

**DEPARTMENT OF AGRICULTURE****Forest Service****36 CFR Part 223**

RIN 0596-AB70

**Sale and Disposal of National Forest System Timber; Modification of Timber Sale Contracts in Extraordinary Conditions; Noncompetitive Sale of Timber****AGENCY:** Forest Service, USDA.**ACTION:** Interim final rule; request for comment.

**SUMMARY:** This interim final rule revises regulations at Title 36, Code of Federal Regulations, part 223, on noncompetitive disposal of timber and other forest products based on the Secretary of Agriculture's determination that extraordinary conditions exist. The rule will expand upon the 1996 interim final rule currently applicable to certain sales in Washington and Oregon. The 1996 interim final rule defines extraordinary conditions to mean those circumstances where a contract must be changed to prevent environmental degradation or resource damage, or as the result of administrative appeals, litigation, court orders, or catastrophic events and applies throughout the National Forest System. This rule permits, without advertisement, timber or forest products from outside the area specified in the contract to replace material deleted from the contract when such extraordinary conditions exist. Replacement material must come from the same national forest as the subject contract and the decision to replace must be made in compliance with all applicable laws and regulations. The value of replacement material may not exceed the value of the material it is replacing by more than 10% or \$10,000, whichever is less, as determined by standard Forest Service appraisal methods. The intended effect of this rule is to reduce damage claims by offering replacement material of similar volume, quantity, value, access and topography in lieu of contract cancellations or partial cancellations.

**DATES:** *Effective Date:* This rule is effective June 16, 2006.*Comment Date:* Comments must be received in writing on or before August 15, 2006.**ADDRESSES:** Send written comments by U.S. Mail to Director of Forest Management; USDA Forest Service; 1400 Independence Avenue, SW., Mailstop 1103; Washington, DC 20250-1103; by e-mail to [reptbr@fs.fed.us](mailto:reptbr@fs.fed.us); or by facsimile to (202) 205-1045.

The public may inspect comments received on this rule in the Office of the Director, Forest Management Staff, Forest Service, USDA, 201 14th Street, SW., Washington, DC 20250. Parties wishing to view comments are requested to call ahead (202) 205-1496 to ease entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Forest Management Staff personnel, Lathrop Smith (202) 205-0858, or Richard Fitzgerald (202) 205-1753.**SUPPLEMENTARY INFORMATION:****Background**

The National Forest Management Act (NFMA), codified in part at Title 16 U.S.C. 472a(d), requires the Secretary of Agriculture to advertise all sales of forest products unless the appraised value of the sale is less than \$10,000, or the Secretary determines that extraordinary conditions exist, as defined by regulation. The requirement to advertise sales unless extraordinary conditions exist applies to the substitution of timber outside a sale contract area.

District court injunctions in *NFRC v. Glickman*, (No. 95-6244-HO (D. Or.)) required the Forest Service to take immediate action pursuant to section 2001(k) of the 1995 Rescissions Act to award and release certain timber sales offered or awarded between October 1, 1990 and July 27, 1995. Concurrently the Forest Service needed to modify many of these sales to meet standards and guidelines of the 1994 Northwest Forest Plan Amendment before they were awarded or released. Given the duty to comply with the district court's injunction, and the urgent need to modify these timber sales to meet standards and guidelines of the 1994 Northwest Forest Plan Amendment, in 1996 the Secretary promulgated an interim final rule set out at 36 CFR 223.85(b), that defined extraordinary conditions for sales released pursuant to section 2001(k) of the 1995 Rescissions Act (61 FR 14618, April 3, 1996).

