DON DWYER DEVELOPMENT COMPANY,	)	**AGBCA No. 2000-107-1**
	)	
Appellant	)	
	)	
Appearing for the Appellant:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

September 5, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

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

This appeal arises out of Contract No. 054038, Addington Fire Salvage, a salvage timber sale (bid in August 1997) between Don Dwyer Development Company (Dwyer or Appellant) and the U. S. Department of Agriculture, Forest Service (FS), Stonyford Ranger District, Mendocino National Forest (NF), Willows, California. The contract was for harvesting of timber which had been subject to a severe fire, the August 1996 Fork Fire. The Appellant claims that it is entitled to a reduction of $172,351 in the amount it paid the FS for the Included Timber on the sale. It asserts it is entitled to the reduction because the value of the Included Timber on the contract decreased after award, due to the development of blue stain. The Appellant claims relief under clause B8.12 of the timber sale contract. That clause deals with allocating risk of loss prior to the timber being cut and removed. The appeal also involves issues relating to delays in the start of the work and effects of El Nino. The FS does not dispute that there was significant blue stain in the timber by the time Appellant performed its harvest. The FS, however, disagrees that there is any entitlement to relief, contending among other defenses that damage to the quality of the timber does not constitute a timber value loss
under clause B8.12; that the clause is not applicable to foreseeable losses on a salvage sale such as this, that the timber was already blue stained at the time of bid; that Appellant failed to mitigate and

was negligent in not harvesting in the fall of 1997 and, that Appellant assumed the risk of loss when it waited until the spring and summer of 1998 to harvest. A two-day hearing was held in San Francisco, California.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. ' ' 601-613, as amended.

FINDINGS OF FACT

1. In August 1996, a severe wildfire, the Fork Fire, burned approximately 83,000 acres of land on the Upper Lake and Stonyford Ranger District of the Mendocino National Forest (Appeal File (AF) 144; Government Exhibit (G) G-15). The Fork Fire was extremely intense and resulted in widespread tree mortality leaving most trees completely black with very few needles. There were some limited patches of green canopies that remained after the fire. (AF 155; Transcript (Tr.) 305, 308-09.)

2. On September 23,1996, a month after the fire, FS officials inspected the burned area. They reported that several types of borers (insects) had begun to infest the sapwood of the burned timber. The officials predicted that as the weather would warm during the spring of 1997, a combination of weather checking, borer activity and stain would rapidly make the smaller size classes of timber useless for dimension lumber. (G-15.)

3. According to various FS and Appellant witnesses, as well as literature on fire killed timber, blue staining is a condition that develops in fire killed trees. It is a condition that changes the color of the wood it infests but does not generally materially damage the integrity or volume of the wood or cause decay. The change of color is significant, because it reduces for cosmetic reasons what a mill will pay a harvester as compared to timber that is not stained (bright timber). (Tr. 463-64, 520; G-7A at page (p.) 8, 9, G-7C at p. 6.)

4. Blue stain can be introduced into a tree in several ways. Generally it is introduced into fire damaged trees by insects. Generally that is bark beetles, but blue stain is also introduced by other wood boring insects such as round headed borers, flat headed borers and ambrosia beetles. (Tr. 477; G-7A at p. 1, 6-8, G-7B at p. 1, G-15.)

5. After the fire and in order to capture the value of deteriorating timber and rehabilitate the fire area, the FS prepared several timber sales to salvage the dead timber from the fire. Among the sales was the Addington Sale. The FS was instructed by wildlife personnel not to include green timber in the sale and thus the sale was essentially comprised of burned timber with a small smattering of green timber included. The sale was primarily comprised of ponderosa and sugar pine. The sale area was set on a south facing slope at approximately 4,000 feet. (AF 129-36; Tr. 29, 306, 308; G-15.)

6. Between August 1996 and June 1997, the FS planned for and conducted an environmental analysis of the Addington Timber Sle (AF 144-62; Tr. 306). As part of the planning, the FS examined the area and calculated the value of the timber. Robert McCabe, the FS representative for contracts on the Mendocino NF, spent over two weeks examining timber on the sale area prior to the sale being advertised. He had seven years experience in that position, had been the sales preparation officer for the district for 10 years prior to that and had been with the FS full time since 1973. (Tr. 303-04, 306-07.) He testified that he had extensive experience with one-and two-year old fire killed timber and had administered and prepared sales for hundreds of millions of board feet of fire burned timber over the years (Tr. 319). As part of his duties prior to the advertisement of the sale, Mr. McCabe prepared a document titled Transaction Evidence Appraisal (TEA) to appraise the value of the timber that was to be sold. To determine value, he used information from nearby sales sold in the recent past, industry data, as well as specific information from the Addington Sale area. (AF 141-43; Tr. 311-14.)

7. In pricing the timber for establishing the minimum bid which the FS would accept, Mr. McCabe discounted the value of the Addington sle timber by $100 per thousand board feet (MBF) to account for the value of loss to the timber which was anticipated because of blue stain (AF 143; Tr. 313-14). In preparing the TEA, he did not specifically inspect the timber for the presence of blue stain. He did not examine for blue stain because blue stained timber is not considered by the FS to be damaged timber. It is not a defect as far as FS scaling rules are concerned. As explained by Mr. McCabe, "it's a quality thing of value and we don't deal with that, that is what the bid process is for." (Tr. 309.) Mr. McCabe said that he provided the blue stain adjustment in the timber value because the timber had been decaying for a year since the Fork Fire had burned and it was his experience and understanding of the scientific literature that a year after being killed by fire, pines are infected by blue stain (Tr. 309, 313-14, 319).

8. The $100 adjustment in the TEA was included as part of an adjustment to the TEA calculations, identified as "Unique adjustment" of $140. The $140 was composed of the $100 deduction for blue stain and deductions for additional water and extra time to move in and out of the sale area. Mr. McCabe arrived at a final figure of $126.18/MBF as the advertised rate for ponderosa and sugar pine. (AF 141-43.) When that rate was multiplied by the anticipated MBF for the various species of timber, the appraisal showed a minimum advertised rate of $437,844.60. That number was set out in the FS prospectus for the sale. (AF 135.) In further explaining the FS appraisal process, Mr. McCabe also identified another downward adjustment he made of 20%, which he said was used by the district to assure that the sale was offered at a value that would attract a bidder (Tr. 311). As he saw it, the FS was offering blue timber on this sale (Tr. 314).

9. Mr. McCabe arrived at the $100 deduction for blue stain by calling different mills to see what type of adjustments they were making for blue stain. He got numbers of $100 to $150 depending on the size of the timber. Based on his appraisal experience and the belief that the majority of the timber was going to be blue stained, he used $100 for the deduction. While he described his arriving at $100 as arbitrary, it was clear from the context of his testimony that the general figure of $100 was based on information he gathered. His use of the term arbitrary simply referred to his using $100

rather some other figure such as $90 or $110. (Tr. 314.) Mr. McCabe was not alone in his pre-sale expectation that significant blue stain would be present by the time of the bid. In his report of October 31, 1996, titled Evaluation of Tree Survival Potential in Fork Fire, an FS entomologist wrote to the FS Supervisor, Mendocino NF, and stated, "Several types of borers have already begun to infest the sapwood. As the weather warms during the spring 1997, a combination of weather, checking, borer activity and stain will rapidly make the smaller size classes useless for dimension lumber." (G-15.)

ADVERTISING THE SALE

10. The FS advertised the sale as a salvage sale on August 9, 1997, approximately one year after the fire (AF 4, 133). The sale was comprised of 3,470 MBF of fire killed trees, of which 2,970 MBF were ponderosa pine and 500 MBF were sugar pine (AF 135). The sale was advertised as a contract scaled sale (AF 133).

PROSPECTUS

11. The Sale Prospectus contained the following at paragraph 1.

> This prospectus is to furnish sufficient information in addition to that contained in the published advertisement, to enable prospective bidders to decide whether further investigation of the sale is warranted. DESCRIPTIONS, ESTIMATES, AND OTHER DATA IN THIS PROSPECTUS ARE NOT PART OF THE CONTRACT UNLESS OTHERWISE STATED. IN THE EVENT THE PROSPECTUS IS IN ERROR OR CONTRADICTS THE SAMPLE CONTRACT, THE CONTRACT GOVERNS. BIDDERS ARE URGED TO EXAMINE THE TIMBER SALE AND TO MAKE THEIR OWN ESTIMATES. ESTIMATED QUANTITIES IN THE CONTRACT ARE NOT GUARANTEED. Timber Sale contract, Form 2400-6 (10/73) will be used. The sale area and sample contract should be inspected before submitting a bid. The transaction evidence appraisal, other information on the timber, and conditions of sale and bidding may be obtained at Forest Service offices named in the attached advertisement . . . .

(AF 133.)

12. At paragraph 4 of the Prospectus, titled TIMBER VOLUME AND RATES, the Prospectus advises bidders that the size of the timber is estimated based on detailed cruise information on file and available for inspection at the FS offices. It continues, AINFORMATION LISTED HEREIN IS MADE AVAILABLE WITH THE UNDERSTANDING THAT VALUES SHOWN ARE NOT ESTIMATES OF A PURCHASER=S OWN RECOVERY AND ARE NOT PART OF THE TIMBER SALE CONTRACT. (AF 134.) It then states, AFor these reasons, bidders are urged to examine the timber sale area and make their own recovery estimates.@ (AF 134). In addition, the Prospectus announced that the normal operating season would be between May 1 and November 30,

and the contract termination date would be November 30, 1998 (AF 135, AF 34). Thus Appellant had until November 30, 1998 to complete the harvest.

SAMPLE CONTRACT AND ROAD PACKAGE

13. As identified in the Prospectus, the FS had a sample contract on this sale. At that time the FS also had completed a road package, which was included as part of the sample contract. The road package dated July 23, 1997, consisted of two parts, a schedule of items (a detailed listing of hardware, the type of work and the value placed upon the road work by the FS) and drawings depicting the location of the work on the ground. Mr. McCabe testified that he would not have been able to do an appraisal for the sale without the road package. (AF 116-23; Tr. 325-27; Appellant Exhibit (A) A-13.)

14. According to Mr. McCabe, after the sale was advertised, copies of the package were available at both the Willows and Elk Creek offices of the FS, as part of the sample contract (Tr. 326-28). He testified that copies of the road package were also available at the bid opening (Tr. 330-31, 442-46).

PERTINENT CONTRACT PROVISIONS

15. The following provisions of the contract are pertinent to this appeal. The provisions were included in the sample contract and thus available to Appellant for review prior to bid:

> Section B2.133 Damaged by Catastrophe. As provided under B8.33, undesignated live and dead timber within Sale Area, meeting Utilization Standards, and affected by Catastrophic Damage. ACatastrophic Damage@ as used hereunder is a major change or damage to Included Timber. . . (a) caused by forces, or a combination of forces beyond control of the 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 (b) affecting the volume or value of any trees or products meeting Utilization Standards, within the Sale Area and estimated to total either (i) more than half of the estimated timber volume stated in A2 or (ii) more than one million board feet or equivalent. Catastrophic damage does not include changes caused by forest pest epidemics if Included Timber was sold for salvage or pest control.

(AF 41.)

> Section B3.32 Rate Determination after Catastrophic Damage. In the event of Catastrophic Damage and adjustment, if any, of Included Timber, Forest Service shall make an appraisal to determine for each species the catastrophe-caused difference between the appraised unit value of Included Timber remaining immediately prior to the catastrophe and the appraised unit value of existing and potential Included Timber immediately after the catastrophe. Said Included Timber

> is any that would not be eliminated under B8.33. Said potential Included Timber is any that would be added under B8.33.

(AF 43.)

> Section B8.22 Termination for Catastrophe. In event of Catastrophic Damage, this contract will either be modified under B8.33 following rate redetermination under B3.32 or terminated under this Subsection.

(AF 53.)

> Section B8.11 Title Passage. All right, title, and interest in and to any Included Timber shall remain in Forest Service until it has been cut, Scaled, removed from the Sale Area or other authorized cutting area and paid for, at which time title shall vest in Purchaser. For purposes of this Subsection, timber cut under cash deposit, Effective Purchaser Credit, or payment guarantee under B4.3 shall be considered to have been paid for. Title to any Included Timber which has been cut, Scaled and paid for, but not removed from Sale Area or other authorized cutting area by Purchaser on or prior to Termination Date, shall remain in Forest Service.
>
> Section B8.12 Liability for Loss. If Included Timber is destroyed or damaged by fire, wind, flood, insects, disease or similar cause, the party holding title shall bear the timber-value loss resulting from such destruction or damage, except that such losses after removal of timber from Sale Area, but before Scaling, shall be borne by Purchaser at Current Contract Rates and Required Deposits. There shall be no obligation for Forest Service to supply, or for Purchaser to accept and pay for, other timber in lieu of that destroyed or damaged. This Subsection shall not be construed to relieve either party of liability for negligence.

(AF 53.)

In addition to the above, the following three provisions of the contract are also relevant: Section B8.221 Termination by Purchaser, B8.222 Termination by Forest Service, B8.33 Modification for Catastrophe. (AF 53.)

16. Appellant argues that the language in clause B8.12 must be applied literally. Since the blue stain developed prior to the Appellant cutting the timber, the Appellant contends that the risk of loss falls on the FS. Appellant points out that there are no internal words of limitation in clause B8.12 which exclude damages or destruction that was foreseeable from coverage under clause B8.12. In opposition, the FS contends that the blue stain damage does not constitute a timber value loss, since
it involves only quality degradation. It further asserts that clause B8.12 applies only when there is an unforeseeable event which causes a significant change in the nature of the timber offered for sale.

The FS points out and we agree that blue staining of fire damaged trees on a salvage sale is not unforeseeable. The FS continues, that if the Board allows purchasers to recover under clause B8.12 any time that the weather, insects, or disease reduce the value of timber over the course of a timber sale, then every salvage sale will provide the purchaser with a right to adjust the sale price. According to the FS, purchasers would be rewarded for delaying operations and allowing timber to deteriorate. (FS Brief, at 41-42.)

17. In addition, the FS charges that Appellant's reading would create a conflict between clause B8.12 and the B2.133 Damaged by Catastrophe. The FS points out that B2.133 specifically states that a purchaser is not entitled to a rate redetermination on salvage sales where the timber is damaged by forest pests. As the FS reads the clauses, if one adopts Appellant's broad reading of clause B8.12, then that reading would render the language of B2.133 a nullity.

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18. The FS bid form used on the solicitation stated that bidders were to certify that they had read and understood the sample contract (AF 131, 133). Although Mr. Dwyer signed the certification with his bid, he acknowledged during his testimony that at the time he signed the certification, he had not read the sample contract. He had read the Prospectus. He also acknowledged that he did not review the TEA either prior to or at the time he bid. (AF 130; Tr. 148-50.)

SITE VISITS

19. Mr. Dwyer had worked in forestry since 1964 and in the logging business for about 20 years (Tr. 16). His company was capable of operating more than one sale at a time and depending on what work was going on, Dwyer could operate with a skeleton crew or with up to 22 employees (Tr. 19). In 1997 Appellant had bought several other sales on the Mendocino NF in addition to Addington (Tr. 19-22).

20. Prior to bidding this sale, Mr. Dwyer made three separate trips to the sale area. On the first, he checked for blue stain by chopping a few inches into the trunk of a tree at its base and at breast height. He looked to see if there was any staining. He examined several trees and found no stain. He considered the trees to be bright (i.e. not blue stained). On his second trip, he again chopped into trees and again found bright wood. On the third trip, he was accompanied by Robert Fehly, the log buyer for Wisconsin-California Forest Products, Inc. (Wis-Cal), a prospective buyer of logs from the sale. On that visit, Mr. Dwyer again saw bright wood. In total, Mr. Dwyer chopped into 20 to 30 trees. (Tr. 23-24, 29-33, 130-31, 134; A-4.)

21. Although Mr. Fehly was not put forth as a witness, the Appellant submitted a letter Mr. Dwyer had requested from Mr. Fehly, where Mr. Fehly set out his observations as to conditions on the date of their visit. Mr. Fehly reported:

> I visited the sale area prior to the bid date of 08-26-97. At that time the timber appeared to be in good shape as far as blue stain was concerned. I chopped into a number of trees and could detect no blue stain.

(A-4.)

22. As further explanation as to why he expected trees to be bright and not blue stained, Mr. Dwyer pointed out that a lot of the sale was composed of larger diameter trees. He stated that he did recognize the possibility of encountering some blue stain and expected approximately 15% of the timber would be blue stained by the time he finished harvesting the sale. Mr. Dwyer described 15% as a recognized industry standard for the amount of blue stain two years after a fire. He acknowledged that he did not have any documents or scientific publications which stated the 15% figure. He expected to remove two-thirds or more of the timber by the close of 1997 and the remainder the next season. He expected the timber removed in 1997 to be bright and some of the timber in 1998 to be blue. (Tr. 30, 37, 145-46.)

