignee, the Contracting Officer may only become aware of an assignment when an Assignee delivers a copy asserting its rights under the assignment. However, the Regional Attorney must clear an assignment provided by the Purchaser in accordance with subpart 32.8 of the Federal Acquisition Regulations before a Contracting Officer may accept it.

An assignment does not relieve the Purchaser of its obligation to be fully responsible for complying with all obligations, agreements, and covenants under the assigned contract. Assignor remains fully responsible for maintaining the contract in good standing.

The Assignee is not liable for and does not have responsibility for the performance of any of the obligations, agreements, and covenants undertaken, made, or assumed by Assignor under the assigned contract. But, if the Assignor defaults on its indebtedness the Assignee may assume actual possession of Assignor's rights under the assigned contract including completing all obligations, agreements, and covenants undertaken by the Assignor and the rights to any balances on deposit with the United States to the credit of Assignor subject to the following:

An assignment:

1. Does not constitute a transfer of the contract or a release for the Purchaser or the Surety from any obligations to the United States.

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2. Does not give the Assignee any authority to engage in logging or other operations under the contract, except as an agent of the Purchaser (the Assignor).
3. Does not authorize the Assignee to transfer the contract to a third-party under a foreclosure or trustee's sale.

Upon receipt and approval by the Regional Attorney of an assignment, any monies that would be paid or refunded to the Purchaser under the terms of the contract are sent to the Assignee unless or until a properly executed release of assignment is proffered. Contracting Officers shall obtain clearance by the Regional Attorney prior to acting on a release of assignment.

Refer to the Federal Acquisition Regulations, Subpart 32.8 for additional information pertaining to assignment.

### **37 - UNCOMPLETED CONTRACTS**

An uncompleted timber sale or integrated resource timber contract may terminate for the following reasons:

1. Expiration at the termination date stated in the contract;
2. The repudiation or abandonment of the contract by the Purchaser; or
3. The cancellation of the contract, either with or without the Purchaser's consent.

#### **37.1 - Action when a Timber Sale Contract Expires Before Completion**

When uncompleted timber sale or integrated resource timber contracts expire at the termination date, Contracting Officers shall promptly determine if the United States has been damaged (sec. 37.3). Seek compensation for damages from the Purchaser and prevent and/or remedy increasing or future damages. Contracting Officers shall promptly reoffer the remaining timber in the sale unless there is an overriding reason not to do so (sec. 37.2).

The remaining work on an uncompleted timber sale contract may be completed by any of the following:

1. The defaulter may complete contractual obligations pursuant to B/BT9.5 or J/JT.5 Settlement, except cutting and removal of timber is not permitted;
2. The Forest Service using the defaulter's deposits, forfeited bonds, including payments made by Surety; appropriated funds; administrative offset, or a combination of such funds;

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3. The Surety may complete contractual obligations, except for cutting and removing timber. Notify the Surety via certified mail both in advance of an anticipated default and when a principal defaults;

4. The Purchaser of the resale.

Procedures for determining damages are included in contract provisions in each of the following contracts:

FS-2400-6/6T contracts dated 4/04 and 6/06: Follow the procedures in contract provision B/BT9.4 Damages for Failure to Cut or Termination for Breach, B/BT9.5 Settlement, and the following sections.

FS-2400-3S/3T contracts: Follow the procedures in contract provision B/BT9.4 Damages for Failure to Cut or Termination for Breach, B/BT9.5 Settlement, and the following sections.

FS-2400-3P contracts: Follow the procedures in contract provision B/BP9.4 Damages for Failure to Harvest or Termination for Breach, B/BP9.5 Settlement, and the following sections.

FS-2400-13/13T contracts: Follow the procedures in contract provision J/JT.4 Damages for Failure to Complete Contract or Termination for Breach, J/JT.5 Settlement, and the following sections.

FS-2400-4 contracts: Pursuant to General Condition 14, all monies paid under the contract must, upon Purchaser's failure to fulfill the terms of the contract, be retained by the Contracting Officer to be applied toward completion of Purchaser's uncompleted work or damages due the United States. Follow the procedures in the following sections for determining damages.

FS-2400-2 contracts: The FS-2400-2 contract does not include a General Condition regarding damages for failure to cut or termination for breach. Notwithstanding the lack of a specific condition, damages should be determined following the procedures in the following sections.