The 1996 interim final rule allows substituting timber from outside the sale area specified in the contract, without advertisement, on specific timber sales in Washington and Oregon affected by section 2001(k) of the fiscal year 1995 Rescissions Act (Pub. L. 104-19), that were previously subject to section 318 of the fiscal year 1990 Interior and Related Agencies Appropriations Act (Pub. L. 101-121, 103 Stat. 745). One of the primary reasons for promulgating this rule was the recognition that the event or situation causing a need for replacement timber generally precludes obtaining suitable replacement timber

from within the original contract area. The 1996 rule does not place any restrictions on where outside the contract area of 2001(k) sales replacement timber may be obtained. Hence, replacement timber for sales in Washington and Oregon could come from any national forest in the system.

Pursuant to the advertising requirements of 16 U.S.C. 472a(d), material found outside the contract area must be offered competitively to other potential contractors, unless the Secretary of Agriculture determines that extraordinary conditions exist. The current rule at 36 CFR 223.85(b) is limited to 2001(k) sales and does not authorize contract modifications that add or replace material from outside the contract area of non-2001(k) sales.

Prior to NFMA, the Government Accountability Office (formerly the General Accounting Office) held that substitution of timber outside the contract area for timber in the contract area violated the Agency's authority to sell timber (Letter to Mr. Secretary, 1973 WL 7905 (Comp. Gen.), B-177602 (1973)). Since the passage of NFMA, but in the absence of a regulation defining "extraordinary conditions," the Agriculture Board of Contract Appeals has decided similarly in several cases. See Appeal of Summit Contractors, (1986 WL 19566 (AGBCA), Nos. 81-252-1, No. 83-312-1 (Jan. 8, 1986), and Appeal of Jay Rucker, 1980 WL 2345 (AGBCA) Nos. 79-211A, 79-211B (June 11, 1980). See also, *Croman Corporation v. United States*, 31 Fed. Cl. 741, 746-47 (August 16, 1994)).

Developing case law on environmental and related statutes and regulations, such as the Endangered Species Act, the Clean Water Act, and the Clean Air Act, in conjunction with finding new information on the environmental effects and resource impacts of various activities on National Forest System land, has led to constantly changing and more rigorous management requirements.

Before authorizing activities on National Forest System lands, the Forest Service must ensure compliance with applicable laws and regulations and with conditions on the ground at the time of the authorization. Even so, after entering into timber sale contracts, environmental changes may occur such as the listing of a new species on the endangered species list, or a catastrophic event may occur, such as a large wildfire resulting in the need to modify the contracts. Also, court orders and decisions resulting from environmental litigation may require making changes to existing contracts even when those contracts are not

specifically named in the litigation if they are similar to contracts that were named. When this occurs, it is essential for Forest Service officials to have flexibility to adjust management activities and contractual arrangements without incurring enormous financial liability. At the time a sale is sold, there is no way to accurately predict what future litigation or environmental changes may occur that will result in the sale contract needing to be changed. Each occurrence is a unique situation that constitutes an extraordinary condition. The Forest Service needs the ability to provide replacement timber or forest products for contracts that must be modified to prevent environmental degradation or resource damage, or as a result of administrative appeals, litigation, court orders, or catastrophic events that occur after contract award. Thus, the Forest Service is revising the regulations on noncompetitive sale of timber and other forest products based on the Secretary of Agriculture's determination that extraordinary conditions exist whenever a timber or forest products contract needs to be modified or canceled to address such unexpected changes. This provides contracting officers with an opportunity to avert costly claims by providing replacement timber or forest products from outside the contract area.

#### **Comments on the 1996 Interim Final Rule at 36 CFR 223.85(b)**

The comment period for the 1996 interim final rule ended May 20, 1996. Because that interim final rule is similar to this interim final rule, those comments are being incorporated as background information for this rule. Two respondents submitted comments; one from a timber purchaser and one from a Federal agency. One respondent stated that this rule should apply agency-wide to provide broad authority to the Forest Service to prevent harvesting in areas under contract that are found to be environmentally sensitive and to give the Forest Service greater ability to negotiate modifications rather than canceling contracts and paying large damage claims. The Forest Service concurs with this recommendation and has incorporated it in this rule, but with limitations addressed in the following paragraph.