23. To further support his expectation and observations, Mr. Dwyer also submitted a letter from Harry Petersen of Petersen and Evans. According to Mr. Petersen, that firm was conducting a logging operation to salvage fire killed timber on private land adjacent to the Addington Sale Area during the summer of 1997. Once Mr. Dwyer's claim arose, Appellant sought out information on Petersen's harvesting. Mr. Petersen wrote the following to Appellant, "The condition of timber in regards to insect damage and blue stain during the logging conducted in 1997 was excellent." (A-3.) Mr. McCabe of the FS, in his testimony, noted that he recollected that the adjacent landowner had conducted the harvest during the spring of 1997 (Tr. 360).

SUBMISSION OF BIDS AND AWARD OF CONTRACT

24. On August 26, 1997, the FS received bids on the sale (AF 129). Appellant initially wrote $777,777.77 on the bid form. However, Appellant increased that at bid opening to $876,543.21, after seeing other bidders. (AF 129; Tr. 36, 286.) The bid was for a combined estimated quantity of 3,470 MBF of timber of which 2,970 MBF was estimated Ponderosa and Jeffrey pine and 500 MBF was for sugar pine. When the MBF of timber is divided into Appellant's bid price, the average price per MBF is $252.60. According to Mr. Dwyer, Appellant based the bid on verbal numbers given Dwyer in 1997 by Wis-Cal. Thereafter, in December 1997, Appellant entered into a purchase order with Wis-Cal. The prices in the purchase order were the same as the prices that Appellant had been given at the time of bid (AF 129; Tr. 174-75.) Although Appellant thought at the time of bid that the timber was bright, when he calculated the bid, he assumed that 15% of the volume would be stained by the time he harvested all of the timber. Appellant reduced his bid because he expected that 15% of the timber would fetch lower prices at the mill. (Tr. l 36.) Appellant's bid for the timber was the highest bid received by the FS and was twice that of the FS advertised figure of $437,844.60, the minimum acceptable bid set out in the bidding documents (AF 129, 135). Mr. McCabe testified that at the time, he thought Mr. Dwyer's bid was extremely high for what was offered. Putting that

in perspective, Mr. McCabe noted that the area's most common bidder for FS projects, Sierra Pacific Industries, did not submit a bid. (Tr. 315.)

25. According to Mr. Dwyer, he had a conversation with Mr. McCabe at bid opening and indicated to Mr. McCabe that he would like to get going as soon as possible. They talked about weather in the area and Mr. Dwyer stated that Mr. McCabe told him that it was a dry area. That indicated to him that he would be able to get the harvest in during the fall of 1997, by working into December and if possible later, before the snows. (Tr. 41.)

26. The FS sent out its formal notice of contract award on September 4, 1997, by certified mail. Mr. McCabe testified that he sent it on that date because the Appellant had shown no interest in starting operations immediately. Mr. McCabe said that he would have expedited the award and execution process if Appellant had expressed an interest in getting his operation started. (Tr. 333.) In practice, due to the deterioration of timber, most loggers execute salvage contracts on the same date that bids are opened, so they can immediately begin operations (Tr. 339, 348; G-4). At the time of the bid opening, Appellant was working on the Star Timber Sale, a sale near Chester, California. According to Mr. McCabe, Mr. Dwyer told him at the bid opening that Dwyer was working on the other sale and until he finished that work he would not start on Addington. He told Mr. McCabe that he would get back to him, and as a result, Mr. McCabe proceeded with award through the normal mail process. (Tr. 334.) Appellant received the award letter on September 12, 1997 (AF 163-65).

27. Mr. Dwyer contested Mr. McCabe's description of those initial dealings. Mr. Dwyer said that he wanted to get started as soon as possible and intended to harvest a substantial portion of the sale in 1997, but the FS delayed him. He said that at bid opening he asked the FS to schedule a pre-operations meeting and asked again for that meeting in early October 1997. He said he was told that the FS was not available. (Tr. 166.) The sales contract calls for a pre-operations meeting prior to starting physical work at the site (Tr. 43).

28. The Appellant further stated that he was delayed in starting because the FS did not provide him with a road package. He stated that the contract enclosed with the award letter did not include detailed road work plans. Both Mr. and Mrs. Dwyer (also at times referred to as Roberta Olney) testified that they started in September 1997 to make telephone calls to the FS in an attempt to secure the road work plans on the sale. According to Mr. Dwyer they were told that they had to contact Bruce Smith, a Forest Service road engineer, to secure the plan. (Tr. 62-63, 71-75, 288-91; A-9-10.) They reported that despite numerous telephone calls to the FS, the FS did not tell Mrs. Dwyer until October 28, 1997, that the road plans were available for her at the Elk Creek Work Station. The Dwyers then immediately drove to Elk Creek to pick up the plans that same day. (AF 199; Tr. 79-81, 291.) According to Mr. Dwyer, it was only then (having the road plans) that he was in a position to begin operations (Tr. 152).

29. Mr. Dwyer testified that on the date he picked up the road plans at Elk Creek in late October 1997, he again spoke with Mr. McCabe about operating the sale that fall. He said that he wanted to

start operations as soon as possible but could not begin work until the required pre-operations meeting (sales contract clause C6.3) with the FS was held. Mr. Dwyer said that Mr. McCabe told him that the earliest date for a pre-operations meeting was November 17, 1997, and it would be a pre-operations meeting for road construction only. (Tr. 82-83, 293.) The pre-operations meeting was held on that date (AF 166, 350). By way of explanation, Mr. Dwyer said that the reason for the time gap between October 28 and November 17 had to do with the unavailability of the FS road engineer. Mr. Dwyer identified Mr. McCabe as the source of that information. (Tr. 83.)

30. The FS presented a different picture as to events surrounding the bid opening, the pre-operations meeting and the start of work. As noted above, Mr. McCabe said that he asked Appellant at the bid opening if he intended to begin operations immediately. He pointed out that time is a factor on salvage sales and generally offerors begin soon thereafter, because the longer one waits the more the timber deteriorates and loses its value. (Tr. 348; G-4.) Mr. McCabe stated that Mr. Dwyer told him that he was unable to begin operations because he was busy working on the Star Sale. Mr. McCabe specifically denied that Mr. Dwyer told him that Dwyer wanted to get started as soon as possible. (Tr. 348.) According to Mr. McCabe, he was the person in charge of setting up the pre-operations meeting and he was available for that meeting from the day of bid opening onward, except for a week vacation in October (Tr. 333-36).

31. The FS also presented testimony as to some of the pre-work matters from Ms. Georgina Gaddini (Bobbin). She was the resource clerk at the FS office and was involved in conversations with Mr. and Mrs. Dwyer in the early stages after award. She also was the person who put together the contract sent to the Dwyers with the award letter. She stated that the road package should have gone with the original contract, although she could not be certain that it had. She also testified that she heard Mr. Dwyer state to Mr. McCabe that he could not start right away because he was committed to Lassen (the Star Sale). (Tr. 447, 455-57.)

32. Appellant had been awarded the Star Sale on December 11, 1996 (G-13 at 2). After Appellant was awarded that sale, but before submitting the Addington bid, a wind event occurred in the area of the Star Sale blowing down numerous trees. Because of that, FS officials approached Appellant about removing approximately 1,081 MBF of additional timber on that sale. Appellant agreed and, thereafter, entered into a modification with the FS which added some trees due to the wind event, as well as corrected for trees that had been missed in the original marking of the sale. Appellant stated that while he was not threatened with default or breach on that sale, the FS indicated that he would be sorry if he did not accept the additional quantity. (AF 210, 215; Tr. 61-63, 157-58, 180, 433-34.) Appellant proceeded to remove the additional timber and was working the Star Sale during the fall of 1997. As Mr. Dwyer explained, because of the blowdown, trees blew over existing timber and therefore, he had no choice but to agree to remove the additional timber as that was the only way to get to the trees covered on his original contract. (Tr. 179-80.) As indicated above, there was disagreement as to whether the work on the Star Sale prevented the start on Addington, with Appellant in its brief and at the hearing emphasizing the affect of the road package and weather. There are, however, a number of pre-appeal documents from Appellant and his representatives which take the position that the Star Sale prevented Appellant from beginning in

the early fall of 1997. Specifically, there is a letter from Mr. Dwyer's initial attorney dated June 10, 1998, where the attorney stated that because of the additional board feet on the Star Sale, Dwyer was unable to move into the Addington Sale in September/October as planned. (AF 210-11.) There is also a letter sent by Mr. Dwyer to the FS dated March 22,1999, where Mr. Dwyer stated that he delayed the start of harvesting in 1997 not due to any negligence but because of the timber on the Star Sale. At the hearing, Appellant addressed the position taken in these letters and attributed the emphasis on the Star Sale to his lawyer's judgment as to the situation. Mr. Dwyer noted that while he acknowledged that he had worked on the Star Sale, he could have also worked on Addington, but was prevented because of a lack of road plans, weather and delay of the pre-operations meeting. (Tr. 152.)

33. Another matter which affected the start of work was difficulties with the down payment and the performance bond. In order to execute a contract, the purchaser must make a down payment and secure a performance bond. (Tr. 338.) On October 8, 1997, Appellant made the down payment (or Bill of Collection) of $113,052.18 on the Addington Sale (AF 165; Tr. 46; G-27 at 3). Initially, the Appellant sought to secure an irrevocable letter of credit in lieu of a performance bond from Gold Country National Bank. However, the FS had problems as to the wording on the initial October 7, 1997, irrevocable letter of credit from the bank. The wording was not finally resolved until some time between October 15 and October 22, when a performance bond from the bank was ultimately approved by the FS. (Tr. 49-51, 339-47; G-5, G-27.) The FS points out that Appellant could not have begun road work or logging until the letter of credit/performance bond matter was resolved, and therefore, even had Mr. Dwyer had the road plans in August or September 1997, a contested matter, he would not have been permitted to begin until October 22, when the bond matter was resolved (Tr. 347).

34. At the hearing, Mr. Dwyer was asked to identify the main factors which prevented his getting started, soon after award. Initially, he identified the weather in the fall of 1997 and the Star Sale as the two main factors but later amended that to include the lack of a road package. (Tr. 151.) He further reiterated that some of the positioning he took in early letters to the FS was due to advice by his attorney at that time and what he characterized as FS directions as to what to say (Tr. 152). When pressed on cross-examination he said the road package was one of the main reasons and then the weather coming behind that further complicated matters (Tr. 152).

BEGINNING OF WORK

35. On November 20,1997, Appellant's subcontractor began roadwork on the sale. Operations were shut down for a few days in November due to rain. (AF 199; Tr. 89; G-11.) According to Mr. McCabe, temporary shut downs for rain are common in the area in November (Tr. 319). Road work was completed on December 3, 1997, which was three days after November 30, the date set in the contract for the end of the normal operating season. (AF 34, 135, 199.) According to Mr. Dwyer, once the roadwork had been completed on December 3, the weather became stormy and the FS told him to shut down for the year (therefore setting resumption in May 1998, the start of the next season) (Tr. 90-91).

36. The winter and spring of 1997-1998 were wetter and slightly cooler than average conditions (Tr. 316). The total precipitation measured at the Stonyford Ranger District (an area which given the geography and weather patterns of the area, was considered by the FS to be the most representative data available for Addington, even though Addington was located in a different locale on the Upper Lake Ranger District, about ten miles away) was 46.02 inches, which was approximately 50% higher than the average rainfall at that location for the preceding three years. The FS, however, pointed out that in 1994-1995, it rained more in the Addington area than in 1997-1998. The average temperature between November 1997 and June 1998 was approximately 51 degrees as compared to an average of 53 degrees over the period from 1998-2000. (Tr. 317-19; G-3, 10.)

37. On May 6, 1998, the following spring, the parties held another pre-operations meeting. On May 7, 1998, Mr. Dwyer resumed road grading and timber felling. This was six days after the May 1 identified start in the contract for the 1998 year operating season. In order to remove the cut timber, Mr. Dwyer needed to get tractors and similar equipment into the sale area. He tried to move this equipment in on May 13, 1998, but the "Low Boy" equipment transporter could not get up the switchbacks because of wet conditions. Mr. Dwyer was able to get some equipment in and began skidding logs May 18-25, 1998. He started hauling logs off the sale area on May 22, 1998, but on May 26, 1998, snow and rain made the roads too slippery for safe operation. (Tr. 93-98, 295, 543-44.) On May 28, 1998, the FS told Mr. Dwyer's crew to shut down. Because of conditions, Mr. Dwyer was not able to re-start operations until June 15, 1998. (Tr. 99, 112.)

38. Mr. McCabe testified that it is common to have operations temporarily shut down in May due to weather (Tr. 319). He continued that it was his understanding, relying on reports by the FS inspector in the field, that by early June conditions had improved so that skidding conditions were excellent, and the haul conditions were good enough to use, even though there were a few wet sections. When questioned by Appellant's counsel as to whether the wet sections could have made the road unusable for haul, Mr. McCabe contended that if that were the case the FS inspector would have written the report differently. (AF 304; Tr. 354-55, 396-97.)

39. On May 29, 1998, Mr. Dwyer wrote to the FS asking for a rate redetermination on the sale. There he stated that the "timber sale has deteriorated drastically since the time it was advertised and sold, resulting in great devalue of timber." For that reason, he was requesting a rate redetermination based on Catastrophic Damage caused by the effects of El Nino, making the sale economically unfeasible. In the letter, he set out a chronology of the delays and weather. He stated that he had not received the road package until October 28, 1998 (sic 1997). He blamed the state of the timber on not being able to start after the contract was awarded and further stated that he began road pre-operations on November 17,1997, started road work on November 20,1997 after rains, but only got in one hour before new rains started, and had to stop road work starting November 26, 1997. He completed the road work by December 3, 1997. (AF 199-200.)

40. Mr. Dwyer continued that he attempted to restart the next spring on May 6 and 7, 1998, but continued to run into wet conditions and rain. On May 28,1998, he notified his crew of a shutdown because of weather. He stated that he checked the timber in December 1997, and it was still okay, but, with the warm rains, the timber had turned blue and the smaller material was full of various worms and borers. He noted that some loads of logs had bunk logs broken in half upon reaching the mill, placing public safety at risk because of the break down of timber. He concluded that he had contacted another logger to assist in moving the volume but because of the onslaught of unseasonable weather, he was at that point at a standstill. (AF 200.) He then stated that he thought he was entitled to some relief and cited the FS to clauses B2.133, B3.32, B6.4, B8.221, B8.222 and B8.33 (AF 199-200).

41. In addition to the above letter, Dwyer also wrote a letter dated June 5, 1998, to the office of his Congressman, seeking assistance in dealing with what he described as an economically unfeasible job. He stated that timber prices dropped dramatically and had not stopped since he purchased the contract. He referenced other contract work with the FS that he was performing during 1997. More specifically, he said, that "Due to this increase in volume, I was in Lassen National Forest until 12-3-97." He also pointed out that he purchased two other salvage sales in 1997, one in July and one in March. Returning his attention to the Addington Sale, he noted that as of June 5, 1998, the units were still too wet to operate. He then said that there was catastrophic damage due to El Nino during the normal operating season from January 5, 1998, thru June 3,1998, in continuation of unseasonally warm and cold weather. (AF 203-204.)

42. By letter of June 8, 1998, the FS responded to Mr. Dwyer's May 28 request for a rate redetermination. The FS stated that based on the information in Appellant's letter and interpretation of contract clause B2.133, Damaged by Catastrophe, the sale would not qualify for a rate redetermination based on catastrophic damage. The FS stated that since the sale was sold as "Fire Salvage" to begin with, the sale would have to have another catastrophic event occur that would have affected the timber of the sale area other than "the predicted damage that would take place due to the fire." (AF 205.)

43. By letter of June 15, 1998, Mr. Dwyer responded. After reciting the clause in B2.133 including that portion which states, "Catastrophic damage does not include changes caused by forest pest epidemics if Included Timber was sold for salvage or pest control," Mr. Dwyer continued saying, "This timber was damaged by El Nino, a Catastrophic Event causing major natural phenomenon affecting the volume or value of any trees especially this fire salvage. No forest pest epidemics occurred because pests that cause epidemics do not attack dead trees burnt as severely as this fire did. There is no life flow (sap flow) to interrupt in a tree already dead." Mr. Dwyer then stated:

> The Catastrophic Damage increased blue staining by "El Nino," causing the process to rapidly increase excessively through out the Addington Fire 100% fold, due to excessive moisture. Devalued Timber was caused by climatic changes caused by AEl Nino.@ Blue stain is caused mainly by moisture and temperature. As we all know moisture promotes fungus. AEl Nino@ has caused 50% devalue to the timber on the

> Addington Sale. AEl Nino@ has caused catastrophic damage world wide. I believe this fact, that the effects of AEl Nino@ are considered Catastrophic. . . .