In cases of abandonment or the inability or unwillingness of a Purchaser to satisfy contract requirements, Contracting Officers shall notify Surety of the status of the sale and formally request, in writing, that the Surety complete the contract. If the Surety does not wish to carry out the contract, the Contracting Officer shall seek to cancel the contract for breach (sec. 34.2).

### **37.2 - Resale of Timber**

Upon the expiration, abandonment, or cancellation of timber sale or integrated resource timber contracts, Contracting Officers shall promptly offer the remaining included timber for sale unless there is an overriding reason not to do so. Follow the procedures in FSH 2409.18, section 56.2,

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Resale of Timber from Uncompleted Contracts. Ensure that the Regional Attorney has determined evidence of abandonment to be conclusive, and that the Surety has declined to complete the contract before reoffering timber in an abandoned contract.

### **37.3 - Determination of Damages**

Contracting Officers shall determine whether non-completion of timber sale or integrated resource timber contracts results in damages to the United States. If so, Contracting Officers shall appraise the damages with care and impartiality and shall not include any unsupported item (FSH 2409.18, sec. 45.1). Reports should include discussion of each item of damage, the provision of the contract breached, the amount of damage sustained, and the method of appraisal used. The cost of timber resale and the cost of reappraisal and re-advertisement should also be included in the report.

Damage appraisals must be made in accordance with standard appraisal practices and instructions in effect at the time of sale expiration (FSM 2423). Damaged or destroyed young growth values should be determined by following appraisal instructions under FSH 6509.11h, section 21.12c, Service-wide Claim Management Handbook.

Purchaser's failure to make a periodic payment during the period of a contract results in repeated dunning's including interest, administrative fees, and penalties pursuant to B/BT4.4 until the debt is either paid or the contract terminates. Upon termination, there is no longer an open contract to apply the periodic payment to, and the Contracting Officer shall seek to have the bill cancelled. However, the interest, administrative fees, and any penalties that accrued between the date of the original bill and the contract termination date remain a valid debt that must be included in the calculation of default damages. For example, if the Purchaser accrued \$1,250.00 of interest, administrative fees, and penalties at time of contract termination on an unpaid periodic payment, this would be added to any other default damages addressed in B/BT9.4 and reflected on the statement of account as part of the amount billed. The interest, administrative fees, and penalties at time of contract termination become a new principal amount in the calculation of damages.

Send a copy of the damage report and appraisal to the Purchaser via certified mail along with a bill for collection for the amount of damages, if any, minus any credits that were on account and applied to the damages. If the Purchaser fails to pay the bill or disputes either liability or amount, assert the Government claim by means of a Contracting Officer's decision (FSH 2409.15, sec. 72.1).

### **37.4 - Distribution of Damages**

When damages are collected, they are deposited into fund code TDTD and recorded as cash payments on the timber sale statement of account. Distribution to the appropriate management codes is accomplished in the Forest Products Financial System (FPFS) in the following priorities:

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1. Outstanding penalties and administrative costs;
2. Outstanding interest;
3. CWF2 for settlement work under B/BT9.5 and/or Restoration of Improvements (RIRI) associated charge accounts;
4. Miscellaneous receipts - any balance remaining after satisfying the priorities above. This includes damages for loss of stumpage value due to failure to complete contract and any fines and penalties (for example, charges for cutting undesignated timber).

Do not distribute any damages collected to the National Forest Fund (NFF) or retained receipts regardless.

### **37.5 - Action when a Timber Sale Contract is Repudiated**

Repudiation occurs when the apparent high bidder for a timber sale contract or the best value offeror for an integrated resource timber contract fails to execute the contract pursuant to the requirements in the Contracting Officer's award letter. Procedures for calculating damages for repudiation are addressed in the instruction to bidders attached to the bid form.

## **38 - BANKRUPTCY AND RECEIVERSHIP**

This section provides a general overview of the bankruptcy procedures and steps necessary to coordinate various relationships with a debtor, obtain any necessary authorization from the bankruptcy court, and protect the interests of the United States to the maximum extent possible under the Bankruptcy Code. Forest Service responsibilities with respect to bankrupt parties are significantly different from ordinary commercial relationships. Because of the complexity of the bankruptcy process and the need for prompt agency action to protect its interests, Contracting Officers are strongly urged to seek assistance from the Office of General Counsel immediately when bankruptcy of a Forest Service contractor is suspected or verified.