One respondent expressed a need to allow replacement timber to come from other districts or other forests if needed to protect fish and wildlife resources. The Forest Service agrees in part with this recommendation and did that under *NFRC v. Glickman* on the basis that the 1995 Rescissions Act provided the independent authority to provide

replacement timber in this manner. But the Forest Service found that going beyond the boundaries of the administrative unit where the original contract was let to find replacement timber often created other problems including greater difficulty in finding similar timber that could be harvested at comparable prices, increased National Environmental Policy Act costs, and interference with timber sale programs on other units. Because of those experiences, this interim final rule limits substitution to within the boundaries of the national forest where the subject contract is found. Confining replacement timber to the original national forest has the advantages of allowing individual Forest Supervisors to evaluate the pros and cons of substituting timber and forest products on their units based on the specific circumstances. This would lessen administrative, resource, and monetary effects to the purchaser and Forest Service. It also ensures accountability to the Forest Service administrative unit which offered the original contract.

#### **Good Cause Statement**

This rule is being promulgated as an interim final rule for the following reasons: (1) Existing regulations at 36 CFR 223.85(b) already permit going outside of a contract area to find replacement timber for sales subject to section 2001(k) of the 1995 Rescissions Act. This rule expands the existing regulation to more than just those 2001(k) sales; (2) This rule is not expected to be controversial. Only two respondents provided comments during the comment period for the 1996 interim final rule at 36 CFR 223.85(b) that established a foundation for this rule. Both of those respondents supported going outside the contract area to find replacement timber; (3) Comments received in response to the proposed FS-2400-6 and FS-2400-6T timber sale contracts (68 FR 70758), and the interim integrated resource contracts FS-2400-13 and FS-2400-13T (69 FR 59577) supported searching for replacement timber outside the contract area as an alternative to contract cancellation or partial cancellation. No comments were received opposing seeking replacement timber outside of the contract area; (4) Establishing a process for the Forest Service to provide replacement timber from outside the contract area has been a longstanding issue with timber purchasers and the forest products industry. By making this rule effective immediately upon publication, the Forest Service can finally resolve this issue by incorporating the change in the FS-

2400-6 and FS-2400-6T contracts which are in the final stages of revision; and (5) By making this rule effective immediately upon publication, the Government may be able to provide replacement timber in lieu of paying damages on sales that are cancelled before notice, comment and publication of a final rule could be accomplished. During fiscal years 2004, 2005, and the first quarter of 2006, the Forest Service paid a little more than \$4.6 million in damages associated with litigation and changes in environmental conditions affecting existing contracts. The Forest Service currently has approximately \$60 million in unresolved claims associated with litigation and changes in environmental conditions affecting existing contracts. Many of these claims may have been averted if replacement timber could have been provided from outside the contract area. Some of these claims could still be resolved by providing replacement timber from outside the contract area in lieu of the Forest Service paying monetary damages. This interim final rule helps to reduce payment of costly claims and as such, implementation should not be delayed.

#### **Explanation of Revisions to 36 CFR Part 223, Subpart B**

This interim final rule revises the current paragraph (b) at 36 CFR 223.85 by correcting the reference to "16 U.S.C. 472(d)" to "16 U.S.C. 472a(d)." This interim final rule also adds paragraph (c), which defines "extraordinary conditions" and allows forest officers, without advertisement, to make modifications to awarded timber and forest products contracts to replace timber or forest products from outside the area specified in the contract. But, it does place limits on substituting timber or forest products not contained in the 1996 regulation in that replacement timber or forest products for non-2001(k) sales must be from the same National Forest as the subject contract, must not exceed the value of the material it is replacing by more than 10% or \$10,000, whichever is less, and must comply with laws and regulations applicable to any new timber sale including, but not limited to, the National Forest Management Act of 1976 as amended, the Endangered Species Act of 1973 as amended, the National Environmental Policy Act of 1970 as amended, and the Appeals Reform Act as amended. This interim final rule authorizes the Forest Service and the purchaser to search for, within the same national forest as the subject sale, replacement timber of similar volume, quantity, value, access, and