(AF 207-08.)

44. By letter of June 10,1998, Douglas Cuthormsen, an attorney for Appellant, wrote to the Contracting Officer (CO). He pointed out that Mr. Dwyer was working on two different salvage sales located in the Lassen National Forest in September 1997. He stated that a blowdown occurred in the area which led the FS to mark an additional one million board feet of timber and when Mr. Dwyer bid the Addington Sale, he did not know about that additional blow down timber. The attorney continued that because of the FS marking the additional one million board feet on the Lassen Sale, Mr. Dwyer was unable to move into the Addington Sale in September/October as planned and but for having to remove the blowdown timber at the FS request, he would have substantially completed the added Addington Sale in the fall as he had planned. The letter continued that the spring of 1998 (up to the date of the letter) had allowed only a few days for work, due to "the record rainfall of the century." He continued that the county where the sale was located was declared a disaster area due to the rainfall. He charged that the trees which could have been removed in the fall now turned blue and blamed that failure to take out the trees on FS requiring him to remove more timber on the other sales. He said that the Addington Sale had lost 50% of its value due to blue staining. He referenced his client being in a Catch-22 situation, with being in a potential breach situation if he had walked from the sales. He said that Mr. Dwyer's mill price as delivered is divided into two categories. Those trees which have sound sapwood, and those trees which have sound sapwood and are blue stained. There is a $200 to $250/MBF decrease in what a mill pays for blue-stained wood. (AF 210-14.)

45. The FS wrote to Appellant on June 22, 1998, and reviewed the prior correspondence and requests (AF 219). The FS noted that one of the main items being asked for was an adjustment in the smaller trees due to rot and financial relief (stumpage adjustment) due to delays on logging operations because of weather delays and the effects of El Nino. The FS stated that it had already made the "necessary" adjustments for the rot in the smaller trees by raising the minimum diameter at breast height (DBH) required for harvesting from 10 inches to 18 inches under provisions of the contract. The letter went on to note that the FS was unable to determine the specific affects on Addington of (1) the delays caused by increased volume on other sales; (2) the delays due to wet weather; (3) and impact of El Nino.

46. In a letter of July 2, 1998, authored by Leo Steidlmayer, identified as attorney for Mr. Dwyer, Mr. Steidlmayer responded to the FS June 22 letter. He asked for relief through a rate redetermination retroactive to the start of the contract, pursuant to Sections B3.311, Emergency Rate Redetermination; B3.32, Rate Determination after Catastrophic Damage; and B8.33, Modification for Catastrophe (AF 222-24.) He justified the request by citing three bases: (1) delays due to the additional volume on the Star sale, (2) delays due to wet weather, and (3) effects of "El Nino." In support, he attached an "expert opinion" from Bradford R. Seaberg, along with 43 pages of

background information on tree pathology; a document authored by former counsel, Mr. Guthormsen; two pages from the FS that Mr. Steidlmayer said supported the theory that 1997/1998 was a historically "wet" year; a letter from the FS representative on the Star Sale; and finally, an excerpt from a publication again addressing the affect of El Nino in California. (AF 225-82.)

47. The author of the expert report, Mr. Seaberg, held a degree in forest management from the University of New Hampshire and a Master of Forest Science degree from Yale. From 1977 to the present he had been continually working in the forest industry and during that time had worked approximately 15 years for the FS. Since 1992, he had been a consulting forester with a consulting firm. (AF 226-32.) He had neither majored in forest pathology nor had he been employed or published in the field of forest pathologist. He was, however, familiar with the blue stain condition and had knowledge of forest pathology through course work, readings and experience. (Tr.195-96.) He had some personal knowledge of the site and area on or around the time of the fire, having visited an adjacent site on a timber cruise some time in late August, early September 1996, after the Fork Fire was controlled, but while there were still some hot spots (Tr. 199-200).

48. In the report addressing the blue stain on Addington, Mr. Seaberg concluded that Appellant should be entitled to relief under clause B8.33 - Rate Redetermination after Catastrophic Damage, citing El Nino as the damaging event. He pointed out that the FS had recognized problems with the Included Timber on the sale and had raised the minimum DBH requirements to 18 inches. He also cited potential relief under Termination by Purchaser and Changed Conditions (138.32). He stated that on a June 26,1998, visit to the sale site and a June 29,1998, visit to the mill, he observed almost 100% blue stained logs. He identified the following as the three major factors that impacted the value of the sale: (1) delay due to the Star Sale; (2) El Nino weather conditions resulting in moisture content in the dead timber being conducive for increase in blue stain; and (3) rainy weather in June 1998 delaying operations, causing additional degrade. (AF 226-29.)

49. Mr. Seaberg described the Fork Fire as a catastrophic stand-replacing fire and said that soon after the fire, he saw stands that were almost completely fire killed and trees so destroyed by heat damage that insects were not a significant factor in tree mortality, probably limited to 5 to 10% of the timber volume that ultimately succumbed. He pointed out that the fire occurred at the end of a growing season when there was little sap movement and consequently the trees were not killed by insect attack. He stated that blue stain fungus is introduced into a tree either through airborne spores or by the western pine beetle. He stated that because of the severity of the burn, only a small percentage of the trees actually succumbed to beetle attack. He continued that the fire created numerous infection corts, allowing the entry of the fungal spores. He noted that moisture content is recognized by the industry as an important factor in the spread of blue stain and contended that it is an industry practice to prevent blue stain by surface drying lumber to less than 18 to 20% moisture content. He asserted that when the purchase was bid in August 1997 there was very little degrade or deterioration of the timber, basing that statement on his conversations with the log buyer for Wisconsin California (Bob Fehly) who had purchased logs from an adjacent sale on private property. Mr. Seaberg also made a variety of conclusions in his report which relied upon a contention that 15% blue staining reflected the industry standard. Using that standard, Mr. Seaberg set out

calculations as to anticipated and actual blue stain through 1998. We do not specifically address that part of his report, for during his testimony, Mr. Seaberg disclaimed the calculations he made in the report stating that his later calculations in A-5 were more accurate. At the hearing, he was asked about the origin of the 15% as an industry standard. He cited the FS timber sale appraisal handbook as the origin for the alleged industry standard. He, however, was unable to explain the matter further and did not produce the handbook or a specific citation to it as evidence to support his allegation. More importantly, when he was asked at the hearing by FS counsel if he had any confidence in the derivation of the 15% figure as he arrived at it in the report appended to Mr. Dwyer's initial claim, he testified that he did not. (AF 226-29; Tr. 242-50.)

50. By letter of September 12, 1998, while the Appellant was still waiting for an answer from the FS on Appellant's initial claim, the Appellant through Wesley R. Higbie, a newly retained attorney, wrote the FS. Mr. Higbie stated that the purpose of his letter was to put the FS on notice that Mr. Dwyer was experiencing significant loss under Standard Provision Clause B8.12 Liability for Loss. Mr. Higbie noted that recognition of this fact may bear on the FS determination of Mr. Dwyer's pending claim for relief under the Catastrophic Damage provisions of the contract. (AF 287-89.) In citing to clause B8.12 and B8.11 dealing with retention of title, Mr. Higbie referred the FS to several cases where the Board had interpreted the clause. More specifically he stated, that "Liability under this clause is not conditioned on the loss being unforeseeable or extraordinary," continuing by noting that losses from fire, flood, insects and disease are foreseeable in that they occur every year somewhere on the national forests.

51. On September 30, 1998, the CO issued a letter that he called a final decision. The letter responded to the July 2, 1998, claim from the Appellant, which the FS pointed out had not specified a dollar amount. The decision solely addressed the catastrophic damage theories. It did not address clauses B8.11 and 8.12, which had been cited as the new basis of Appellant's claim by Mr. Higbie, in his September 12 letter. In the September 30 decision, the CO concluded that purchaser was not entitled to catastrophic damage adjustments when timber deterioration is caused by insects or disease, when the sale was originally sold as a salvage sale (AF 9-15.) As an attachment to the decision, the CO also included a two-page document dated August 18, 1998, from Dr. John Kliejunas, Regional Forest Pathologist. (AF 17-18). The document addressed some of the points made in the earlier referenced report by Mr. Seaberg. Dr. Kliejunas stated that moisture and temperature conditions within the wood help govern the progress of blue stain fungi in wood, however, wood in a standing killed tree absorbs very little moisture in the first few years after death, even where the climate is wet. He stated that he thought that temperature rather than moisture would play a larger role and that lower temperatures which he believes were associated with the wet winter of 1997/98 winter would slow the progress of blue stain. He then pointed out, through example, that a single factor may not always have the same effect as to deterioration. He agreed with Mr. Seaberg as to the practice of drying lumber to retard blue stain, but pointed out that the practice dealt with green cut lumber and not standing trees. He also noted that it is a common practice to retard blue stain in cut logs by keeping the logs wet through sprinkling or submersion in water. Finally, he noted that during the first 12 months after a fire, fungi attack sapwood.

52. Dr. Kliejunas then specifically addressed the expected status of blue stain by the end of the second year. He stated that pines generally have blue stain throughout the sapwood by the end of the second year and by the end of the third year practically no sapwood is salvageable because of decay fungi. He continued that in pines the first sign of deterioration is staining of the outer sapwood and blue stain ordinarily becomes evident within the first year after the fire. He said that sugar pine sapwood stains rapidly and by the end of the second year the sapwood is 75% deteriorated. More than three fourths of the board foot volume of sapwood is usually blue stained by the end of the first year after the fire. With ponderosa and Jeffrey pines, most of the sapwood has become blue stained and incipent decay has begun. (AF 18.)

53. Appellant removed approximately 1,230.87 MBF of ponderosa and sugar pine on this sale, all of which was delivered to Wis-Cal mill. (AF 323, 326; Tr. 357; A-7). As to the remaining timber, the FS agreed to delete approximately 2,239 MBF of timber that had originally been in the sale. This was the subject of a modification, which is not part of the record. The parties disagree over why the FS deleted that timber, with the FS asserting that the timber was removed due to checking, a cracking or drying out of timber from the outside in, and Appellant contending that the timber was deleted because of blue stain. (Complaint (Comp.) 15; Tr. 321-24.) Checking makes logs unusable as far as the scaling cylinder. Generally on a fire sale, checking starts in the smaller diameter trees when the tree starts breaking down and works up to the larger diameters through time. (Tr. 322-23.) Appellant has provided no evidence to establish that the FS removed the timber due to blue stain and Mr. McCabe has acknowledged that no one measured the amount of blue stain in the deleted timber. Thus, any conclusion we would draw as to the respective arguments on the deleted timber would be speculation. (Tr. 321-24.)

54. The Appellant completed logging and all other operations on the sale by September 30,1998, two months before the contractually specified termination date (AF 34, 323; Tr. 124). According to the Appellant's scaling reports, approximately 60% of the timber it ultimately harvested was stained (750 MBF stained out of 1,231 MBF cut) (A-8). Appellant contends that when all of the Addington timber is considered, including the 2,239 MBF that were deleted (which Appellant claims was blue stained), approximately 86% of the timber was stained. (Comp. 17.) As noted above, the FS disagreed and the Appellant has provided no substantive evidence to support a finding that the deleted timber was deleted for any reason other than the timber was cracking (checking), as reported by the FS (Tr. 321-24).

55. According to the FS, the amount of blue stain evident in the summer of 1998 was normal for two-year-old fire killed pine. None of the FS officials who visited in the summer of 1998 were surprised by the amount of blue stain present. (Tr. 319-20, 468, 523.) According to Dr. Kliejunas, having 60% of the pine logs blue stained after two years would be unusually low (Tr. 474-75).

56. On March 22, 1999, Appellant filed a claim letter where it identified clause B8.11 and clause B8.12 as the basis for recovery and quantifying the claim (for the first time) at $135,430. The claim included a downward allowance to account for 15% of the timber being blue stained. (AF 20.) Appellant used a calculation, prepared by Roberta (Olney) Dwyer, of timber value loss to establish

the dollar figure for the claim. The calculation set out the volumes by MBF of bright and blue timber by species and diameter class. Mr. Dwyer multiplied the MBF for blue stain for each diameter by what Appellant called the blue stain penalty (the amount by which Wis-Cal's payments to Mr. Dwyer were reduced for each size and species due to blue stain). (A-2, 6, 8.) The penalty varied from $100 to $250 per MBF, depending on log diameter (A-2). Mr. Dwyer calculated the loss as $172,351, for an average blue stain penalty of $230 per MBF (AF 24; Tr. 296-97). In the claim letter, Mr. Dwyer made an allowance of $36,921 to reflect Dwyer's expectation at the time of bidding that 15% of the timber would be blue when harvest was completed (AF 21, 24). When asked to provide the basis for the 15% Mr. Dwyer stated, " Fifteen percent is what I have always figured in on all my burn sales, it's just a standard thing." He considered it to be an industry standard for a sale of this nature. (Comp. 18; AF 21, 228; Tr. 37, 145-46.) While Mr. Dwyer insisted that under normal conditions blue stain would not begin showing up until almost two years after a fire burn, he could identify no scientific or professional publications to support the position (Tr. 145-46). The timber volumes used by the Appellant were from summaries of scaling reports and the prices were from the Wis-Cal Lumber Co. purchase order. The FS did not provide evidence to contest the volumes used by Appellant nor did it attack the Wis-Cal prices. Therefore, we have no reason to doubt the accuracy of the numbers provided by Appellant. (AF 24; A-8 (the two are the same except the 15% allowance is calculated differently, with the adjustment in A-8, the latter created document, being $42,416).) Set out below is the quantity of blue stained timber by MBF for various sizes of ponderosa pine, the amount of bright timber and the dollar difference per MBF between what the mill paid Mr. Dwyer for bright versus blue timber of that size. Finally, in the right hand column, we show the dollar loss claimed by Mr. Dwyer, arrived at by multiplying the quantity of blue timber times the dollar difference.

25 + inches	276.56 MBF (blue)	148.62 MBF (bright)	$250 per MBF	$ 69,140
20-24 inches	229.72 MBF (blue)	103.46 MBF (bright)	$200 per MBF	$ 45,944
15-19 inches	148.82 MBF (blue)	106.90 MBF (bright)	$250 per MBF	$ 37,205
13-14 inches	28.76 MBF (blue)	28.91 MBF (bright)	$200 per MBF	$ 5,752
8-12 inches	24.64 MBF (blue)	33.17 MBF (bright)	$200 per MBF	$ 4,928
6-7 inches	1.60 MBF (blue)	.74 MBF (bright)	$100 per MBF	$ 160
			TOTAL	$163,129

(AF 24; A-8.)

In addition to the above, Mr. Dwyer presented a similar breakdown for sugar pine. That claimed loss totaled $9,222. The total volume of blue timber for sugar pine was 40 MBF and the volume for bright timber was 58.76 MBF. Of the 40 MBF of blue timber, 23 MBF were for trees over 20 inches and in each of those instances, the bright timber significantly exceeded the amount of blue timber. For timber with a DBH of 15 to 19 inches, the blue volume was 11 MBF and the bright was 6 MBF. The amount of timber for sugar pine under 15 inches was de minimis (AF 24; A-8.)

57. The CO denied the $135,430 claim (AF 24) by final decision letter of July 29, 1999. There the CO concluded that clause B8.12 did not provide a remedy for timber-value-losses that were expected at the time of bidding and accounted for in the (FS) appraised value of the Included Timber. The CO said that by providing a $100/MBF discount, due to blue stain, on the Included Timber at the time the sale was offered, the FS effectively bore the timber-value-loss associated with that condition. The CO determined that applying clause B8.12 to this case would result in a second and unjustified discount for the purchaser. Alternatively, the CO concluded that even if clause B8.12 covered the expected loss, the purchaser was not entitled to recovery because it was negligent by not harvesting in a timely manner. (AF 1-8.)

WAS THE BID TIMBER BLUE STAINED IN AUGUST 1997

58. Generally, as indicated in scientific studies and papers, blue stain is measured by the actual volume of wood stained. The measurement can be for a tree or log, however in most scientific studies, the more prevalent measure used is staining of the tree. (Tr. 479-80; G-7A at 8,14-15, G-7B at 1.) In contrast, lumber mills measure stain by the log not the tree. A tree can often produce multiple logs, and staining may affect a single log from a tree or all of the logs. When a lumber mill grades a log, it grades the log as entirely stained, even if only a small segment of the log is stained. (Tr. 128, 208, 218.) This was illustrated by Mr. Seaberg who stated that if one had a 16-inch-by-16-foot-log (approximately 160 BF) which had two or three splotches of stain, that entire 16-foot log (160 BF) would be considered blue stained for mill purposes (Tr. 218-20). Accordingly, the limited visible blue stain (various radial lines) shown in various photographs, particularly G-1, photo 3, would cause the entire log to be treated as stained by a mill, notwithstanding that much of the volume of the log was not otherwise blue. (Tr. 207-08, 219-20; G-1).