The material provided in this section is intended to provide general basic information only and should not be used as a substitute for legal advice or relied upon as legal authority.

### **38.05 - Definitions**

Assignment. The act of transferring to another all or part of one's property, interests, or rights. For example, transfer of a timber sale contract from a debtor to a third-party.

Automatic Stay. The period of time after a bankruptcy petition filing during which creditors are prevented from taking action against the debtor to satisfy judgments, collect debts, or foreclose on or repossess property pursuant to a debt that arose before the bankruptcy petition was filed.

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Claim. A right to payment or a right to an equitable remedy for a failure of performance if the breach gives rise to payment.

Creditor. One to whom the debtor owes money or who claims to be owed money by the debtor.

Debtor. In bankruptcy the individual, partnership, limited liability company, or corporation that owes money and files a bankruptcy petition.

Debtor-in-Possession. A debtor that keeps possession and control of its assets while undergoing reorganization under Bankruptcy Chapter 11 (Sec. 38.1) without the appointment of a case trustee.

Estate. The assets and liabilities of a debtor.

PACER. Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts via the internet at <http://www.pacer.gov/>.

Proof of Claim. A written statement setting forth a creditor's claim.

Relief from Stay. Court order permitting creditor to pursue an action otherwise prohibited under the automatic stay.

Secured Creditor. A creditor who holds some form of a financial assurance of payment from the debtor, such as pledged collateral or lien.

Trustee. A person appointed under the Bankruptcy Code to take charge of and administer a debtor's estate.

Unsecured Creditor. A creditor who does not hold some form of a financial assurance of payment from the debtor such as a pledged collateral or lien.

### **38.1 - Bankruptcy Code**

If an individual, partnership, company, or corporation is unable to pay its bills primarily due to debts and liabilities that exceed assets and income, that entity, or in some instances its creditors, may file a petition with the bankruptcy court seeking relief under one of the Chapters of the Bankruptcy Code. Bankruptcies are governed by Federal statute commonly known as the Bankruptcy Code, 11 U.S.C. §§ 101, et. seq. Federal Rules of Bankruptcy Procedure and other local rules of practice are adopted by Bankruptcy courts located in each Federal judicial district. Information regarding the 94 districts can be found at: [http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts\\_1.aspx](http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx). The Bankruptcy courts, Bankruptcy Code, and local rules set forth formal legal procedures for dealing with the debt problems of individuals and

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businesses. The goal of bankruptcy is to give debtors a financial fresh start from burdensome debts. A Bankruptcy Judge is the court official authorized to make decisions about a bankruptcy and related matters. The Bankruptcy Judge conducts hearing, rules on motions, approves reorganization plans, and takes other actions to have the bankruptcy cases move toward final discharge for debtor and payment to creditors. The Forest Service is represented in the Bankruptcy court by the United States Attorney, with assistance of the Office of General Counsel.

A person or company obtaining relief under the Bankruptcy Code is referred to as a “debtor.” While there are six basic types of bankruptcy, Forest Service timber sale Purchasers are most likely to seek protection through one of the following three chapters of the Bankruptcy Code:

Chapter 7: Provides a court-supervised procedure where the trustee liquidates (sells) certain assets owned by a debtor. Proceeds from the sale are used to pay administrative expenses first and then the remaining balance used to pay creditors all or part of the amount the debtor owed, in accordance with the priorities set out in the bankruptcy code.

Chapter 11: Provides a means for a debtor who wishes to continue operating a commercial business, to reorganize its business, repay creditors through a court-approved reorganization plan, and restore itself to economic health. As a part of the reorganization the debtor may reject certain burdensome obligations (for example one or more timber sale contracts), and thereby reduce its debts. In Chapter 11 proceedings, the debtor remains in possession of its estate under the supervision of the court, unless the court orders the appointment of a trustee. The debtor acting in that capacity is known as the “debtor-in-possession.” Generally, a debtor-in-possession has most of the rights and duties of a trustee in bankruptcy.