topography, and to adjust stumpage prices to account for differences between replacement timber and timber deleted. The Forest Service and purchaser shall make good faith efforts to identify replacement timber within these parameters. When replacement timber or forest products agreeable to both parties is identified, the contract will be modified to reflect the changes associated with the substitution, including a rate redetermination. Concurrently, both parties will sign an agreement waiving any future claims for damages associated with the deleted timber or forest products except those specifically provided for under the contract up to the time of the modification. Either party may opt to end the search if satisfactory replacement timber or forest products cannot be found. Although the objective will be to replace timber of equal quantity and value, exact matches are unlikely and in some cases will exceed the value of the timber it is replacing. However, the interim final rule specifies that the value of replacement material may not exceed the value of the material it is replacing by more than 10% or \$10,000, whichever is less, as determined by standard Forest Service appraisal methods. To the extent that contract cancellations and partial cancellations are avoided, the effect of this rule will be to allow purchasers to harvest timber as expected when they entered into the timber sale contract and will also provide the Forest Service an opportunity to mitigate potential damage claims that may arise as the result of a cancellation or partial cancellation of the contract.

### Regulatory Certifications

#### *Unfunded Mandates Reform*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Agency has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

#### *Regulatory Impact*

This rule has been reviewed under USDA procedures and Executive Order 12866, Regulatory Planning and Review. The Office of Management and Budget (OMB) has determined that this is not a significant rule. This rule will not have an annual effect of \$100 million or more on the economy nor adversely affect

productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this rule is not subject to OMB review under Executive Order 12866.

Moreover, this rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). An initial small entities flexibility assessment has been made and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by SBREFA. The rule has no adverse or special impacts on small business, small not-for-profit organizations, or small units of the Government because it imposes no additional requirements on the affected public.

#### *Environmental Impact*

This rulemaking action falls within a category of actions excluded from documentation in an environmental impact statement or an environmental assessment. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental assessment or impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Agency’s assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist, which would require preparation of an environmental assessment or environmental impact statement for this rule.

#### *No Takings Implications*

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12360, and it has been determined that the rule will not pose the risk of a taking of private property, as the rule is limited to the establishment of administrative procedures.

#### *Civil Justice Reform*

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. After adoption of this rule, (1) all State and local laws and regulations

that conflict with this rule or that would impede full implementation of this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) this rule would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

#### *Federalism*

The Agency has considered this rule under the requirements of Executive Order 13132, Federalism. The Agency has made a preliminary assessment that the rule conforms with the federalism principles set out in this Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of Government. Based on comments received on this interim final rule, the Agency will consider if any additional consultation will be needed with State and local governments prior to adopting a final rule.

#### *Consultation and Coordination With Indian Tribal Governments*

This rule does not have tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Therefore, advance consultation with Tribes is not required.

#### *Controlling Paperwork Burdens on the Public*

This rule does not require any record keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) and implementing regulations at 5 CFR part 1320 do not apply.

#### **List of Subjects in 36 CFR Part 223**

Exports, Government contracts, National Forest, Reporting and record keeping requirements, Timber sales.

■ For the reasons set forth in the preamble, the Forest Service proposes to amend part 223 of title 36 of the Code of Federal Regulations as follows:

#### **PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER**

##### **Subpart B—Timber Sale Contracts**

■ 1. The authority citation for part 223 continues to read as follows:

**Authority:** 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213, 16 U.S.C. 618, 104 Stat. 714–726, 16 U.S.C. 620–620j, unless otherwise noted.