59. Blue stain does not necessarily affect or become present in every fire killed tree. When it develops, it does so over time. Pines are particularly susceptible to the introduction of blue stain. A large diameter tree will deteriorate more slowly than a smaller diameter tree and an older tree more slowly than a younger tree. (G-7A, p. 3.) The butt log of a dead tree will deteriorate more slowly than the upper logs, as more moisture is available at lower levels. Thus, blue stain in a dead tree is more apt to be located at higher points rather than lower segments. (G-7A, p. 4.)

60. The parties each presented evidence to support their position, as to the probable presence of blue stain at various times. To support the contention that the sale was essentially blue stain free in August 1997, Appellant first relied on observations made by Mr. Dwyer, Mr. Fehly and Mr. Petersen. (AF 21, 277; Comp. 13; Tr. 23,131, 285.) We do not question what Mr. Dwyer observed when he chopped into various trees. However, his observations need to be looked at in conjunction with other evidence as shown on photos and discussed in testimony and literature. That competing evidence demonstrated that staining is often patchy and localized and staining first appears in higher segments rather than lower segments of trees. (Tr. 269-70, 526; G-1, G-7A at 4 and 6.) Consequently, the fact that Mr. Dwyer did not see blue stain at the time of his site visits does not mean it was not present in other segments of the trees where he cut.

61. Turning to the observations of Mr. Petersen and Mr. Fehly, we again do not question what they saw. However, neither testified at the hearing and their statements do not contain sufficient detail for us to equate their observations to the conditions in August 1997 at Addington and to overcome other FS evidence. (A-3, A-4.) Mr. Petersen reported that he had been involved in a logging operation on adjacent property in the summer of 1997 (returning in the summer of 1998). He said that the condition during logging in 1997 was excellent and when he returned in 1998, the timber had significantly degraded, which continued to be the case through the summer. However, Mr. Petersen does not say when he logged in 1997, nor does he address the similarity of conditions. Further, Mr. McCabe of the FS stated that logging of adjacent property began at the latest, during the spring of 1997. (Tr. 360.) As to Mr Fehly, he stated that he first visited the site prior to the bid date of August 26, 1997, and the timber appeared to be in good shape as to blue stain. He, however, relied, as did Mr. Dwyer, on chopping into some trees. Again, we have no details as to the specific attributes of the site or how he conducted the chopping examination. (A-4.) Finally, both Mr. Petersen and Mr. Fehly attributed increased blue stain in 1998 to the heavy rain, with Mr. Fehly saying it was from El Nino and Mr. Petersen simply referring to heavy spring rains and rain in winter (1997/1998) (AF 227; Tr. 200, 211, 224-26, 255-56, 359-60; A-4).

62. The Appellant also presented technical evidence from Mr. Seaberg, whose report of July 2, 1998, has been addressed earlier (AF 226-29). In forming his opinion as to the status of blue stain development at the end of August 1997, Mr. Seaberg relied on what he had been told by Mr. Dwyer and Mr. Fehly as to conditions. He had no independent knowledge. (AF 227; Tr. 200, 211, 224-26, 255-56; A-5 at 1.) Scale records on this sale show that of the 1.2 million board feet cut and removed, approximately 60% of the board feet were blue stained (Tr. 217).

63. The FS presented its position as to the development of blue stain through three witnesses and through reference to articles which addressed the development of blue stain in fire killed timber. Mr. McCabe expected the trees to be blue stained at the time of bidding. He said that he based that conclusion on his over 30 years of experience, much with fire killed timber. He acknowledged that he had not conducted an examination of the Addington timber for blue stain. He reflected his expectation in the TEA he prepared for bidding purposes and did that by adjusting the FS pre-bid estimate (the FS appraisal) by $100 an MBF to reflect the anticipated lessened value due to blue stain. (Tr. 303-09, 311-14, 319.)

64. The FS also presented testimony from Mr. John Clifton Johnson, an FS employee and an experienced master log scaler for the northern-half of California. He had 30 years experience in the industry. Part of the job of a scaler is to recognize defects and deterioration in timber. Mr. Johnson stated that he would have expected 100% of the pine trees to be stained a year after they were killed by the fire. (Tr. 519-21, 523-24.) He testified as to what he described as a similar situation relating to fire killed pine, near the Addington area, where in his examination of that timber, he found that every tree he looked at had blue stain (Tr. 524-26; G-9, G-26). In addition, the FS presented a declaration from Mr. Stephen Hagan, a local logger, who stated he had viewed the sale area and was not surprised by the amount of blue stain given the amount of time that had passed. Mr. Hagen,

however, was addressing conditions in the summer of 1998 and not August 1997. Further, he did not appear at the hearing and his declaration, like the observations reported by Mr. Petersen and Fehly, lacked detail necessary to sustain a comparison with conditions at the critical times at Addington. (G-2.)

65. The FS final witness was Dr. John Kliejunas, a forest pathologist with the FS. In his work and training, Dr. Kliejunas has studied various pests and pathogens that affect forest and urban trees, such as blue stain. (Tr. 461-62.) He holds a PhD in plant pathology from the University of Wisconsin and since 1972, has regularly held positions involving work in plant pathology. At the time of the hearing, he was Leader, Plant Pathology, USDA Forest Service, Pacific Southwest Region. He has published numerous articles in journals and conducted approximately 75 biological evaluations. (G-6.)

66. He testified as to the progression of blue stain in a fire killed forest such as Addington. He first pointed out that pines, the type of tree on this sale, have the fastest rate of blue stain. Within a month or two after the fire, wood boring insects, which vector blue stain, would have begun to infest the dead and dying timber. (Tr. 468, 477; G-15 at 1.) During the fall of 1996, airborne fungal spores may have vectored stain into the dead and dying timber (Tr. 258). Given the immediate colonization by wood boring insects and potential for infection by airborne spores, some of the burned trees were likely blue stained in the fall of 1996. According to literature, ambrosia beetles, sometimes called pin-hole borers and essentially sapwood borers, are usually the first to attack the sapwood and frequently the first to attack fire killed trees. He thought that the borers or ambrosia beetles were probably the primary vectors of blue stain. (Tr. 258, 476-77, 502, 506-07.)

67. Per Dr. Kliejunas, from late August 1996 to the end of the fall of 1996, the growth of blue stain would have been essentially dormant, although there would have been some insects that would carry blue stain into the trees during that time (Tr. 502-03). As of October 1996, there may have been some blue stain that had been introduced into the tree from the wood boring insects, in contrast to bark beetles like the western bark beetle. Blue stain that was introduced in 1996 would begin to grow in the spring of 1997. (Tr. 506-07.) Following the typical progression for the August 1996 fire, it would not have been until the spring of 1997 that the bark beetles would come into the dead trees. They would introduce blue stain fungi as well as open up a further infection course for decay fungi and for secondary wood boring insects, such as the pin-hole borers. (Tr. 463.)

68. In the opinion of Dr. Kliejunas, by April 1997 there was probably significant growth of blue stain in the burned trees due to the increased insect activity and fungal growth that occurs with rising spring temperatures, and the blue stain would occur relatively quickly within the spring of 1997 (Tr. 503-04, 508; G-7A at 5-6). In his view, by August 1997, the majority of the pine timber burned in the fire was almost certainly stained. More specifically, he expected that by August 1997, 95 out of 100 trees would be expected to have visible blue stain. (Tr. 509.) In terms of how that translated into the percentage of board feet that would be stained (in an exchange with FS counsel regarding his opinion on the accuracy of Mr. Seaberg's estimate in board feet on A-5, where Mr. Seaberg used expected stain of 0 to 5% for the first year), Dr. Kliejunas stated that after a year, he would have

expected the percentages to range from 50 to 70%. He described those percentages as low and attributed it to the severity of the fire and the impact of that on lessening the colonization of the western bark beetle in the first year. He reiterated that the severity of the fire would not eliminate the development of blue stain, because there were other insect vectors of blue stain such as the wood boring insects, round headed borers, flat headed borers and ambrosia beetles. (Tr. 476-77.) The testimony provided at the hearing is also consistent with his August 18, 1998, response to the CO, where he stated: "blue stain ordinarily becomes evident within the first year after the fire." (AF 18; Tr. 472.)

69. Regarding two years after the fire, Dr. Kliejunas said that based on his experience and knowledge of scientific literature, he would expect close to 100% of fire killed pine trees to be stained two years after the fire (Tr. 468-69). He said in the earlier referenced August 18 letter that "Pines generally have blue stain throughout the sapwood by the end of the second year." (AF 18.)

70. To further support the FS position that blue stain was present in both the first and second year, the FS referred the Board to various passages in articles dealing with fire killed timber. In *Deterioration of Fire-Killed and Fire-Damaged Timber in the Western United States,* prepared in April 1992, the authors stated, "Blue stain will appear in susceptible trees within the first year." (Tr. 471; G-7A, p. 11.) In an article titled *Survivability and Deterioration of Fire-Injured Trees in the Northern Rocky Mountains,* authored October 2000, the authors said, "some tree species are more susceptible than others. Sapwood of pines is often completely blue stained within a year after death." (G-7B.) In the article *Deterioration of Fire-Killed Timber in Southern Oregon and Northern California,* issued October 1996, the authors said, "One year after death, the sapwood of the pine was heavily stained." (G-7D.) *In Rate of Deterioration of Fire-Killed Timber in California,* issued in 1955 by James W. Kimmey, he said, "In sap tree species especially the pines, the first sign of deterioration usually is standing [sic] staining) of the elder sapwood. This so-called blue stain, often referred to as sap stain, ordinarily becomes evident within the first year after the fire." (G-7C.) In addition, Kimmey made the following additional points. Principal agents causing deterioration are fungi and insects. The initial attack by the two agents is usually considered to be practically simultaneous and they work together at generally similar rates. (G-7C, p.5.) In some tree species, especially the pines, the first sign of deterioration usually is a staining of the outer sapwood. This so-called blue stain (also referred to as sap stain) ordinarily becomes evident within the first year after the fire. Immediately after the fire, killed timber contains approximately the same merchantable volume that it did just before the fire. During the first 12 months after the fire, fungi attack the sapwood. In most burns they cause little volume, or cull, if the timber is salvaged before the end of the first year, though often some degrade will be encountered toward the end of that year. This degrade is caused largely by blue stain in the sapwood. On burns at lower elevations and especially on southern exposures, the amount of degrade will be considerably more than average by the end of the first year. (G- 7C p.10, G-2 p.1.) The Addington Sale had a southern exposure (see Finding of Fact (FF) 5).

71. A particularly pertinent article in relation to this appeal is the above-referenced Kimmey article (G-7C) and study. That article addressed a study by Kimmey, over a five-year period, where Kimmey studied the effects of fire on fire killed timber. Particularly pertinent to this appeal is that

Kimmey quantified the affect of blue stain for each year. (G-7C, p. 16.) The article is particularly applicable because both Dr. Kliejunas and Mr. Seaberg relied on Kimmey's study with Mr. Seaberg stating that it was the primary study relied upon in the industry regarding blue stain and degradation of fire killed trees. Moreover, Mr. Seaberg incorporated the Kimmey study numbers into his preparation of A-5, where he attempted to justify the claim of a 15% industry standard for blue staining. (Tr. 214, 469-70; G-7C.)

72. As part of his study, Kimmey prepared a graph, Figure 6, which quantifies the expected deterioration for the timber studied and which showed blue stain in ponderosa pine for the first year by both cubic volume and "percent of gross board foot volume," as measured against tree diameters starting at 10 inches and going to 60 inches. The results for the end of the first year for blue stain, using board feet, were as follows: (1) 40% for 25+ inches; (2) 42.5% for 20 to 24 inches; and (3) 47.5% for 15 to 19 inches. (G-7C, graph 6.)

73. As addressed above, Kimmey had separate graphs which showed cubic and board foot measurements. In explaining the difference, Kimmey stated, "The actual extent of deterioration is best shown as a percentage of the cubic-foot-volume, because only actual volumes of deteriorated wood are deducted from the gross cubic-foot-volume. In board foot computations, it is necessary to deduct some sound material that is interspersed with deteriorated wood; therefore, the percentage of the board-foot volume that is deteriorated is greater than the cubic foot volume deteriorated."(G-7C.) The reference to including non-deteriorated timber in a board foot calculation is consistent with the testimony that once there is some blue stain in a log, the entire log is treated as blue. (see FF 58.) In the article, Kimmey also provided a narrative comparison as to the two measurements for sugar pines. He stated that ordinarily more than one-half of the cubic foot volume and more than three-quarters of the board-foot-volume of the sapwood was blue stained "by the end of the first year after the fire." As to ponderosa and Jeffrey pines, he states that at the end of the first year after the fire about one-fourth of the cubic volume of the sapwood contained limited deteriorations due principally to blue stain. The article narrative did not specify a board volume of deterioration for the ponderosa and Jeffery pines; however, as noted above, the amount of blue stain, by board feet was addressed and quantified in the graph at Figure 6.

74. Neither party challenges the accuracy of Kimmey's findings nor the applicability of his numbers as a guide in this appeal. The parties, however, differ on two important points in applying Kimmey's findings to this sale. According to the Appellant, Kimmey's reference to one year after the fire would not in this case properly refer to August 1997. Instead, it must be read to mean 1998. In A-5, Mr. Seaberg applied Kimmey's percentages to the end of the 1998 season. Appellant arrives at its position by pointing out that the parties agreed that the bark beetle would not be particularly active after August 1996 fire, until the spring of 1997 when the bark beetle and vectors introducing blue stain would resume. Thus, according to Mr. Seaberg, 1997 would be the first full season after the August 1996 fire. Using Mr. Seaberg's charts in A-5 as reference, he stated that the end of the first year after the fire would be slightly more than a year, described that first year ending September through December 1997 (where he applied 0 to 5% staining) and the end of the second year would be end of 1998 (where he applied Kimmey's percentages). He based his designation of years, not on

Kimmey, but instead on the experience of what Mr. Dwyer and Mr. Fehly reported to him as to conditions in August 1997. (Tr. 257-60.) Since he was told that there was virtually no blue stain in August 1997, Mr. Seaberg bumped Kimmey's numbers forward a year. The parties also disagree as to what the Kimmey numbers measured. The FS, through Dr. Kliejunas, took the position that Kimmey was measuring actual volume. The Appellant took the position that when Kimmey was measuring using board feet, he was basing that on scaling procedures. It is also of note that while Dr. Kliejunas was very knowledgeable as to development of blue stain, he did acknowledge at several points that he was not particularly familiar with the scaling process or how mills handled the measurement of blue stain. (Tr. 260-65, 478-80, 512-14.)

75. The computation by Mr. Seaberg at A-5 essentially assumes no blue stain growth prior to May 1997. In A-5, Mr. Seaberg gives his opinion as to the expected amount of blue stain on this fire for the first and second years. To make his point he used three sets of charts. The first took the estimated volume of timber to be removed under his scenario for the first year. He broke the timber down by DBH and applied to that estimated first year harvest either 0% anticipated blue stain (low bound estimate) or 5% anticipated blue stain (high bound estimate). He confirmed that the source of the 0% and 5% was "based on information provided by Bob Fehly at Wisconsin-California, who harvested volume from adjacent private land." For purposes of volume, he assumed that two-thirds of the timber was to be harvested in the fall of 1997. (Tr. 237; A-5.)

76. Mr. Seaberg then addressed the second year, using charts, which again were divided into low and high bound estimates. For the second year chart he used the remaining one-third of volume (that not anticipated to be harvested in the first year) which he identified as 1,157 MBF. He then applied percentages ranging from 30% to 45% on the low bound estimate and from 35% to 50% on the high bound estimate. Those percentages were the percentages used by Kimmey for "one year after the fire." Mr. Seaberg then combined his results and arrived at a total for anticipated blue stained timber which he applied against the total sale volume. It is noteworthy that the combined percentage under his two-year calculation came to approximately 15%, the same number used by Mr. Dwyer in his pre-sale bidding adjustment. The 15% is also the same percentage that Mr. Seaberg used in his July 1998 letter. (Tr. 215-18, 236; A-5.) Although he used 15% in both 1998 and in the new charts prepared in April 13, 2001 (A-5), Mr. Seaberg clearly stated that what he wrote on April 13, 2001, was more accurate than what was contained in his July 2, 1998, letter and report. He could support the April 2001 calculation, but not the methods used in July 1998, which coincidentally came to the same 15% number. (Tr. 242-49.)

77. In A-5, Mr. Seaberg concluded that based on normal conditions for this site, the fire that burned in August 1996 would have less than 5% blue stain until May 1998 and 15% at the end of harvesting (Tr. 236). He cited three factors which led him to conclude that Mr. Dwyer should have anticipated 15%. Those were: (1) the condition of the timber at the time of sale; (2) the removal of about two-thirds of the timber volume during the first season; and (3) a normal spring that would have allowed for timely removal of remaining volume. When asked if there was something unique about this sale area, he said he thought the area was dryer than the areas studied in literature and there was less blue stain than he would normally have expected. (Tr: 236-38.)

78. Mr. Seaberg's conclusion as to blue stain is dependent on his finding that at the end of the first year (after August 1996) only 0 to 5% was stained. He based much of that on the reasoning that the western pine beetle did not infect substantial amounts of blue stain by that time. (Tr. 258.) He acknowledged, however, under cross-examination, that the western pine beetle is not the only factor [sic] (vector) of blue stain, acknowledging that blue stain can be introduced through windblown spores that go into the holes or cracks in the bark. Finally, he also stated, "There are probably other borers and stuff that could do the same thing, but with the western pine beetle is the one I'm familiar with." (Tr. 257-59.) The following exchange amplifies the license he took regarding interpreting and applying Kimmey's numbers:

> A. Because the experience of what they found on the sale was not what the publication said, as far as what they experienced in the fall of 1997. They did not have the blue stain levels that Kimmey shows here.
>
> Q. So you're using Kimmey for something entirely different than what Kimmey says, right?
>
> A. I'm bumping it up, you know, the next season.
>
> Q. What Kimmey says, this is what you should expect one year after the fire, and you're saying no, in this area I'm going to take Kimmey and I'm going to apply it to a year and a half because of conditions, is that correct?
>
> A. Yes that's about it.

(Tr. 260.)

79. The FS characterized Mr. Seaberg's position as to the amount of expected blue stain during the first year, as tailoring Kimmey's data to the specific conditions that were reported to him regarding the Addington Sale, but with no scientific or other support (Tr. 259-60, 479). The FS also pointed out that Mr. Seaberg's analysis was based on the assumption that two-thirds of the timber would be removed in the fall of 1997. The FS further contended that Mr. Seaberg incorrectly assumed that Kimmey's data is referring to the amount of stain in a log as graded by a mill when instead, the paper in the FS view, refers to the true amount of stain by volume in a given log and not the scaling grade. (Tr. 478-80, 512-14.) The FS continued, that even if the Kimmey paper had been written from the perspective of a lumber mill, in presenting what would be the normal amount of blue stain two years after the fire, Mr. Seaberg still misuses the data, by not properly measuring one year after the fire (Tr. 259).

80. During cross-examination, the Appellant elicited some testimony from Dr. Kliejunas regarding seasons and years. We find the testimony confusing and do not conclude from it that Dr. Kliejunas was taking a position other than that using Kimmey, the end of the first year after the fire would be August 1997. (Tr. 484-86.)

81. Appellant in its final brief and arguments justifying an adjustment, did not emphasize its arguments regarding delays and El Nino and instead focused on application of clause B8.12. We have earlier addressed in detail the facts surrounding the road package controversy and the affect of the Star timber sale. We have not, however, addressed in depth the El Nino argument where Appellant described the rains in 1998 as catastrophic. Mr. Seaberg claimed that Kimmey supported the proposition that increased and excessive rainfall causes excessive blue stain. However, under cross-examination, he admitted that he could cite no support for the proposition that increased rainfall causes increased moisture in the log in a standing dead tree. (Tr. 223-24.) He further conceded that the amount of rain from November 1997 to April 1998 would not have had a significant affect on blue stain. Rather, he attributed the increase in staining to rains in May and June 1998. (Tr. 252-53.) He did not conduct a historic analysis of rainfall and had no documents to support the claim that the rainfall was of historic proportions. (Tr. 221.)

82. Dr. Kliejunas expressed several opinions regarding rain. He said that rain during the winter of 1997/1998 would not have caused an increase in blue stain as a general rule and confirmed that increased rain does not cause increased moisture in standing trees. To the extent increased rain would do so, it would be slight. (Tr. 464-65.) By way of explanation, he pointed out that water comes to a live tree through the roots. If a tree is dead, it is still standing. It is in a vertical position so he could not see how it would be absorbing rain water. Plus there would be bark for the first year or two which would be a protective barrier against absorbing rainfall. He conceded that if a branch is broken off, then some moisture might come in through that location. He did not think that would be significant. His opinion was that having heavy rainfall would not cause a noticeable increase in the amount of blue stain in trees such as those here that had been in the Fork Fire. (Tr. 465-66.)

DISCUSSION

Appellant seeks $172,351, which it identifies as the timber value loss it incurred because of the development of blue stain in significant portions of the Included Timber harvested on this project. Appellant asserts that it has met all of the elements necessary for relief under contract clause B8.12 Liability for Loss. It contends that the language in clause B8.12 should be strictly construed. The $172,351 claimed does not reflect a credit for blue stain anticipated by the Appellant during the sale. (FF 22.) Appellant asserts that clause B8.12 does not require it to provide the FS with such a credit, but states that if the Board finds that an equitable adjustment has to reflect Appellant's bid expectations, then the Board should reduce the claim by 15% and award $129,936 rather than the $172,351.

The FS disagrees with Appellant's interpretation of clause B8.12 and with the application of the clause to the facts of this appeal. The FS contends that the coverage of clause B8.12 is limited to an unexpected event which intervenes after the contract is awarded and which significantly reduces the value of the timber to be harvested. The FS contends that in this sale, no unexpected event intervened to affect the natural deterioration of the timber. The FS asserts that timber became stained as would any trees killed by fire. Further, the FS contends that even if clause B8.12 allows reimbursement due to damage from blue stain, the Appellant is still not entitled to relief because: (1)

the timber in issue was stained at the time Appellant bid the sale; (2) further damage by blue stain was foreseeable as the time would pass between bid and harvest; (3) Appellant could have eliminated or minimized the damage by promptly operating the sale in the fall of 1997; and (4) Appellant was negligent in not proceeding with the operation of the sale in the fall of 1997.

During Appellant's initial pursuit of relief and in the early stages of the appeal process, Appellant put forth several other theories, which it did not emphasize in its briefing but did address at the hearing. Some of these theories involve disputes over whether the FS delayed Appellant due to a lack of road plans, whether Appellant was delayed because of the Star Sale and what effect the weather, and particularly rains, had on the Appellant's contract performance. To the extent those matters affect the basic positions of the parties and our decision as to entitlement in this appeal, they too will be addressed.

BACKGROUND

This sale was the result of the Fork Fire in the summer of 1996. The sale was sold as a scaled salvage sale. (FF 1, 5, 10.) Blue stain is a condition that occurs at some point in many fire killed trees. At the time the sale was bid, both Appellant and the FS were aware of blue stain in relation to fire killed timber and aware that blue stain would tend to develop and increase as one got further in time from the date of a fire. The FS expectation as to blue stain on this sale was reflected in the TEA analysis prepared by Mr. McCabe, who reduced the FS project estimate or appraisal by $100 for each MBF of timber, because he expected the trees to be blue stained by the time of bidding and harvest. In contrast, Appellant did not expect significant blue stain. Appellant, however, anticipated that approximately 15% of the timber might be blue stained by the time of harvest and based that expectation on what Mr. Dwyer described as the industry standard. (FF 3, 7, 9, 22, 24.) There is no dispute that the blue stain developed prior to Appellant's cutting the disputed timber. It is also not in dispute that under clause B8.11 and clause B8.12, the FS had title to the timber prior to its being cut. Finally, it is clear that blue stain decreases the value of timber, but does not generally, and did not in this case materially decrease the volume or quantity of timber available to be harvested. (FF 3, 9, 15.)

Both of the mills that operated in the sale area paid less for blue stained logs than bright logs. Appellant sold the logs from this sale to Wis-Cal and sold them at the same blue and bright prices, as reflected by that mill at the time Appellant bid. There has been no evidence or argument that Appellant could have secured a better price for the blue stained timber than it did. (FF 9, 56.)

Finally, in setting out its claim calculation of $172,351, Appellant compiled a listing of the volume of timber at various sizes, identified how much of that timber was bright and how much was blue stained, and identified the MBF per species. The Appellant also identified the dollar amount of difference per MBF between blue stained and bright timber of various sizes and species. (FF 56.) The FS has not challenged any of the Appellant's quantities, nor has it challenged the payment differential used by Appellant.

COVERAGE OF CLAUSE B8.12

Clause B8.12 (FF 15) provides in pertinent part as follows:

> Section B8.12 Liability for Loss: If Included Timber is destroyed or damaged by fire, wind, flood, insects, disease or similar cause, the party holding title shall bear the timber-value loss resulting from such destruction or damage, except that such losses after removal of timber from the Sale Area, but before Scaling, shall be borne by Purchaser at Current Contract Rates and Required Deposits. There shall be no obligation for Forest Service to supply, or for purchaser to accept and pay for, other timber in lieu of that destroyed or damaged. This Subsection shall not be construed to relieve either party of liability for negligence.

Blue stain causes cosmetic damage to timber which reduces the amount that a mill will otherwise pay for the timber (FF 3, 9). Blue stain is a fungus and generally fits within the scope of "insects, disease or similar cause." (FF 3, 4, 49, 66-68, 70). At the time blue stain developed on this sale, the timber had not been cut. Under clause B8.11, it is clear that the FS retains title until the timber is cut and removed from the sale area. (FF 15, 57.) Given these findings, if we take clause B8.12 at face value and apply its plain meaning, the clause puts risk of loss on the FS, absent a showing that the Appellant was negligent.

The FS argues that we should not read the clause literally, contending that to do so will result in an illogical and unfair result. The FS provides a reading based on an alternative interpretation of some of the clause language. The primary focus of the FS interpretation is that the damage or destruction of timber cannot occur under the clause if it results from an "expected," as compared to an "unexpected event or cause." The FS contends that one cannot have a timber value loss, where the purchaser, at the time it submitted its bid, should have expected that loss to ultimately occur. The FS points out, and factually we agree, that a purchaser on a fire killed salvage sale should and would expect the timber to develop blue stain over time. Development of diseases and infestation by insects is an expected part of the cycle for fire killed timber and will result in degradation and loss of value over time. (FF 3, 7, 8, 22, 49, 63-74.)

We further recognize that among the named occurrences, listed in clause B8.12, are flood, windstorm and fire, all of which are essentially sudden and unexpected events. While those occurrences are possible on virtually any timber sale, we recognize that they are not the type of occurrence which one could predict with any certainty. That contrasts with damage by disease or insects, the other named occurrences in clause B8.12 and the general category under which blue stain falls, which, as is evident from much of the literature, are often not sudden and generally (given enough time) are predictable. (FF 70.) Moreover, what is particularly noteworthy as to the various listed occurrences, is that the clause makes no distinction between the Aexpected@ and Aunexpected events or causes,@ as to how damage or destruction is to be treated. Thus, the FS is asking us to independently distinguish treatment of the causes and asking us to recognize and apply a distinction not stated in the clause.

We acknowledge that to the extent clause B8.12 has been the subject of litigation, the cases have generally involved damages arising from "unexpected events" and not from deterioration over time. See Rocky Mountain Log Homes, Inc., AGBCA No. 97-125-1, 1 98-1 BCA & 29,716 (fire); Buse Timber & Sales, Inc., AGBCA Nos. 90-168-1, 90-200-1, 94-1 BCA & 26,456 (spiked trees); Neiman Sawmill, Inc., AGBCA Nos. 90-203-1, 91-119-1, 92-187-1, 93-2 BCA & 25,686 (fire); Ken Rogge Lumber Co., AGBCA No. 84-145-3, 84-2 BCA & 17,381 (stolen timber).

The FS urges us to conclude from those cases that in order for there to be coverage under clause B8.12, the damage justifying the adjustment in price must be from an unexpected event. What the FS misses, however, in making its argument, is that there is no language supporting what the FS wants us to conclude. The FS wants us to add a modifier to the clause that is not there. We find no basis to do that. Moreover, the FS can show us no holding where this Board or a court has concluded that damage under clause B8.12 must be from an "unexpected event" in order for risk of loss to fall on the FS.

Historically, coverage under clause B8.12 has been broadly construed and the Board has not read the coverage narrowly. For example, in Ken Rogge, the Board rejected the FS argument that clause covered only natural causes, pointing out that fire and flood could be either natural or man caused or induced. Applying that to the facts in Rogge, the Board then ruled that theft would be a covered cause.

In addition to the plain meaning and lack of a restrictive modifier, another matter is particularly important in assisting us in analyzing the position of the FS and the language of the clause. In B8.12 and in B2.133 of this contract, the FS has set out specific language which limits and excludes certain named situations and causes from coverage. In B8.12, the FS excludes coverage under the clause where the party seeking relief is negligent. In B2.133, Damaged by Catastrophe (and discussed in more detail below), the FS states that the "Catastrophe" clause does not apply (within certain parameters) in the case of damage from forest pest epidemics if Included Timber was sold for salvage or pest control. (FF 15.) We read the wording "pest epidemic" in B2.133, to include within its scope, the insect and disease damage. Clearly, where the FS wanted to set out a specific exclusion affecting a particular type of damage on a salvage sale, it did so, as is evident by B2.133. It could have similarly included language which would have excluded insect or disease damage on salvage sales from coverage under clause B8.12, or limited insect or disease damage to specific conditions or time. The fact that the FS did not, supports the Appellant's position that B8.12 does not contain the exclusion urged by the FS.

In that same vein, we also point out that in the liability for loss clause BT8.12, used for timber sales to be measured before felling, as opposed to B8.12 the clause used for a scaled sale, the FS again demonstrates that where it wants to make exclusions, it does so by specific wording. Just as is the case here, under the BT8.11 clause, title remained with the FS until the timber was removed from the sale or other authorized cutting area. However, in the standard BT8.12 clause, Liability for Loss (not part of the record, but cited in Louisiana Pacific Corp., AGBCA No. 81-144-3, 81-2 BCA & 15.820), the FS, after reciting named occurrences, such as fire, wind, flood, insects, disease or

similar causes, and noting that the party holding title shall bear the timber value loss caused by such damage or destruction, states, Aexcept that such losses caused by insects and disease after the felling of timber, shall be borne by the Purchaser unless the Purchaser is prevented from removing the timber for reasons that would qualify for Contract Term Adjustment.@ Clearly in the BT clause, the FS was treating insect and disease damage differently from named causes such as fire, flood and wind and clearly in BT8.12, liability of loss was different than what was specified in B8.12 the clause in issue in this appeal. The FS could have included in B8.12 language dealing with insects and disease. For example it could have excluded insect and disease damage of an Aexpected nature.@ The FS did not. However, it wants us to interpret the clause in such a manner, notwithstanding that lack of language.

When we look at the FS arguments for not applying clause B8.12 to the blue stain damage, we find policy arguments, rather than an analysis of language. The FS is asking us to interpret the clause in light of FS policy concerns and says when we read the clause in that context, the FS position and reading is more reasonable than that of Appellant, and the Appellant's reading would lead to an unfair result. The FS policy position has some appeal. If we apply this clause to insect or disease damage on a salvage sale such as Addington, we are, as the FS points out, allowing an adjustment for a condition that Appellant should have expected. Under most contract situations, where a bidder should have been aware, or was aware, of the presence or development of a particular condition, the bidder, and not the Government, assumes the risk of loss due to the development of the condition. Here, if we rule for the Appellant we appear to come to an opposite result. In addition, if we apply clause B8.12 to a salvage sale situation such as this, then we need to, and do, recognize that it would be the rare salvage sale that did not have some post-contractual insect or disease damage. The matter is further compounded by the fact that the amount of insect or disease deterioration is directly related to how long the purchaser waits to harvest, with the condition expected to increase as time moves forward. Finally, a decision in favor of the Appellant's reading opens up potential bidding problems. The goal of the FS is to sell the purchase to the bidder who is willing to pay the highest price for the unharvested timber. If a bidder knows that he or she can adjust the price it pays the FS downward, if the timber is damaged or destroyed by normal disease or insect damage after the sale, it opens the potential for bidders to bid unreasonably high. It presents the opportunity for a purchaser to take the chance that if damage occurs before harvest, the price that purchaser will have to pay the FS will be adjusted downward to reflect the lower value and lesser price the purchaser will receive from its buyer. Taking the above into account, it is evident that if we find for the Appellant, the result is a situation that in many respects runs counter to the purpose and operations of a salvage

sale and sets up a situation where, for as long as the timber remains uncut, the FS may be the guarantor as to risk of loss, even for deterioration that should have been expected.[1]
Notwithstanding the above-identified valid policy concerns, we cannot adopt the FS reading in this appeal. We cannot ignore the fact that the plain wording of the clause covers, and does not exclude, damage from blue stain, even where staining should be expected. Further, we cannot ignore that in clause B2.133 the FS specifically excludes from that clause, pest damage on a salvage sale, a wording that could have been included in B8.12 if such were the intent of the drafters. The language in clause B8.12 simply does not say what the FS wants us to conclude. Therefore, even valid policy arguments cannot justify our re-writing the clause.

Moreover, even were we to get over the hurdle of the plain meaning and over the fact that the FS failed to be consistent in setting out exclusions, we would still have to find in favor of the Appellant. We come to that conclusion, because, at best, we would have a case of competing interpretations. Under competing interpretations, we must look to the reasonableness of the non-drafting party's reading and compare it to the interpretation put forward by the drafter. This is not a case where the FS can reasonably establish that the Appellant's reading is patently unreasonable. At best, the FS can argue that the FS reading is more reasonable and more in line with the intent of the contract, but that is not enough. Here the FS concedes that Appellant's reading is conceivable; however, it then characterizes the reading as unreasonable, because Appellant's interpretation reaches a result that will subject the FS to substantial risk. (FS Reply Brief, at 3.) We have examined Appellant's reading and find that the reading is more than just conceivable. Appellant's reading is consistent with the plain meaning of the words and consistent with the absence of exclusionary language, such as that used elsewhere in the contract. We see no ambiguity. The unexpressed, subjective or

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[1] In deciding this appeal on the basis of the language in B8.12, we have been bothered by the question of whether every named or qualifying damage to timber, no matter what the amount or scope (in relation to the total contract) would qualify under the clause for adjustment. Given the facts in this case, these parties have not focused on whether the words Adamaged@ or Adestroyed@ requires a threshold damage of some significance as to the amount of timber affected, before the clause can be involved. An open question remains for fact-specific cases whether some minimum threshold must be satisfied before recovery can occur.

unilateral intent of one party is insufficient to bind the other. Firestone Tire & Rubber Co. v. United States, 195 Ct. Cl. 21, 444 F.2d 547, 551 (1971).

Recently, in our decision in Rich Macauley, AGBCA No. 2000-155-3, 01-1 BCA & 31,350, the presiding judge, in his opinion, construed the plain meaning of the contract in favor of the FS, notwithstanding what he saw as clear evidence that the Appellant had failed to take that language into account in bidding. Macauley was required to absorb costs even though he had not included those costs in his pricing. In ruling for the FS in that appeal, the presiding judge held the parties to the terms of the contract. There, as here, there was no language or other evidence to support the Board ignoring the words the parties used. In Macauley, the contractor could argue that he was on the short end of fairness. Here, the FS argues that strict interpretation would cause an unfair result for the FS. That may be the case. However, just as in Macauley, we hold the parties to the agreement they made.

In an alternative argument, the FS has argued that Appellant's reading of clause B8.12 creates an inconsistency with clause B2.133, Damaged by Catastrophe. The latter clause, as noted above, specifically provides that "Catastrophic" damage does not include damage caused by pest epidemics on salvage sales. (FF 15.) In using clause B2.133 to support its position, the FS's point appears to be that if Mr. Dwyer cannot qualify for relief under clause B2.133, which covers even more extensive damage than that on Addington, then it would be illogical to allow Mr. Dwyer to qualify for an adjustment under clause B8.12. At first look, the FS position seems logical. However, the FS position does not stand, when one reviews the purpose and application of B2.133 and its associated clauses.

One must read clause B2.133, Damaged by Catastrophe, in conjunction with clauses B8.22, B8.33 and B3.32. When that is done, the perceived inconsistency argued by the FS disappears. Under clause B2.133 in order to qualify as catastrophic damage (1) the cause has to do its damage within a 12-month period, (2) it has to affect the volume or value of the timber, (3) it had to either affect more than half the estimated timber volume as shown on A-2 or more than 1 million board feet or equivalent and finally, (4) to be considered catastrophic damage, the change could not be caused by "forest pest epidemics" if the timber was sold for salvage or pest control.

Putting aside the specifics of qualification on this sale,[2] once timber is identified as qualifying under B2.133, as being timber subject to catastrophic damage, the contract directs the actions of the parties and provides several options. As stated at clause B8.22, "In the event of Catastrophic Damage, this contract shall either be modified under B8.33 following rate redetermination under B3.32 or terminated under this Subsection." Where there is damage meeting the qualifying quantities and

[2] Although the sale was advertised for 3,470 MBF of timber, prior to harvesting the FS deleted 2,239 MBF due to checking. The FS in fact stated that the timber was not deleted because of blue stain. (FF 53.) Appellant harvested 1,231 MBF of timber. Of that 750 MBF was identified as blue stained. The 750 MBF is below the one million board feet threshold addressed in B2.133 and well below one-half of the original 3,470 MBF of advertised timber. (FF 54.)

where the sale is not for salvage, the parties must either modify the sale, following identified parameters, or terminate the sale. If the decision is to modify the sale, the FS, following clause B3.32, compares the appraised value of the timber before and after the catastrophe and then reduces the flat rate or alternate rate being paid for the timber by the purchaser by that difference. Alternatively, in those situations, where the purchaser can show that harvesting for the redetermined rate will leave it no profit or risk money, then, under the termination provision of clause B8.221 the contract shall be terminated at the request of the purchaser. Finally, even where the purchaser wants to proceed at the redetermined rate, in cases of Catastrophic Damage, the FS still retains the right to terminate unless the purchaser agrees to the conditions set out in clauses B8.222 (a), (b) and (c). Finally, clause B2.133 is neutral as to title, clause B8.12 is not. (FF 15.) While one could argue that there are areas of potential overlap, the fact is that the clauses are quite different. Clause B2.133 opens up remedies, some of which help the purchaser and some of which are in favor of the FS. Its primary thrust is providing a means to end the contract where the circumstances of the sale have changed dramatically. Clause B8.12 involves different scenarios. Therefore, we are not persuaded by the arguments of the FS that Appellant's reading of clause B8.12 creates an inconsistency and conflict with B2.133 and its related clauses.

While we find that clause B8.12 applies to the loss from blue stain, we would be remiss if we did not point out that purchaser negligence would negate recovery under clause B8.12. In point of fact, the FS argued that the Appellant here was negligent because it did not harvest as soon as it could have. The FS claimed that Appellant had an obligation to harvest the timber in the fall of 1997 and to the extent blue stain developed after that time, the Appellant should be responsible for any damage because Appellant failed to mitigate and was negligent in not operating sooner. The concept of negligence is based on violation of a duty to have acted otherwise. To establish negligence the FS must provide sufficient evidence for us to determine that the Appellant breached its duty to exercise reasonable care. Ken Rogge Lumber, supra. Here the FS has not shown such a breach. The FS set the time frame for harvest in this sale. It allowed the Appellant until November 1998 to harvest the timber. It could have set an earlier date but did not. In the face of the stated term for harvest in the contract of November 1998, it is simply unreasonable for the FS to say that Appellant was negligent by not removing timber by the late fall of 1997. To apply the FS version of negligence would render meaningless the time allowed in the contract. While it is likely that Appellant could have mitigated the amount of timber affected by blue stain by harvesting sooner, the contract imposed no such duty on the Appellant. Therefore we do not find that lack of mitigation under the facts of this particular case equate to negligence.

Finally, while our decision may create some limited immediate problems for the FS, if the FS wants to put the risk of loss for expected insect and disease deterioration on the purchaser in a salvage sale, it can insert language in its future contracts to do that. Further, the FS, as an alternative, can limit the dates for harvest, thereby assuring that the purchaser will have to harvest within the optimum time frame.

MEASURING THE ADJUSTMENT

Clause B8.12 does not set out a procedure for calculating timber value loss. It does not set specific dates for comparison of pre-and post-loss value, nor does it tell us how to deal with a condition such as blue stain that develops in timber incrementally (over time), generally develops in pockets even within a single tree, and finally does not always affect all Included Timber in a stand. In instances where the controlling contract clause provides us no specific direction as to how to perform an adjustment, we turn to basic contract principles for measuring and calculating allocation of risk. In general, absent instructions which define how to calculate adjustment, we attempt to make the adjustment so as to put the injured party (the non-risk holding party) in the same position it would have been but for the injuring event. We do that in the context of the overall contract, taking into account how other adjustments are treated. To the extent an adjustment is warranted, the adjustment is not to be a windfall. Finally, in determining the adjustment due to blue stain, we note that in order to qualify as damage under clause B8.12, the damage for which relief is given, here blue stain, is damage that occurred after the time of bidding. Clause B8.12 covers events occurring under the contract and thus to the extent that blue stain was present in August 1997, that blue stain is not subject to an adjustment. As is evident in our discussion below, the parties dispute the status of blue stain in the timber as of August 1997.

There have been a number of cases which have dealt with timber value loss, under clause B8.12. In general, those cases have not provided a consistent road map for calculating recovery. See Rocky Mountain; Buse Timber & Sales, Inc.; Neiman Sawmill, Inc.; Ken Rogge Lumber.

In Ken Rogge, the Board specifically stated that the standard for comparison (with the post damages value) was the pre-loss value of the timber. The Board, however, then went on to use the purchaser's higher bid price, rather than the pre-loss value. The circumstances causing that apparent deviation are not present here. Thus, in this case, we find that the proper measure of loss is the timber's value prior to the loss (and not the bid price) as compared to the value after the loss. Using the value just prior to the damage takes into account decreases or enhancements in value after the time of bid and assures that the party seeking the adjustment is put in the same position it would have been but for the damaging occurrence.

In the case of damage or destruction from generally sudden events such as a fire, flood or windstorm, it is usually simple to determine the pre-and post-loss dates. Here, however, the development of blue stain occurred to different trees over time. There is therefore not one set date (or limited set) for defining when damage occurred. Based on our reading of the literature and the testimony at the hearing, blue stain would have been developing in individual trees on almost a continuing basis, starting in the early spring and summer of 1997, growing rapidly through that spring and summer and continuing to invade trees into the spring and summer of 1998. (FF 3, 7, 8, 22, 49, 64-74.)

While we cannot set a specific date to apply to all of the timber, we do know that prior to the invasion and development of visible blue stain fungus, measurable logs within a tree can be described as bright. Further, we know that once there is evidence of visible blue stain on a log within a tree, that log is considered stained as long as there is any visible staining. There is no middle ground as to blue stain. A log either has blue stain or not, and once the presence of blue stain is identified, the

extent of the blue stain within a measurable log is essentially irrelevant for purposes of decrease in value. (FF 58.)

The evidence in this case shows that Appellant received a certain dollar amount for bright timber and a lesser amount for blue stained timber. That difference was consistent throughout the life of the contract. Accordingly, for purposes of this appeal, we find that the value of the timber before it turned blue was the price Wis-Cal paid for bright timber and the value after the damage was what Wis-Cal paid for blue logs. (FF 56.)

In using the above, we reject the FS argument that we should set the pre-damage value of the timber at the time of the Appellant's harvest and not use the before and after dates for the damage. Under the FS view, any timber which developed blue stain before Appellant's spring 1998 harvest date should not be part of a timber value loss, since Appellant should have taken that loss into account when it bid. In effect, the FS reargues in the context of quantum, the same argument regarding "expected loss," as it did in entitlement (interpretation of the clause), that being that the FS should not have to adjust the price for damage that Appellant should have expected.

Having determined that Appellant is entitled to have its payment per MBF to the FS reduced by the difference between what Wis-Cal paid it for blue versus bright timber, we now turn to the remaining disputed issue. The Appellant contends that it is entitled to adjust the price to the FS on the total MBF of blue timber it harvested. The FS argues that the timber was already blue at the time of bid and therefore, even if Appellant is correct in its contention that clause B8.12 puts this risk of loss on the FS, there was no timber that was damaged during the contract because at the time of the sale, the timber was already blue. The evidence does not support the FS position that all the timber was already blue, however, the evidence does show that a significant amount of timber was stained at the time of the bid. (FF 63-72.)

The Appellant says that the eyewitness testimony and observations of Mr. Dwyer, Mr. Petersen and Mr. Fehly establish that at the time of the sale the timber was essentially blue stain free (FF 19-23). We do not question what Mr. Dwyer and the other two gentlemen saw; however, their observations do not establish an absence of blue stain. We come to that conclusion for several reasons. First, it was well established that in order for a log to be considered blue stained by a mill, the mill only needed to identify a minimal amount of blue stain in that log. Mr. Seaberg illustrated this point by the following example. He said that if only a small segment of a 16-foot-log had blue stain and the rest was blue stain free, the entire log would be considered blue stained by the mill. Mr.Seaberg observed the spotty and limited nature of the blue stain after cutting. The limited nature of the staining was also shown in a number of photographs. (FF 58-60.)

In addition, the evidence shows that early blue stain tends to appear in higher segments of a tree, rather than in the lower segments (FF 59). Mr. Dwyer testified that he was making his cuts at the base and at approximately breast height (FF 20). That further lowers the probability that the procedure used by Mr. Dwyer would accurately discover existing blue stain. Finally, as to the corroboration of Mr. Petersen and Mr. Fehly, we first point out that neither testified. We do not

have details as to when they started their cutting of timber nor when they made their observations. We do not have details as to the specific location and circumstances of their cuttings (for example north or south slope), nor do we have other necessary information which would support analogizing their experience to Addington. (FF 21, 23, 61.) In that regard, we point out that Mr. McCabe testified that he had observed Mr. Petersen's crew cutting on the adjacent site and recollected that cutting taking place no later than the early summer of 1997. As noted and discussed in more detail below, blue stain growth would have been limited in the fall of 1996 after the fire, although some blue stain would have developed. However, come spring of 1997 the blue stain would have begun to develop and would have developed rapidly through that summer. (FF 23, 63-72.) Thus, conditions reported by Mr. Petersen, even if comparable in some respects, were conditions at a time when the blue stain would have been at a significantly lower stage of development than August 1997. Finally, the Appellant also relied on Mr. Seaberg's testimony to support the claim that the timber was essentially blue stain free. We discuss aspects of Mr. Seaberg's testimony and reports in more detail below, however, for purposes of addressing the issue of conditions in 1997, we find that Mr. Seaberg relied virtually entirely on what was reported to him by others. (FF 49.)

In contrast to the evidence presented by Appellant, the FS evidence as to conditions at the time of the purchase, although lacking in any eyewitness testimony (as to specific August 1997 conditions) (FF 7), was quite convincing. The FS evidence essentially fell under three categories: (1) extensive testimony from three experienced forestry personnel as to their experience on other projects with similar fire killed timber; (2) several documents which the FS had prepared well prior to the dispute and documents which evidenced a FS expectation of blue stain within the timber; and, (3) literature in the field of fire killed timber, which identified that blue stain would be expected to occur within a year after a timber fire such as Addington. (FF 6-9, 64-74.)

Mr. McCabe testified that he assumed, based on his prior experience (30 years), that the timber would be extensively blue stained by August 1997. That is confirmed in the TEA he prepared in July 1997, where he reduced the expected sale price by $100 an MBF to reflect anticipated blue stain in the timber to be harvested. This estimate was done well before any dispute arose. (FF 6-9.) Mr. Johnson, a master scaler with over 30 years experience similarly supported the expected presence in August 1997, of significant blue stain. He said he would have expected 100% of the trees to be blue stained by the end of the first year. (FF 64.) Appellant argued that Mr. Johnson's testimony should be disregarded, because his estimate of 100% of the trees, conflicted with the final harvest figures which showed that even at final harvest in the summer of 1998, the final blue stain count was well under 100% of the timber. Appellant's challenge to Mr. Johnson however, is misplaced. Mr. Johnson refers to 100% of the trees and not 100% of the logs or MBF. As was illustrated by Mr. Seaberg, one can have blue stain in one segment of a tree, while the rest of the tree is blue stain free. (FF 58.) Consequently, there is no inconsistency. What we draw from Mr. Johnson's testimony is not that 100% of the logs were blue stained in 1997, but rather that blue stain would have been prevalent and extensive as of August 1997. That is consistent with the expectations of Mr. McCabe. (FF 6-9.)

In addition to Mr. McCabe and Mr. Johnson, the FS also put on the testimony of Dr. John Kliejunas, a plant pathologist, who testified as to his significant experience as well as education in dealing with

fire killed timber (FF 65-69). As was the case with earlier FS witnesses, Dr. Kliejunas expected the trees to be extensively blue stained by the end of the first year after the fire. He stated that he would have expected 95 out of 100 trees to have blue stain by the first year. He based that on his years of experience in observing fire killed timber and on his reading of the literature in the field. (FF 68.)

Turning to the literature, we find that the position taken by the various FS witnesses is consistent with the literature dealing with blue stain. In *Deterioration of Fire-Killed Timber in the Western United States* (1992), the authors state, "Blue stain will appear in susceptible trees within the first year." (FF 70.) In *Survivability and Deterioration of Fire-Injured Trees in the Northern Rocky Mountains,* the authors state, "Some tree species are more susceptible to blue stain than others. Sapwood of pine is often completely stained within a year after death." In *Deterioration of Fire-Killed Timber in Southern Oregon and Northern California,* the authors note, "One year after death, the sapwood of the pine was heavily stained." (FF 70.)

In addition to the above, and in our view the most useful article on the subject of blue stain, was the 1955 James W. Kimmey article, *Rate of Deterioration of Fire-Killed Timber in California.* There, Kimmey made a number of conclusions regarding blue stain and further quantified anticipated blue stain after a year. He did that quantification on both a volume basis and a board foot basis. (FF 71-74.)

The Kimmey article was discussed by both Dr. Kliejunas and Mr. Seaberg in their testimony. Both acknowledged that Kimmey's work was the major or principal study as to blue stain and deterioration on fire killed timber. Both experts appeared to accept Kimmey's conclusions as being applicable to the Addington Sale, including the percentages to be expected for blue stain over time on a fire-killed timber sale. In fact, Mr. Seaberg in his calculation at A-5, used Kimmey's percentages for anticipated blue stain. (FF 76.)

In general, Kimmey's conclusions supported the FS position that blue stain would be developed by the end of the first year. Kimmey stated that in some tree species, especially the pines, the first sign of deterioration was the staining of the outer sapwood. He went on to state, "This so-called blue stain (also referred to as sap stain) ordinarily becomes evident within the first year after the fire." (FF 70.) He made several other points. He stated that the principle agents causing deterioration are fungi and insects. The initial attack by the two agents is generally considered to be practically simultaneous and they work together at similar rates. During the first 12 months after the fire, fungi attack the sapwood. In most burns they cause little volume or cull, if the timber is salvaged before the end of the first year, though often some degrade will be encountered during the end of that year. The degrade is largely caused by blue stain in the sapwood. On burns at lower elevations and especially on southern exposures, the amount of degrade will be considerably more than average by the end of the first year. (FF 70.) Addington had a southern exposure (FF 5).

Appellant attempted to counter the FS position that various articles and literature supported the conclusion that blue stain would be prevalent by August 1997. The Appellant pointed out distinctions between the conditions addressed in some of the articles and conditions at Addington.

We recognize that there are differences and have reviewed and applied the articles with that in mind. However, when viewed in light of the total evidence, the distinctions identified by Appellant do not change the fact that the overwhelming evidence shows that blue stain would have been active and well developed on this site by August 1997. In reaching that conclusion we further take into account that both experts agreed that the western pine beetle, a major vector for blue stain, would not have been particularly active from August 1996 until May 1997. However, the record shows that there are numerous other vectors through which blue stain would have been introduced after the fire. Moreover, and what we find particularly crucial, is that starting in April or May 1997, the western pine beetle along with other vectors would have been active and as stated by Dr. Kliejunas and as corroborated in the literature, the growth of blue stain would have been rapid starting in the early spring of 1997. (FF 4, 9, 65-70.)

In summary, we find the evidence overwhelming that there was significant blue stain on the Addington Sale as of August 1997. The Appellant's percentages of 0 to 5% for the first year are simply not believable nor supportable. The evidence was clear that even though Mr. Dwyer attempted to discern the presence of blue stain and saw virtually none, blue stain was still present, but simply was not in the segments of the trees cut by Mr. Dwyer. For us to conclude in the face of the evidence before us that blue stain was not present would require us to conclude that this site was incredibly unique. We have no evidence that would lead us to that conclusion. Thus, the issue to be determined is how much blue stain was present at the time of bid in August 1997 and how does that affect Appellant's claim for an adjustment.

As noted above, both Mr. Seaberg and Dr. Kliejunas accepted the percentages arrived at by Kimmey in his study of blue stain development on fire killed timber, as applicable to this sale. While they both accepted Kimmey, the experts differed on two major points. The first dealt with the timing for applying Kimmey's percentages, with Mr. Seaberg saying that Kimmey's first year percentages should be applied to the year ending 1998 and not to August 1997; and with Dr. Kliejunas stating that the first year after the fire clearly meant August 1997. The second issue dealt with determining whether Kimmey was measuring actual volume or using a mill type measurement. As to measurement, the FS took the position that Kimmey was measuring blue stain by actual volume. The Appellant contended that at least as to the graph for board foot measurement, Kimmey was measuring blue stain as would a mill and not on an actual volume basis. (FF 78-80.)

We find the evidence to be clear that when Kimmey uses one year he is referring to a calendar year and not some longer time frame. Appellant's argument that Kimmey's first year data should be applied to 1998 is strained and artificial. When Kimmey references one year after the fire, that in our understanding means one year. Thus, when we apply the end of Kimmey's first year to this dispute, the end of the first year is August 1997.

As to the dispute over whether Kimmey measured actual volume or mill volume, we find that the record supports the finding that Kimmey was using mill type measurement for board feet. We base our conclusion on Kimmey's own narrative where he states the following, "The actual extent of deterioration is best shown as a percentage of cubic-foot volume, because only actual volumes of

deteriorated wood are deducted from the gross cubic-foot volume. In board-foot computations, it is necessary to deduct some sound material that is interspersed with the deteriorated wood; therefore, the percentage of board foot volume that is deteriorated is greater than the cubic-foot volume deteriorated." (FF 73.) In the quoted passage, Kimmey makes clear that in measuring board feet, he is recognizing that he is including in that percentage more than deteriorated material. He is also including sound material. That is entirely consistent with how mills measure blue stain. (FF 58, 73.) In coming to our conclusion we recognize that Dr. Kliejunas disagreed and contended that Kimmey was at all times measuring volume. We found Dr. Kliejunas's testimony on this issue to be conclusory and thus not convincing in the face of Kimmey's own words.

We have thus concluded that we can apply the Kimmey study to this sale to estimate the status of blue stain in August 1997. We recognize that in relying on Kimmey, we are rejecting Appellant's various calculations. We do that without any hesitation, as we find Appellant's use of the range of 0 to 5% blue stain for the first year to be totally unrealistic and unsupported. In order for this Board to adopt the Appellant's numbers we would have to ignore what we find is knowledgeable testimony from FS witnesses and ignore literature on the subject. We would have to conclude that Addington was an anomaly and a completely unique situation from the norm. Appellant's evidence does not convince us to do that or make those conclusions.

We now turn to the Kimmey's numbers. In his study, Kimmey shows at Graph 6, the percentages of blue stain that he found, by board feet, for various sizes of ponderosa and Jeffrey pines. He shows, (1) 25-inch and over trees are approximately 40% blue, (2) 20 to 24 inches are between 40 and 45% blue, (3) 15 to 19 inches are between 45 and 50% blue, and (4) 14 inches and smaller are approximately 50% blue. (FF 71-74.) As to sugar pines, the percentages reported on Graph 5 and in the narrative, stated that Kimmey found "more than 3/4's of the board foot volume of the sapwood was blue stained by the end of the first year after the fire." That percentage is considerably more than the breakdown of blue stain reported by Mr. Dwyer for sugar pines. Mr. Dwyer reported approximately 40% blue staining for sugar pines, with the percentage being lower for larger trees and higher for smaller trees. Since the sugar pines do not exceed Kimmey's percentages, we provide no adjustment for that species. (FF 56, 73.) Finally, it is also noteworthy that Kimmey's numbers, while admittedly somewhat lower than those of Dr. Kliejunas, are in line with the opinion as to percentages given by Dr. Kliejunas, who predicted 50 to 70% of the board feet would be blue at the end of the first year. (FF 68.)

CALCULATING THE ADJUSTMENT UNDER CLAUSE B8.12

As we earlier stated, B8.12 covers damage and destruction to the timber which occurs after the award of the contract. Accordingly, we have decided that the Appellant is not entitled under B8.12 for an adjustment for timber which was blue at the time of the award. Appellant is, however, entitled to a readjustment of price for timber value loss for the timber turning blue after the award. Below we set out charts which aid us in arriving at the proper adjustment. The charts and our calculations deal solely with ponderosa pine, since the amount of blue stain encountered on sugar

pine was not in excess of (using Kimmey's percentages) anticipated blue staining on the sale at the end of the first year (the date of bid).

The chart below sets out for ponderosa pine by size, the total timber harvested (broken down by blue and bright timber) and states the percentage of timber for each size that was harvested as blue. In addition we calculate a combined total for harvested blue timber (including all sizes) and do the same for bright timber. We finally calculate the total ponderosa pine harvested (including blue and bright).

25+inches	276.56 MBF (blue) +	148.62 MBF (bright) =	425.18 MBF	Blue is 65% of the timber
20-24 inches	229.72 MBF (blue) +	103.46 MBF (bright) =	333.18 MBF	Blue is 68% of the timber
15-19 inches	148.82 MBF (blue) +	106.90 MBF (bright) =	255.72 MBF	Blue is 58% of the timber
13-14 inches	28.76 MBF (blue) +	28.91 MBF (bright) =	57.67 MBF	Blue is 50% of the timber
8-12 inches	24.64 MBF (blue) +	33.17 MBF (bright) =	57.81 MBF	More bright than blue
6-7 inches	1.60 MBF (blue) +	.74 MBF (bright) =	2.34 MBF	De minimis numbers
TOTAL	710.10 MBF	421.80 MBF	1,131.90 MBF	

(FF 56)

Below, we then take the total MBF harvested for each size of ponderosa pine and multiply that MBF by the percentage of blue timber that Kimmey's study said on average would exist one year after the fire. We find that total to be the probable amount of blue timber that existed as of August 1997 on the Addington Sale. It represents a reasonable estimate for determining existing blue stained timber. We then take the difference between that and the amount of timber that Mr. Dwyer ultimately harvested as blue. That difference is what we find to be the amount of MBF of blue stain that was damaged after the bid date and the blue stained timber (excess blue) covered under B8.12.

SIZE	Blue Vol.	Total Harvested. x Kim 1 yr. %	Excess blue
25+inches	276.56 MBF (blue) -	(425.18 MBF x 40%) = 106 MBF	106 MBF
20-24 inches	229.72 MBF (blue) -	(333.18 MBF x 42.5%) = 88 MBF	88 MBF
15-19 inches	148.82 MBF (blue) -	(254.91 MBF x 47.5%) = 29 MBF	29 MBF
TOTAL			223 MBF

(FF 56, 72)

The next step is to calculate the proper measure of compensation. Absent further adjustments, we would simply multiply the excess blue stained timber, as identified in the chart above, and multiply

that by the dollar difference for each size. In this case however, we first need to make an adjustment to the quantity of that multiplier. We need to do that so as to reflect that Appellant included some blue timber in its bid. Since Appellant priced a portion of its quantity as blue (FF 24), we find Appellant should not be compensated for encountering what it had already included in its pricing. The law is clear that absent an ambiguity, in interpreting the parties' responsibilities under a contract, one must look to the plain meaning of the contract's language. One, however, needs to consider the language in the context in which it is used and where the mutual intent is clear, we need to interpret the contract in line with the intent of the parties and in concert with how they understood their responsibilities and obligations.

On the matter of the intent of the parties as to coverage of B8.12, we have earlier concluded that the plain meaning of B8.12 covers damage and destruction from blue stain, that the evidence does not support adding various exclusions not set out in the instrument, and that the evidence does not establish that Appellant read the clause in the manner put forward by the FS. Thus, we determined that B8.12 called for an adjustment in favor of the Appellant. While the above analysis applies as to deciding the meaning and operation of B8.12, when it comes to calculating the amount due Appellant, it is appropriate that before assessing damages, we again look at intent. Mr. Dwyer testified that when he bid the project, he had adjusted the price he was offering the FS to reflect that by the time he completed the harvest, 15% of the timber would not be bright, would have deteriorated, and because of blue stain would bring him a lower price. Dwyer was specifically addressing deterioration which would occur between award and harvest. (FF 22, 24.)
Appellant's claim for timber value loss rests upon his having to pay the FS for timber that he priced as bright timber but which turned blue. To be consistent with that, Appellant should not receive compensation for a quantity that he had already priced at the lower figure. As to that volume, the Appellant suffered no timber value loss.

To make the calculation for timber value loss and to take into account the 15% that Dwyer acknowledged that he accounted for as blue, we need to make several calculations, using in part estimated figures. We confine our calculation to ponderosa pine and treat as neutral the timber deleted from the project through modification. Using the charts set out above, the calculation shows that Dwyer harvested 1,131 MBF of ponderosa pine. Of that, 710 MBF was ultimately classified as blue stained and of that 710 blue stained MBF, we have concluded that 223 MBF became blue stained after award, with 487 MBF already blue stained prior to award. We deduct 487 MBF of pre-award blue stain timber from the total timber harvested (as pre-award damaged timber is not covered under the clause) and we are left with 644 MBF of timber, which would have been bright as of the award date. (FF 56.) Since the 15% of the represented bright timber was expected by Dwyer to turn blue over the life of the contract, we apply that 15% to the 644 MBF noted above (FF 21-22). That calculates to 96.6 MBF. We then deduct that figure (96.6 MBF) from what we have identified as the excess blue staining, 223 MBF. The remainder is 126.4 MBF, which we find to be the total compensable excess blue staining. We then multiply 126.4 MBF times $230, the average dollar penalty (between blue and bright timber) (FF 56), and arrive at the total of $29,072. This is the sum to which Appellant is entitled.

One could contend that we are not consistent since in allowing relief under B8.12, we relied on the plain meaning of the wording and did not find convincing the extrinsic evidence put forth by the FS, yet here (in adjusting relief to reflect the 15% included in Appellant's pricing), we are going outside the plain meaning of the clause and interpreting the contract by looking at the intent of the parties. We see no inconsistency in what we are doing. The facts surrounding the two matters are entirely different. On the matter of the application of B8.12, we found that the evidence did not establish that at the time he bid, Dwyer knew or understood that the FS was reading B8.12 with the words of limitation and exclusion now being put forward. The evidence, in fact, showed that Dwyer made no specific interpretation of B8.12 at the time of bid. (FF 18.) The fact that Appellant=s bid includes a factor for blue stain (took blue stain into account when he bid) is not sufficient for us to conclude that he interpreted B8.12 to exclude any damage by blue staining from the risk of loss coverage. Further, and we find particularly important, the FS, both in this contract at B2.133, and in earlier versions of B8.12, had made specific exclusions for salvage sales. In the case of B2.133 the FS excluded pest epidemics on salvage sales. In the earlier version of B8.12, the FS excluded insect and disease damage on cut, but not scaled, timber. In both instances, the exclusions and limitations as to recovery or salvage sales were clear. The FS did not provide clear exclusion or limitation here. Given the plain meaning of the clause, the lack of evidence as to Dwyer interpreting it as did the FS, and the fact the FS has used very specific language in other instances where it wished to limit risk, we are comfortable in our conclusion that there is no legal basis to reinterpret in this contract, the language of B8.12 to conform to the FS's unilateral expectation. In contrast, in modifying timber value loss by the 15% reflected in Dwyer=s bid, all we are doing is refraining from paying Dwyer for a blue staining loss that he had already priced into his bid.

Finally, we recognize that many of the numbers we have used are estimates and, as such, are not precise. We do not doubt that both parties can find flaws and ways to distinguish our conclusions. That said, we are comfortable with the estimate. The fact is that evidence is clear that significant portions of the timber were blue stained by August 1997. The evidence is equally clear that significant portions of the timber were not yet affected by blue stain and had blue stain develop after the time of bidding. We find that using the percentages developed by Kimmey was the fairest way to come up with an estimate as to Addington. We recognize in arriving at our number that Kimmey's percentages are somewhat lower than the 50 to 70% range predicted by Dr. Kliejunas; however, Dr. Kliejunas was also presenting an estimate and thus his numbers, just as those of Kimmey, are subject to interpretation and judgment. It is, however, noteworthy that on the smaller trees, the trees which would be expected to first evidence blue stain, the Kimmey figure of 47.5% is not very different from the low end of Dr. Kliejunas' estimate. (FF 68.) Further, both Dr. Kliejunas and Mr. Seaberg identified Kimmey's article and study as the primary work relied upon for fire killed timber in the field. (FF 71.) Finally, while each of the parties may be able to raise some questions and challenges to the use of Kimmey's percentages, the parties each had an opportunity to make their best record. Neither provided a more convincing alternative.

DELAYS TO START OF HARVEST IN 1997

In briefing this appeal, the Appellant relied on clause B8.12 as the basis for its relief and did not strenuously argue many of the points it had earlier addressed in correspondence and at the trial relating to delays and the effect of El Nino. As noted above, we have concluded that Appellant is entitled to a cost adjustment for timber that developed blue stain after acceptance of Appellant's bid. Therefore, the defenses raised by the FS as to the Appellant not starting on time and as to other delays, are not (absent qualifying as negligence) dispositive in this appeal. We have earlier addressed the question of negligence and concluded that Appellant was not negligent.

Although our decision does not turn on the facts surrounding various delays to the start of work, we have come to a number of conclusions as to some of the delay issues and set out our conclusions below. As to the dispute over why harvest did not begin until the spring of 1998, we find that the FS actions did not improperly impede the Appellant from starting earlier in the fall. There may have been unfortunate breakdowns in communication, but we do not find that the FS consciously conveyed to Appellant that the FS did not have road plans nor was unwilling to hold a pre-operations meeting. We believe the road plans were available. If lack of road plans were an issue, the Appellant should have documented the record through letters. Then the FS would have unquestionably been on notice and we would have a basis to make a finding as to possible hindrance. The record, however, does not have any such letters and in this case we find the FS position more credible. Similarly, we do not find that the FS refused to hold a pre-operations meeting. Even if the FS perception as to Appellant's desire to start was incorrect, once again we have a situation where the Appellant did not put the matter in writing and once again that lack of documentation, given the FS testimony, leads us not to find undue delay on the part of the FS. (FF 25-31.)

We do find that the added work on the Lassen Sale was a primary factor in causing Appellant not to start until late October 1997. Appellant's initial attorney specifically said in a letter that Lassen was preventing Appellant from proceeding on Addington. While we recognize, as Mr. Dwyer stated in his testimony, that the attorney may have been interpreting toward a result, the above letter was not the only assertion as to problems caused by the Lassen Sale. Again, as was the case with the road plans, there is no record of Appellant complaining or challenging the additional work or putting the FS on notice that Lassen would impede the Addington Sale. Where a contractor believes a Government action is wrongful or is costing it money, it needs to document the record to establish the condition. It further needs to put the FS on notice that the contractor considers the FS actions to be either wrongful or subject of compensation. There is no record of those type of letters in the fall of 1997. Finally, there is no evidence of Appellant being under duress to do the additional blowdown work. We do, however, understand the logic of Appellant needing to remove the new blowdown on Lassen before it could proceed with the timber below it, thus making the removal of the added timer essentially a necessity. Had Appellant established a record which showed that during the fall of 1997 it made the FS aware of its objections and the impacts of Lassen on Addington, then we might have concluded that the FS hindered Addington during that fall. However, instead, the record indicates to us that the Appellant willingly accepted the work and it only became an issue when Appellant encountered blue stain in the spring of 1998. The fact is that the Appellant agreed to a modification on Lassen and did so with no objections. (FF 32, 34, 41-46.)

On another issue, we agree with Appellant that the TEA is not part of the contract and thus the fact that the TEA indicated blue stain does not mean the contractor is responsible for the blue stain in issue. There are a myriad of cases which hold that because of various disclaimer language in the prospectus and contract, a purchaser cannot rely on representations in the prospectus and similar documents. Accordingly, that means that the FS cannot claim that a purchaser is bound to take into account those representations. The FS cannot have it both ways. It cannot rely on disclaimers in a contract but then argue that representation it made in disclaimed documents must be relied on by Appellant in pricing the contract. We note that while the TEA was not part of the contract and thus would not bind the Appellant, the TEA prepared by Mr. McCabe did serve to corroborate and confirm that the FS and its officials expected a blue stain condition to be developed on the harvested timber and served to corroborate the basic FS position that blue stain was present and to be expected by August 1997.

Finally, we do not find credible Appellant's claims that the blue stain was caused because of excessive rains from El Nino. (FF 39-40, 43-44, 51.) Rather, the evidence showed that blue stain is a relatively common condition and is a condition that one would expect to occur over time after a fire of this nature. We find that the growth and development of blue stain was in line if not better than conditions one would expect under similar circumstances at the time of harvest for a sale of this nature.

RESPONSE TO THE DISSENT

The dissent has raised several points which warrant comment. If we felt that the evidence showed that Appellant bid the project with the understanding that B8.12 did not apply to anticipated events on a salvage sale, such as the development of blue stain, we would have come to a different result, than set out in our decision. We would have concluded that since both parties understood the language in the same manner, that mutual interpretation would prevail, even if the language of the clause appeared not to contain the restrictions now being put forth by the FS.

We, however, on the evidence presented in this case, cannot conclude that Appellant interpreted and understood B8.12 in the same restrictive manner as did the FS. What we find is that Mr. Dwyer made no specific interpretation of B8.12 at the time of bidding. In fact, he testified that prior to bidding, he did not read the sample contract, where the clause in issue (B8.12) was set out. (FF 18.) Further, there was no evidence of any prior dealings by Dwyer with the clause in issue. It appears that Dwyer realized in the spring of 1998, that much of the timber that he had expected to be bright was now blue, that Dwyer sought legal advice and that the positions taken as to the meaning of various contract clauses were an outgrowth of legal advice and not a reflection of what Dwyer thought or did not think at the time of bid. Thus, we have a situation where Dwyer had no position on the clause at bid time and to the extent the FS believed the clause had a particular meaning, there is no evidence showing that Dwyer was aware of that FS interpretation. Based on the recited facts, we do not find support in the record for the dissent=s conclusion that Dwyer understood the clause and understood how the FS interpreted it.

The record does, however, show that at the time he bid, Dwyer did include in his pricing the expectation that approximately 15% of the timber would be blue stained. He said that the figure was an industry standard, it was what one would anticipate and allot for in pricing a purchase such as Addington. It is fair to say that in including the 15% of expected blue staining, Dwyer acknowledges that he included some blue stained timber in his bid price. Put another way, his bid was not based on 100% of the timber being bright. While Dwyer's inclusion of some blue timber is relevant for purposes of calculating any adjustment, we do not find that one can properly expand his inclusion of some blue timber into an interpretation of B8.12 which conforms with that of the FS.

What we have in this case is a contract clause, which on its face does not make the exceptions and distinctions identified and relied upon by the FS. To that we add the facts that B2.133 of this same contract and the old B8.12 (as reflected in Louisiana-Pacific and discussed earlier in this decision) made specific exclusions for salvage sales in the first case, and for, insects and disease damage in the second. We cannot ignore these facts in interpreting the parties= responsibilities under this contract.

In addition to the above, the dissent also raises a course of conduct basis for its position. The dissent correctly points out that neither the Appellant nor FS identified a single instance where a re-evaluation such as the one at issue here occurred. That said, the matter of the history of the clause was not an issue that was developed by either party at the hearing or through documents. From our point of view, the dissent is relying on too narrow a thread (essentially a negative inference) to establish a course of dealing. The dissent also focuses on the fact that prior to the sale, insect damage would have begun. It points out, and we agree, that by the time of bidding some blue stain, in fact significant blue stain, had already developed in the Included Timber. We have identified that timber and have ruled that it is not subject to adjustment, since the damage to the timber occurred prior to the award of the contract. The dissent focuses on the fact that since blue staining had begun on some of the trees, the blue stain which developed after award was neither unexpected in amount nor presence and further that no event had intervened between the time of the sale and the time of harvest (characterizing the blue stain occurring after award as just a continuation of the already started damage). The dissent says, referring to the named causes in the clause, that " An element common to the identified causes of destruction or damage is that the activity occurs after the opening of bids.@ The dissent argues that this common thread is not to be ignored particularly when the list ends with the phrase "or similar cause." According to the dissent, when the start of the damage predates the sale and then continues to devalue the timber over the life of the contract, this damage or destruction is not a risk within the covered clause.

As we stated earlier in this majority opinion, we understand and are indeed sympathetic to the FS policy arguments. Since deterioration is an expected occurrence on a salvage sale, we well understand why the FS argues that a purchaser should take that into account in bidding and not be entitled to a price adjustment for what should have been anticipated. However, the FS position is not reflected in the wording of B8.12 nor in any other part of the contract. The clause says that where a timber value loss occurs due to any of the named or "similar causes," the loss will fall on the party holding title. Among the named causes are insects and disease, both causes that often do begin in a timber stand prior to a sale being consummated. For us to read B8.12 in the manner put forward

by the FS, we need to read into the clause an exception for an occurrence that may have started prior to the sale or need to read into the clause an exception that the occurrence must be unexpected. Despite some appealing policy arguments, the fact remains that to get to the FS reading, one needs to read into B8.12 substantial language which is not there and one needs to give no weight to the inconsistency with FS inclusion of exclusions in earlier and other clauses, but not in B8.12.

As a further matter, we strongly disagree with the interpretation the dissent has put upon the Board inclusion in the facts of the letters from Mr. Fehly and Mr. Petersen. Nowhere in the discussion have we stated nor indicated that we have relied upon the statements made in those letters. In point of fact,we have not relied on the letters as they were indeed unsworn and, in our view more important, the individuals were not available for cross-examination. The dissent=s comments are particularly perplexing, since we have clearly concluded that substantial blue stain did exist as of the date of the award and thus, our decision, is in fact contrary to what each of the individuals identified as conditions prior to award.

Finally, we must comment upon the dissent statement regarding the majority=s suggestion in its footnote 1 that there might well be a need for a threshold of damage before the clause can be invoked. The dissent contends that the majority is relying on an artificial manufactured reading of the language. Objectively, one must note, that the dissent=s position, in large measure, rests upon artificial and manufactured exclusions which he finds but which are not stated and which moreover, when the exclusions were wanted, had been inserted by the FS in other and similar clauses. The use of an artificial basis also applies to the course of dealing determination in the dissent, which seriously lacks factual foundation. The un-refuted evidence was that Dwyer did not read clause B8.12. He made no interpretation of the language at the time he submitted his offer. We do not know precisely why Dwyer assumed some risk of loss when he adjusted his bid for some anticipated blue stain. To the extent there is evidence on that point, Dwyer said that he adjusted because it is an industry standard or expectation. We do not believe that as a matter of law we can stretch the non reading of the clause and inclusion of an industry number into the finding that the dissent makes, i.e., that being that Dwyer interpreted the clause to put the full risk of loss on his company. As to our making the adjustment in Dwyer=s recovery, all we are doing is not paying him for timber that he already had discounted. The clause refers to a loss by the contractor, not to enhanced profits.

DECISION

Appellant is entitled to have its price adjusted by $25,648 plus CDA interest for the timber value loss caused by the blue stain.

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HOWARD A. POLLACK
Administrative Judge

Concurring:

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ANNE W. WESTBROOK
Administrative Judge

Separate Dissenting Opinion by Administrative Judge VERGILIO.

I respectfully dissent from the decision of the majority, which is contrary to principles of contract interpretation and Forest Service contracting practices of several decades. I conclude that the Liability for Loss clause (B8.12) does not place on the Government the risk of bearing the costs of timber-value loss resulting from blue stain damage in a salvage sale occurring after a fire. Unlike the events identified in the clause, blue stain in a fire salvage sale is certain to occur, with an increased loss of timber value over time. The blue stain was not an event falling within the clause.

Moreover, the record does not establish that at the time of bidding the purchaser interpreted the contract in the manner it does here. Rather, given its alleged pricing of its bid, the prior claims, pleadings, and arguments of the purchaser, the proffered legalistic interpretation is one that arose after the fact. At the time of award, neither party anticipated an adjustment under the clause for value loss due to blue stain. It is not for this Board to ignore principles of interpretation and impose a reading which is at odds with the interpretation of the parties.

Further, the Government=s interpretation is fully consistent with its established course of conduct and dealing. For open contracts with the clause at issue, the majority=s reading requires the Government to revalue every salvage sale involving blue stain, other disease or insect damage.[1] It is telling that the purchaser and majority have not identified a single instance since the inception of the standard clause (dated September 1973 in the contract at issue) when such a revaluation occurred. Given the language of the clause, the actions of the purchaser, and the history of the clause, it is not reasonable to interpret the clause to require reimbursement for value loss because of blue stain in a fire salvage sale.

The operative language of the contract clause here at issue, B8.12 Liability for Loss, states:

[1] The majority suggests in footnote 1 that a threshold might have to be surmounted in order to obtain relief; however, the clause is silent regarding a threshold. Any such threshold would exist only by the artificial, manufactured interpretation of the majority, and would be outside of the language of the clause.

> If Included Timber is destroyed or damaged by fire, wind, flood, insects, disease or similar cause, the party holding title shall bear the timber-value loss resulting from such destruction or damage[.]

(Exhibit B at 57). Prior to the sale the fire occurred. Insect activity had begun. Blue stain was present in the included timber. The fire preceding the sale increased the vulnerability of the trees to blue stain. No event intervened between the time of the sale and the harvesting of the timber. An element common to the identified causes of destruction or damage is that the event occur after the opening of bids. This common thread is not to be ignored, particularly when the list ends with the phrase Aor similar cause@ and places liability for Asuch destruction or damage.@ Timber-value loss resulting from destruction or damage arising from a cause which is pre-existing (that is, pre-dates the sale) and which continues to devalue the timber over the life of the contract does not constitute a loss within the covered class. The risk-shifting clause does not benefit the purchaser for this variety of damage.

Turning to black-letter principles of contract interpretation: AWhere the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.@ Restatement, Second, Contracts ' 201(1). At the time of award, neither party anticipated reimbursement for the value loss due to blue stain; this meaning dictates the interpretation of the clause. The purchaser allegedly adjusted its bid price downward in anticipation of blue stain in year two; had the purchaser interpreted the clause as does the majority here, such an adjustment would not have been made. Alternatively, if one considers the purchaser=s interpretation put forward initially during this appeal, the purchaser does not prevail. AWhere the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party[.]@ Restatement, Second, Contracts ' 201(2). The Government did not know the purchaser=s interpretation; the purchaser knew the meaning attached by the Government (the material available with the prospectus identifies Aunique items@ including the adjustment for value loss due to blue stain). The Government=s interpretation prevails.

The damage at issue--caused by blue stain--occurred or began before the sale--as the majority recognizes. To account for the blue stain devaluation, the Government adjusted downward the minimum acceptable price for the sale by $100 MBF, which amounts to $123,069 for the 1,230.69 MBF scaled in this sale. Because such information was available and referenced for review in the prospectus, the purchaser is deemed to have known of this adjustment. Moreover, the purchaser anticipated blue stain in the second year, if not the first year, as it obtained prices for bright and blue timber. The purchaser priced its bid with the expectation that it would not be reimbursed for blue stain damage. The purchaser cut the timber in the second year of the contract; it encountered more extensive blue stain than it had anticipated. Nothing in the clause suggests that the Government is to bear the risk of loss of timber value for devaluation increasing from a pre-existing cause over the life of the contract. The purchaser misjudged the amount of blue stain it encountered, perhaps due to its delay in cutting because it opted to remove timber from another sale.

The majority references the Ainsect or disease@ exception in the Liability for Loss clause used in non-scaled sales (sales measured before felling), BT8.12. Given the Government=s interpretation of B8.12, and what appears to be its undisputed interpretation of the clause since its inception (that is, that the clause does not apply to timber-value loss due to blue stain in a fire salvage sale), no need exists for exclusionary language in the clause. The Government knew how to put in the language; it did not. Such further confirms the Government=s consistent interpretation; the Government would not need to include superfluous language.

In calculating the timber loss, the majority makes an adjustment for the blue stain anticipated by the purchaser. Such an adjustment is at odds with the language of the clause, which does not address a purchaser=s bidding or anticipated profit or loss, but rather Atimber-value loss.@ The timber-value loss occurs without regard to the expectations of the purchaser. The majority constructs an interpretation which states first that the Government bears the risk of loss and later that the purchaser anticipated bearing the risk of loss.

Although not relevant to my conclusion or to the material facts of the case, it is noteworthy that the majority reaches factual conclusions after considering unsworn statements made in letters produced solely for the purpose of supporting the purchaser=s claim (FF 21, 23). Although factually, such statements were made, I find such statements to merit no weight. I point this out because I do not want others appearing before me to assume that the submission of such Aevidence@ will further the evidentiary record. By giving weight to such submissions, the Board impossibly handicaps a party (here the Government), because that party must attempt to rebut submissions or assertions which lack any credible foundation.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
September 5, 2002.