Chapter 13: Provides a procedure for individuals with regular income, including individuals who operate businesses as sole proprietorships, to adjust their debts. Secured and unsecured debts must be less than defined statutory limits. This procedure is sometimes preferable for individuals because they may be permitted to keep valuable assets (such as a home) while repaying creditors over time (typically 3-5 years). In Chapter 13 proceedings, a trustee collects payments from the debtor, pays creditors according to the court approved plan, and makes sure the debtor complies with the plan. Corporations and partnerships cannot file under Chapter 13.

The Bankruptcy Code provides for converting a proceeding under one Chapter into another, such as from Chapter 11 to Chapter 7. Conversions may be initiated voluntarily by the debtor or involuntarily by a creditor for good cause shown. These options may occur when it appears that the debtor will not be able to affect a successful reorganization.

### **38.2 - Participants in a Bankruptcy Proceeding**

The following entities are typically involved in a bankruptcy proceeding:

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1. Bankruptcy Court;
2. Debtor;
3. Debtor's attorney. Partnerships, Limited Liability Companies, and corporations are required to have legal representation; individual debtors are not;
4. Trustee. Appointed in all Chapter 7 and Chapter 13 cases, and some Chapter 11 cases;
5. Debtor-in-possession. The debtor becomes the debtor-in-possession when a voluntary chapter 11 case is filed and remains in that role unless the court orders the appointment of a trustee;
6. Creditors.

### **38.3 - Actions in a Bankruptcy Proceeding**

The Contracting Officer should be notified directly when a Purchaser files a petition with the Bankruptcy Court, particularly if a Purchaser lists debts owed to the Forest Service as liabilities, or Forest Service timber sale contracts as assets or income in their petition filings. However, this does not always happen, and the Contracting Officer may learn of a bankruptcy by word of mouth or an obscure legal notice in a local newspaper. Because of the need for quick Agency action, Contracting Officers should promptly verify when a filing occurred, determine what chapter of the Bankruptcy Code it was filed under, obtain copies of the forms filed by the debtor with the Bankruptcy Court, and obtain any schedule of dates set by the court for hearings or creditor filings. These dates may be rapidly approaching by the time a Contracting Officer first learns of the bankruptcy.

Information about a bankruptcy case can be found on the internet. Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy Courts via the internet at <http://www.pacer.gov/>. PACER is available to anyone who registers for an account, but there are user fees, so registration must be done through someone with procurement authority. Upon learning that a Purchaser has entered a bankruptcy proceeding, the Contracting Officer may register for a PACER account or obtain bankruptcy documents through OGC.

A given debtor may hold more than one form of Forest Service contract or permit (for example, standard timber sale contract and integrated resource service contract) and may hold contracts on multiple National Forests. The Line Officers and Contracting Officers affected need to determine how many contracts and/or permits are involved, what actions should be taken on each, and whether the recommended actions on each contract and/or agreement is compatible and consistent with the others. It is generally desirable to assign one individual to oversee the proceedings and coordinate with the other Forest Service parties and OGC.

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The court will send a notice of the time and date for an initial meeting of creditors. A knowledgeable Forest Service employee should be present at this meeting. This is an informal meeting conducted by either the case trustee or a representative of the Office of the U.S Trustee. The debtor is placed under oath and creditors may ask questions about assets, plans for reorganization, and so forth. This is a good opportunity to find out whether the debtor intends to perform Forest Service contracts or not and to obtain proof of claim forms that will have to be filed with the court.

If a Contracting Officer learns of a Purchaser's bankruptcy petition after the court-scheduled date for hearings or creditor filings, consult with the Office of the General Counsel to determine what action(s), if any, may be available to the Government.

### **38.31 - Automatic Actions**

The filing of a bankruptcy petition invokes certain procedures automatically. Two of the most important are:

1. The debtor's property becomes an "estate" under the jurisdiction of the Bankruptcy Court; and
2. Upon a bankruptcy petition filing, an "automatic stay" period goes into effect which prevents creditors from taking action against the debtor to satisfy judgments, collect debts, or foreclose on or repossess property pursuant to a debt that arose before the bankruptcy petition was filed.

Any action by the Forest Service to demand a payment (issue a bill except as noted below), transfer cash from one contract to satisfy a bill on another contract (for example, setoff), terminate for breach, amend, or modify a contract or permit, or take other actions against a debtor will probably require prior court approval in the form of a "relief from stay" order, and any actions taken without that prior approval may be nullified and possibly treated as contempt of court.

If the Purchaser has cut and removed timber or a periodic payment becomes due prior to the petition date, a determination must be made whether the Forest Service may issue a bill for collection to the Purchaser as part of the Agency's normal exercise of its regulatory powers. Consult OGC to determine if a relief from stay order is needed from the court before sending such bills.

If money is owed the Forest Service on a particular contract and the Forest Service also owes money to the contractor (for example stewardship credits) on the same contract, the credits can be applied up to the amount owed by the contractor. This is known as recoupment and unlike setoff, does not require relief from the automatic stay.

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Performance and payment bonds may or may not be subject to the automatic stay depending on how they are secured. Seek advice from OGC prior to making demands on performance or payment bonds.

### **38.32 - Actions by or on Behalf of the Debtor**

The debtor, or debtor's Attorney, files various documents with the court to describe assets, identify creditors, and in Chapter 11 or Chapter 13 proceedings, propose a plan for paying creditors. Documents filed with the court may include:

1. List of creditors;
2. Schedule of Assets and Liabilities;
3. Statement of Financial Affairs;
4. Disclosure Statement in Chapter 11 cases;
5. Repayment Plan in Chapter 13 cases;
6. Plan of Reorganization if in Chapter 11;
7. A schedule of income and expenditures;
8. A statement of executory contracts and unexpired leases, and in some cases;
9. A certificate of credit counseling.

Documents filed with the court may be viewed on the PACER website (sec. 38.3).

### **38.33 - Actions by or on Behalf of Creditors**

The documents filed by the debtor (sec. 38.32) must be thoroughly reviewed by the Forest Service to ensure that all possible Forest Service claims against the debtor are identified and addressed. Claims not presented and allowed by the Bankruptcy Court may be lost.

The creditors file various documents with the court which may include:

1. Motion for relief from automatic stay;
2. Motion to have the debtor in possession or trustee assume, agree to perform, or reject a contract that has not been performed;
3. Motion asking the court to determine that an asset is not part of the estate and is not covered by the automatic stay;

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4. Proof of Claim;
5. Claim for Administrative Expenses;
6. Motion for Adequate Protection.

### **38.34 - Actions Under Contracts and Permits**

Forest Service responsibilities towards bankrupt parties are significantly different from ordinary commercial relationships. This section provides a broad overview of the general procedures and steps necessary to coordinate various relationships with the debtor, obtain any necessary authorization from the court, and protect the interests of the United States to the maximum extent possible under the Bankruptcy Code. Specific procedures can vary depending on the type of bankruptcy petition filed and local rules. Contracting Officers should seek assistance from the OGC throughout a bankruptcy proceeding.

After filing a petition in bankruptcy, some actions under a contract may no longer be immediately enforceable by virtue of the automatic stay. The stay does not completely preclude all actions against the debtor arising out of the contract. Prior approval by the court may be required to continue certain actions.

Prior court approval of enforcement actions generally requires a two-step process. First, a motion for relief from stay is filed to permit actions to be taken against a debtor. It is often difficult to prevail in these motions as such relief is contrary to the purpose of protection from creditors afforded by the Bankruptcy Code. Such relief can be obtained if there is an immediate threat of loss or damage. Exercise of police or regulatory powers is not restricted by the automatic stay. For example, compelling a debtor to stop cutting and removing timber from a contract it has not assumed. But, it may be necessary to get confirmation from the Bankruptcy Court that a contemplated enforcement action is an exercise of such police or regulatory power before going forward. Seek the advice of OGC prior to taking any enforcement action once a Purchaser has filed for bankruptcy.

Second, a motion for adequate protection is filed. Among other things this motion permits the debtor to remain in possession of a contested asset so long as the debtor provides the creditor with some form of periodic cash payments or replacement liens, or such other relief as might be needed to compensate for any decrease in value of such property as may arise during the period of the automatic stay. This is an extremely valuable provision and should be investigated whenever Forest Service enforcement actions are restrained by the automatic stay. For example, this may be helpful in preserving the value of a timber sale contract claim arising out of a dispute over the removal of downed timber.

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Executory contracts:

1. Executory contracts are contracts that have not been fully completed or performed.
2. Timber sale and integrated resource timber contracts that have not been completed are executory contracts.
3. An uncompleted executory contract is not automatically a part of the bankruptcy estate.
4. Neither the debtor, debtor in possession, nor the trustee in bankruptcy is bound to perform an executory contract after the petition in bankruptcy is filed, unless some action is taken by them to assume the contract.
5. The Bankruptcy Code provides a procedure for the debtor in possession or the trustee to assume or reject an executory contract.
6. The Government can either approve or object to the assumption of an executory contract by the debtor.
7. The estate becomes liable for performing executory contracts that it assumes.

Once a petition for bankruptcy is filed, there is a real need to clarify as soon as possible whether a contract is still in existence and who, if anyone, will perform it. This almost always involves action by the Bankruptcy Court. In a situation where:

1. The debtor-in-possession elected to assume a timber sale contract, and
2. The Government consented to the assumption, thereafter all agreements, modifications, requests, and so forth must be signed by the debtor-in-possession or trustee. It is not sufficient for a debtor-in-possession to sign their name but must sign as “debtor-in-possession” specifically indicating their capacity. A trustee shall sign as “(Name), Trustee.”

In addition, all correspondence and notices sent by the Forest Service shall be addressed and sent to the debtor-in-possession or trustee.

It is not necessary or appropriate to process a third-party or name change agreement for contracts assumed by a debtor-in-possession or trustee.

If an executory contract is in breach or default, the contract cannot be assumed unless the debtor-in-possession or trustee:

1. Cures any breach or default or provides adequate assurance of any cure;

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2. Compensates or provides adequate assurance or prompt payment for any monetary loss resulting from the breach or default; and
3. Provides adequate assurance of any future performance.

When an executory contract is assumed, it becomes an obligation of the estate. If the contract is subsequently breached or defaulted, damages are payable by the debtor's estate as an administrative expense which is a priority claim against the debtor's estate.

If an executory contract is rejected, any breach of contract claim can be filed immediately against the estate. Rejection of an executory contract is an acknowledgement by the debtor-in-possession that it does not intend to complete the contract, and thus constitutes default. The Bankruptcy Code specifically provides that the rejection of an executory contract constitutes a breach of contract arising immediately before the filing of the petition for reorganization. While this may seem like an inconsequential distinction, it is actually very significant. By establishing the time when the debt stemming from the defaulted contract arises, the Bankruptcy Code restricts how the debtor pays that claim. The claim on a rejected contract, regardless of the date of rejection, becomes another pre-bankruptcy claim against the debtor's estate, which will be paid, if at all, by a pro-rata distribution based on how well secured the claim is against the estate, and how that claim relates to other claims against the estate. Forest Service timber sale contracts are completely unsecured against the debtor, so that the Agency's claim is paid as a part of the distribution to unsecured creditors. More often than not, such distributions are for pennies on the dollar at best.

Nonetheless, it is imperative that the Forest Service file a proof-of-claim with the court for each of the debtor's contracts. All pleadings and filings to the court on behalf of the Forest Service are done by the U.S. Department of Justice. Proof-of-claim forms can be obtained online at <http://www.uscourts.gov/forms/bankruptcy-forms/proof-claim-0>. This proof requires an accurate calculation of the claim if the claim has not yet been adjudged. The proof of claim should include a copy of the contract or other documentation substantiating the obligation of the debtor to the Government. The value of this claim may be disputed by the debtor and/or other creditors. Resolution of this dispute may require a hearing on the basis of the Forest Service claim before the Bankruptcy Court. Forest Service records pertaining to its relationship with the debtor must be thoroughly reviewed and the basis for any claim against the debtor's estate must be firmly established.

In addition to claims against the debtor arising out of defaulted contracts, the Forest Service may have claims on other grounds. For example, if there was felled timber on the ground at the date of petition, any deterioration of that timber which arose after the filing of bankruptcy would be an administrative expense. This is an important distinction to make as administrative claims are paid in full before any prepetition creditor. Claims for administrative expenses must be well founded and provable and are may be strongly disputed by other parties to the bankruptcy.

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The debtor may also seek to assign certain contracts as a means of reducing liabilities. The Anti-Assignment Act (41 U.S.C. § 15) provides that such assignments may not take place without the consent of the Government. This prohibition against assignment provides significant leverage to use against the debtor and the assignee to update Forest Service contracts. For example, consent of assignment can be validly withheld until the contract is updated, bond coverage is improved, and all breaches are cured.

### **38.35 - Bidding By and Award to Debtors**

A Purchaser who has filed bankruptcy may bid on new offerings. While this does not happen often, a debtor-in-possession may need to acquire new contracts to continue operating a mill under its reorganization plan approved by the court. Pursuant to 11 U.S.C. § 525, a Government unit shall not discriminate against a person who is or was a debtor. Accordingly, any effort to treat a person differently solely on the basis that a person filed for bankruptcy or failed to pay a discharged debt, is prohibited. The Forest Service may deny award of a contract to a person who filed for bankruptcy, but it may not do so without first conducting a responsibility determination and seeking a certificate of competence from the Small Business Administration (SBA) if debtor is a small business. Demanding increased bonding, solely on the basis that a person filed for bankruptcy, may be viewed as a violation of this section. The Bankruptcy Code is specifically designed to promote a fresh start. Discriminatory actions conflicting with that purpose can be nullified by the Bankruptcy Court.

However, this section of the Bankruptcy Code does not require the Forest Service to blindly enter into obligations with debtors. Contracts should be awarded only after careful analysis of the debtor's abilities to meet the obligations incurred (FSM 2432.62). Documents the debtor is required to file with the court and available on PACER (sec. 38.3) can be helpful in determining the responsibility of debtor-in-possession. Contracting Officers should seek advice concerning contract award to a debtor.

Bid and award documents should be signed as “(Name), Debtor in Possession.” Legally the “Purchaser, Debtor in Possession” is a separate entity from the Purchaser that filed bankruptcy.

In the event a debtor in a bankruptcy proceeding that has not been discharged is the apparent high bidder and intends to post a performance bond or furnish a cash deposit for the entire value of the sale as an alternative to a Financial Ability Determination, award may be made upon approval of those terms by the Bankruptcy Court.

### **38.4 - Receivership**

Receivership is a legal or equitable proceeding in which a receiver is appointed for an insolvent corporation, partnership or individual to preserve assets for the benefit of affected parties. In some instances, a receiver may reorganize viable units of a business so that they may continue after outstanding debts and obligations are resolved.

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While most bankruptcies are initiated by the debtor, most receiverships are initiated by the creditors. Another significant difference in this process is in the judicial system. The Federal Bankruptcy Code guides the bankruptcy process overseen by Federal Bankruptcy Courts. Unlike bankruptcies, there is no national receivership code governing receivership. Receiverships are overseen by State District Courts, who are guided by State Statutory and Common Law.

The lack of a standard code creates additional complexity in addressing a receivership. Prompt agency action is needed to protect the Government's interests when a Purchaser is in receivership. Certain creditors, for example, may have priority over others and shall have their debts paid first. There may be some instances where the Federal Government is entitled to priority over other creditors (*see* the Federal Priority Statute, 31 U.S.C. § 3713; and the Federal Tax Lien Act, 26 U.S.C. § 6321). Upon learning of a receivership, Contracting Officers should obtain a copy of the court order and seek assistance from the Office of General Counsel.

### **39 - CLOSING SALES**

Accept and close sales promptly after the Purchaser completes all contractual obligations and the Forest Service completes the final audit. Purchasers have 60 days after receipt of Contracting Officer's notification that the timber sale is closed to file a claim. Delay in closing sales leaves the Government's liability open and long delays can make it difficult for the Government to collect evidence needed to address a claim. Sales must be closed within 90 days of the final inspection unless there are legitimate reasons for holding a contract open such as unresolved claims, ongoing litigation, or pending administrative offset. Sales that are otherwise ready to be closed must not be held open beyond 90 days past the final inspection for the purpose of revising K-V, BD, or SSF plans or moving money between these funds.

Regions shall query FPFS within the last two weeks of the first month of each quarter and notify Contracting Officers of sales that are 90 days or more past termination that have not been closed. Contracting Officers shall promptly close those sales unless there are legitimate reasons for holding them open.

Contracting Officers shall close sales within the District Ranger or Forest Supervisor's authority in accordance with section 39.3. For sales made within the Regional Forester's or Chief's authority, the designated Contracting Officer shall notify the Regional Forester and the Chief when the Purchaser has met all the contractual obligations before closing the sale.

Only the Contracting Officer signing a timber sale contract, a successor, or a superior with delegated authority may give written notice of contract closure to the Purchaser after the Purchaser complies with the contract terms. Making corrections or obtaining additional payments is often impossible once the contract is closed; therefore, close contracts only after final inspection shows that the Purchaser has met all requirements.

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### **39.1 - Final Inspection Procedures**

The Forest Service Representative or other designated members of the sale administration team shall make final inspections on all advertised sales and stewardship contracts on contract form FS-2400-13/13T. Do not use formal inspection procedures for unadvertised permits or very small sales unless there is potential for significant loss or damage to the Government. Use pre-final inspections before sale closure to allow the Purchaser time to complete required sale area work. Use a level of detail appropriate to the value and complexity of the sale.

The person making the final inspection prior to closing a sale shall complete and sign a Regional inspection form with "FINAL" marked or typed at the top of the form. This documents the inspection and shows that all contract requirements have been completed. Send a completed copy of the inspection record and the final timber sale statement of account with a recommendation to close the sale to the Contracting Officer.

Ensure that all contractual obligations are met using the following check-list for final inspection:

1. Timber sale roads treated as follows:
  - a. Constructed and maintained to standards;
  - b. Erosion damage repaired;
  - c. Right-of-way logs removed, and slash treated;
  - d. Culverts and bridges open and functional;
  - e. Temporary roads, skid trails, and landings properly closed.
2. Stream channels cleared of logging debris.
3. Logging slash treated as required and necessary cooperative deposits made.
4. Erosion control measures completed to acceptable standards and cooperative deposits made.
5. Snag felling requirements met.
6. Improvements repaired or restored as required.
7. Utilization scale made, if needed, and check for damage to residual trees is completed. Action required to collect damages is completed.
8. Purchaser's improvements removed, or a removal plan agreed to.

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9. Required fire lines constructed with necessary cross ditches installed and functional.
10. Environmental requirements for wildlife protection or protection of other resources have been met. Action required to collect damages is completed.

### **39.2 - Records Audit**

Ensure completeness of timber sale contract records by consolidating contract folders (FSH 2409.15, sec. 14.1) and other associated documents before beginning an audit of the records for closure. Develop a check-list suited for Regional or local conditions to ensure that all requirements have been checked prior to closure. The contract closure check list parts A and B are available at:  
<http://fsweb.wo.fs.fed.us/fm/documents/fpfa/Training/TimberSaleFinancialManagementTraining/ClassroomSession/TrainingBinder/15ContractClosure/> and is an optional document available to use to record the closure audit. Attach the following items when necessary:

1. Final inspection report;
2. Certification of disposition of timber, export compliance, and non-substitution of National Forest timber;
3. Proof that all scale product removal permits have been submitted;
4. Final quarter adjustment completed;
5. All payments were received and there is no deficit remaining;
6. All deposits were received;
7. Trust Fund Plans (K-V, SSF, BD) have been revised as necessary;
8. Final acceptance record on all specified roads;
9. Road use and road maintenance fees were collected and/or paid;
10. Set-aside volume requirements were satisfied on set-aside sales;
11. Excess cash deposits were refunded or transferred;
12. Forest Service Representative's letter of recommendation to close the sale.

### **39.3 - Notification**

When the Purchaser meets all contractual requirements for closure, the Contracting Officer notifies the following:

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1. The timber Purchaser of contract closure by certified letter. The letter should include a statement advising the Purchaser of the time limits in B/BT9.21 for submission of a claim.
2. Surety by letter. Follow procedures in FSH 6509.11k, section 82.33 for disposition of a letter of credit.
3. The person responsible for closing the sale in the statement of account process.
4. The person responsible for updating the Timber Management Information System to report the change in sale status and the date of the sale closure letter.
5. All members of the sale administration team assigned responsibility for the timber sale being closed.