■ 2. Amend § 223.85 by revising paragraph (b) and adding paragraph (c) to read as follows:

**§ 223.85 Noncompetitive sale of timber.**

\* \* \* \* \*

(b) Extraordinary conditions, as provided for in 16 U.S.C. 472a(d), are defined to include the potential harm to natural resources, including fish and wildlife, and related circumstances arising as a result of the award or release of timber sale contracts pursuant to section 2001(k) of Public Law 104–19 (109 Stat. 246). Notwithstanding the provisions of paragraph (a) of this section or any other regulation in this part, for timber sale contracts that have been or will be awarded or released pursuant to section 2001(k) of Public Law 104–19 (109 Stat. 246), the Secretary of Agriculture may allow forest officers to, without advertisement, modify those timber sale contracts by substituting timber from outside the sale area specified in the contract for timber within the timber sale contract area.

(c) Extraordinary conditions, as provided for in 16 U.S.C. 472a(d), includes those conditions under which contracts for the sale or exchange of timber or other forest products must be suspended, modified, or terminated under the terms of such contracts to prevent environmental degradation or resource damage, or as the result of administrative appeals, litigation, court orders, or catastrophic events. Notwithstanding the provisions of paragraph (a) of this section or any other regulation in this part, when such extraordinary conditions exist on sales not addressed in paragraph (b) of this section, the Secretary of Agriculture may allow forest officers to, without advertisement, modify those contracts by substituting timber or other forest products from outside the contract area specified in the contract for timber or forest products within the area specified in the contract. When such extraordinary conditions exist, the Forest Service and the purchaser shall make good faith efforts to identify replacement timber or forest products of similar volume, quality, value, access, and topography. When replacement timber or forest products agreeable to both parties is identified, the contract will be modified to reflect the changes associated with the substitution, including a rate redetermination. Concurrently, both parties will sign an agreement waiving any future claims for damages associated with the deleted timber or forest products, except those

specifically provided for under the contract up to the time of the modification. If the Forest Service and the purchaser cannot reach agreement on satisfactory replacement timber or forest products, or the proper value of such material, either party may opt to end the search. Replacement timber or forest products must come from the same national forest as the original contract, and must meet agency requirements for compliance with applicable laws and regulations. Replacement timber or forest products must also come from an area included in an approved National Environmental Policy Act decision in which the appeals process has been exhausted. The value of replacement timber or forest products may not exceed the value of the material it is replacing by more than 10% or \$10,000, whichever is less as determined by standard Forest Service appraisal methods.

Dated: June 7, 2006.

**David P. Tenny,**

*Deputy Under Secretary, Natural Resources and Environment.*

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**BILLING CODE 3410–11–P**

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 212, 225, and 252

RIN 0750–AF25

#### Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces (DFARS Case 2005–D013)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement DoD policy regarding contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States. The rule addresses the status of contractor personnel as civilians accompanying the U.S. Armed Forces and the responsibilities of the combatant commander regarding the protection of contractor personnel.

**DATES:** *Effective date:* June 16, 2006.

*Comment date:* Comments on the interim rule should be submitted to the

address shown below on or before August 15, 2006, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2005–D013, using any of the following methods:

○ Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

○ E-mail: [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2005–D013 in the subject line of the message.

○ Fax: (703) 602–0350.

○ Mail: Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

○ Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, (703) 602–0328.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule revises DFARS Subpart 225.74 and the clause at DFARS 252.225–7040 to implement the policy in DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, dated October 3, 2005. DoD Instruction 3020.41 is available via the Internet at <http://www.dtic.mil/whs/directives/corres/html/302041.htm>.

The DFARS changes address the following areas:

##### 1. Contractor participation in hostilities

Prior to this interim rule, paragraph (b) of the clause at DFARS 252.225–7040 prohibited contractor personnel from using force or otherwise directly participating in acts likely to cause actual harm to enemy armed forces. The interim rule revises the clause to provide for contractor personnel other than private security contractor personnel to use deadly force against enemy armed forces only in self-defense. Private security contractor personnel are also authorized to use deadly force when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract. It is the responsibility of the combatant commander to ensure that private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks,