Land Stewardship Contracting in the National Forests: A Community Guide to Existing Authorities

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Acknowledgments

This guidebook is the result of several group efforts. First and foremost are the ongoing efforts of community practitioners, land managers, and all interested stakeholders who are grappling with the complex issue of developing a balanced approach to collaborative resource stewardship on National Forest lands. Many of the questions raised by these groups have helped to provide the framework for this document. The second group effort involves the many individuals who are attempting to answer these questions by clearly describing the existing authorities that may influence innovative land stewardship projects. In addition to this guidebook, sources of useful information are being developed on several fronts, including government agencies, academic institutions, and community groups. These groups deserve recognition and continued support for their work and, wherever possible, have been noted within the guidebook. Finally, there continue to be numerous efforts to test new approaches to land stewardship where it ultimately matters most -- on the land. Those who have been involved in the development and implementation of such projects are owed significant gratitude for helping to pave the way for future efforts through the examples they have provided.

The entire staff at the Pinchot Institute has been involved in aspects of this project, and thanks go to everyone for the input and support they have given along the way. Al Sample and Mary Mitsos managed the impossible in keeping the project focused on realistic, yet meaningful, goals. Special thanks to Mary for her collaboration in the careful review and editing of the entire document.

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FOREWORD

This guidebook is a direct response to needs identified by both rural community-based contractors and by officials from Federal land management agencies during a series of workshops convened at locations around the country during 1996 and 1997. The workshops were convened to: (a) assist Federal land managers in describing specific kinds of activities needed to address problems of resource degradation, and (b) to assist individuals and small firms in local communities in identifying those kinds of resource restoration and maintenance tasks for which they had the experience, expertise, tools, and willingness to undertake. It seemed at first to be a simple matter of matching one with the other. What we discovered is that this wasn't the real problem. Both the land managers and the local contractors understood one another's needs quite well already. But uncertainty over the agencies' statutory authority to enter into land management agreements other than timber sale contracts was standing in the way of matching land stewardship needs with local capabilities, and developing the necessary contracts to move forward.

The depth of this uncertainty was made clear in one particular regional workshop when, after a specific question was asked about the Forest Service's authority to contract for a certain activity, agency participants from several different administrative regions of the Forest Service immediately disagreed with one another and proceeded to argue from their own particular experiences, while other non-Forest Service participants sat stunned by what they were hearing. Weren't these officials all from the same agency? Didn't they understand what was or was not permitted by their own governing laws and policies?

What we discovered is that local agency officials, not all that surprisingly, are in fact not usually familiar with all of the statutes under which the agency as a whole operates. For the Forest Service, this is hundreds of pages of law, amplified by thousands of pages of Federal regulations. Rather, officials are most familiar with the approaches that have developed over time through regional or local policies, which usually constrain the broad authority that exists for the agency as a whole. Often the rationale for these policy constraints can no longer be recalled, or has never been re-examined in light of current conditions and needs. It is
assumed that, because "this is the way we've always done it," this is the only way it can be done. The Forest Service's past reliance on timber sale contracts as the primary means for accomplishing a range of land management activities has also contributed to a widespread unfamiliarity among both agency officials and local contractors for other ways of getting things done on the ground.

The purpose of this guidebook, therefore, is to clear up some of the uncertainty over the authorities available to the Forest Service to accomplish land stewardship activities through contractual mechanisms other than those used in the traditional timber sale process. It is organized by subject and type of activity for ease of use by local contractors, as well as by Federal officials themselves. For each type of activity, the guidebook specifies and summarizes the relevant portions of major laws, Federal regulations, and agencywide policies such as those described in the Forest Service Manual.

This guidebook has been thoroughly reviewed by legal and resource management experts both in and outside Federal land management agencies. For this the Pinchot Institute is especially grateful to Jay McWhirter of the USDA Office of General Counsel, and to Doug MacCleery, Cliff Hickman, and Patrick Morris of the USDA Forest Service. We also appreciate the many contributions of the participants in the Pinchot Institute's workshops, individuals from federal and state agencies, conservation groups, forest industry, universities, local government and community groups who were eager to "think outside the box" and give us the benefit of both their experience and their creativity.

I would also like to thank Fran Korten, formerly of the Ford Foundation, whose vision and skill in facilitating unlikely networks helped make this effort possible. Her understanding of how institutional and policy change can help bring about organizational and social transformation is extraordinary, and the legacy of what she has taught will remain with the Pinchot Institute, as well as dozens of other community and natural resource organizations across the United States and elsewhere in the world.

Finally, this guidebook is the product of the extraordinary insight and diligence of Paul Ringgold and Mary Mitsos, Research Associates at the Pinchot Institute, who have seen this effort through from beginning to end.
FOREWORD

I am grateful for their drive, their persistence, and their scholarship. Because Federal regulations and policies are always in flux, especially those related to procurement contracts and agreements, an updated revision of this guidebook is probably not far in the future. It is with this prospect in mind that I am most grateful for Paul's and Mary's other endearing quality--their dedication to providing the best possible tools for practitioners to improve forest stewardship, and to help sustain the ecological, social, and economic quality of life in natural resource-based communities throughout the country.

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INTRODUCTION

Over the past decade, there have been numerous local efforts to foster new approaches to land stewardship on the National Forests. These efforts have been initiated by both community groups and by Forest Service personnel. Community group efforts have often been driven by the desire to promote local involvement in National Forest management and to strengthen local economies. Forest Service efforts have often been driven by the desire to increase collaboration, address health concerns in areas with low-value material, and the need to improve contracting flexibility and efficiency in times of shrinking personnel and budgets. A goal common to both groups has been to develop ecosystem management strategies which are sustainable over the long-term, and flexible enough to meet local conditions.

Changing public values have resulted in the need to manage ecosystems for a broader range of goals, which are not easily accomplished with traditional methods. For instance, the harvest of timber is no longer seen solely as a means of meeting sustained-yield fiber production goals. Instead, it is seen as one component of a diverse set of management activities used to meet ecosystem health and related objectives. However, as the federal timber program has been reduced, many land management activities normally accomplished through timber sale contracts are not being performed, leading to resource deterioration and adverse environmental impacts. At the same time, small firms based in rural communities in and around the National Forests have much of the expertise, equipment, and experience needed to accomplish these land stewardship activities. In many communities, fulfilling these stewardship needs represents a significant potential source of sustainable income and employment. To date, it has been difficult to match this growing need for land stewardship services with those communities and firms willing and able to provide such services.

The use of innovative contracting mechanisms can help to achieve management goals on federal lands, while promoting long-term involvement of local community members. A Forest Service field forester in Oregon recently described the land stewardship concept as “a shift away from contractors providing one management service across a wide variety of locations, and toward contractors providing a variety of services in one location.” Such an approach fosters a more thorough knowledge of local
conditions, thereby enabling the contractor to more effectively meet site-specific management objectives. Mechanisms used in land stewardship approaches include: bundling of a variety of management tasks within a single contract, multiple-year contracts, long-term cooperative agreements, and contract performance based upon descriptive end-results. These approaches involve both the testing of new contracting mechanisms, as well as the application of traditional contracting mechanisms in new ways.

Purpose of the Guidebook

One current source of concern regarding the promotion of various innovative contracting mechanisms is the lack of a consistent, shared understanding among stakeholders (which include the general public, potential contractors, and Forest Service personnel). This lack of shared understanding relates to both the extent and limitations of current federal laws and Forest Service policies which relate to the use of various contracting mechanisms. While an understanding of the original intent behind the use of timber sales versus service contracts is essential (see box excerpt on next page), it is also necessary to explore innovative ways in which these contracting mechanisms can be applied to non-traditional situations. The purpose of this guidebook is to address this concern by providing information (both general and specific) on how stewardship projects might be developed within the framework of existing authorities. This will be done not only through basic explanations of these authorities, but also through the use of both hypothetical and actual situations as a means of illustration. The objective is to demonstrate: 1) innovative strategies which are completely permissible under existing law and policy; 2) proposed strategies which the Forest Service is prohibited by law from using; and 3) proposed strategies which are authorized in statute, but are not consistent with current Forest Service policy. Clarifying this last category is perhaps the most important objective of this guidebook. A clear understanding of the rationale behind current management policies is the crucial first step to understanding why the Forest Service uses the strategies it does, even though other alternatives may be fully authorized by law. This will help to determine the conditions under which certain policy changes may be beneficial, as well as conditions for which there is a good reason for opting to maintain current policies intact.
Timber Sale Contract vs. Service Contract: What Are the Differences?
(excerpted from "Current Forest Service Contracting Authorities,"
USDA Forest Service - draft, 1998)

In the context of forest management activities, service contracts are normally used to carry out land management activities, such as tree planting, site stabilization, thinning of forest stands where the trees to be cut have no commercial value, and similar activities. It is a policy choice, not legal mandate, that service contracts have not been used to harvest merchantable timber products. Public works contracts are used to construct facilities, such as roads, campgrounds, and buildings.

Timber sale contracts are used for the sale and removal of forest products that have commercial value and the activities directly associated with such activities. Normally timber sale contracts are used to harvest timber in situations where the value of the forest products removed exceeds the cost of timber harvest and construction and/or maintenance of roads and other facilities necessary for the removal of timber (including an allowance for purchaser profit). Situations where the timber products do not cover such costs are called "deficit sales," which, although legally permitted, are discouraged by policy.

Because a timber sale contract is primarily for the sale and removal of government property that has economic value, rather than for the procurement of services or the construction of facilities, it is governed by specific authorities. There are gray areas, however. Timber sales often require construction of forest roads necessary for the removal of timber. If such roads will be used to serve overall land management objectives in the future, the Forest Service requires purchasers to build permanent roads to standards necessary for multi-purpose use. Absent the harvest of timber, many of these roads would need to be built under public works contracts. Over the years, construction of national forest roads under timber sale contracts has substantially reduced the road mileage that would otherwise have been built under public works contracts and paid for with appropriated dollars.

In a somewhat different vein, the Forest Service has no general authority to trade goods for services. Under certain circumstances, however, it can designate
minor amounts of goods for salvage rights. To illustrate, some precommercial thinning contracts provide that minor amounts of posts and poles may be salvaged. If the volume of such material is sufficient that it could be advertised for sale, it must be disposed of in a timber sale as opposed to using a standard procurement contract for precommercial thinning.

In addition, over the years a number of trust funds have been established for the reforestation of sale areas, disposal of slash generated by the sale, and preparation and administration of salvage sales, some of which have tended to blur the distinction of a timber sale contract solely as a vehicle for the sale and removal of timber. While most of these trust funds have been established to carry out work directly associated with commercial timber harvest activities, such as reforesting lands harvested in the sale and disposing of logging slash produced by sale operations, this is not universally the case. For example, a revision of the Knutson-Vandenbergh Act by the National Forest Management Act provides that receipts collected under timber sale contracts can be used to carry out wildlife habitat, watershed management and other non-timber work on the timber sale area.

**Innovative Approaches to Contracting: A Brief History**

Early forms of land management services contracting (first tested on National Forests during the 1980's) were primarily a response to shrinking federal budgets, reduced personnel and demands for a broader range of outputs from public lands. The contracts were meant to create significant savings of public funds through improved efficiency in contract administration by allowing for the consolidation of multiple stand improvement contracts, as well as the use of end-results performance specifications. Furthermore, the flexibility of the contracts allowed for the execution of unique, site-specific prescriptions. Although initially developed as a means of facilitating traditional timber management activities (such as timber sale layout, site preparation, reforestation, timber stand improvement, and tree marking) these contracts evolved into more comprehensive approaches to ecosystem management with the inclusion of such objectives as wildlife habitat improvement, development and maintenance of dispersed recreation facilities, soil and water conservation practices, and aesthetic improvement. These later contracting approaches, which involved both timber and non-timber objectives, are more commonly referred to as land stewardship contracts. In the mid-1990's, the land
stewardship concept broadened to include local small business participation, alternative commodity sales strategies, and site specific planning by local stewardship councils as key components.

Some of the basic goals of land stewardship contracting can be more clearly defined through a brief review of past pilot projects and federal legislation on this issue. Prior to 1992, land management service contracts had been discussed in Congressional hearings, but had not been legislatively authorized. The FY 1992 Interior appropriations legislation called for the initiation of “stewardship end results contract” pilot projects on the Kaibab National Forest in Arizona and the Dixie National Forest in Utah. This legislation authorized the application of all or part of the revenues received for timber removed under these contracts as an offset against the cost of stewardship services (i.e. “goods for services”). The identified services included site preparation, replanting, silviculture programs, recreation, wildlife habitat enhancement, and other multiple-use enhancements.

The FY 1993 Interior appropriations resulted in the continued authorization for projects on the Kaibab and Dixie, and expanded the program to include projects on the Idaho Panhandle National Forest, the Coconino National Forest in Arizona, and the Lake Tahoe Basin Management Unit in California. The appropriations language additionally called for a study of how payments to local governments could be included in such a program if it were adopted nation-wide on National Forest lands. Since FY 1993, there has been no further Congressional authorization for such projects. However, a number of separate bills were introduced in an attempt to continue existing pilot projects, create new projects nationwide, or authorize a permanent land stewardship contracting program within the Forest Service\(^\dagger\). None of these bills were adopted into law.

\(^\dagger\) For a more detailed summarization of this legislation, see “Land Management Stewardship Contracts: Background and Legislative History,” a 1996 white paper available from the Pinchot Institute.
Goals of Forest Stewardship

There are a number of reasons why none of the recent stewardship bills have been successfully enacted into law, including budgetary concerns and conflicts with other existing laws. However, a key reason seems to have been simply the lack of information necessary to address questions on the effectiveness of proposed strategies in meeting stewardship goals. Questions which have been raised include:

- To what extent do various strategies ensure that forest ecosystem management goals are achieved on the ground?
- To what extent do revenues gained from management activities cover their costs?
- What are the administrative costs and/or savings involved in the use of new contracting strategies, such as multi-year/multi-task contracts at a landscape scale?
- What are the effects of such strategies on the sustainability of the resource?
- To what extent are contracting costs offset by avoiding other costs which could reasonably be expected to result if the contracts are not carried out (e.g., fire suppression costs in areas with heavy fuel loads)?
- To what extent is local economic sustainability and rural community viability affected by the use of various contracting strategies?

Most of these questions are applicable to any resource management program. To understand their relevance the issue of stewardship, it is important to outline the basic goals of forest stewardship programs. The following list describes some of these goals, along with examples of innovative contracting strategies which may be useful for each:

1) a new tool aimed primarily at accomplishing non-timber resource management objectives; this would not take the place of or change the existing timber sale program. Example: a bundled service contract which does not involve the removal of forest products.
2) A means of implementing ecosystem management policies by shifting the focus of federal forest and rangeland management toward achieving desired future resource conditions, rather than on meeting assigned targets or a predetermined schedule of commodity resource outputs. Example: an end results contract with multiple services that may or may not include harvest of forest products.

3) A means by which federal natural resource agencies can contribute to the development of sustainable rural communities, through restoring the natural functioning of the surrounding forest ecosystem and providing a continuing source of income and employment opportunities. Example: a contract which covers a wide array of services to enhance the management of the defined landscape and includes the harvest of multiple forest products.

**Testing New Strategies Under Existing Authority**

The variety of goals related to land stewardship projects can make it extremely difficult for forest managers to implement such projects using traditional timber sale or service contracts. Solutions may be found through the testing of new contracting strategies which can be used to effectively and efficiently meet stewardship goals. Such tests should attempt to use existing timber sale and service contracting authorities in innovative ways, and should be designed to answer questions of effectiveness of various contracting strategies. The results of such tests would then form the basis for discussions of which strategies are the most useful for achieving stewardship goals, and whether those strategies could be enhanced through the development of new authorities, policies, and contract instruments. Together with information from past and present pilot projects, the outcomes of new projects conducted under existing authority could be used to determine the direction for future legislative and agency action on the issue of land stewardship contracting.

An example of how these projects might help to define future action can be found in the testing of new applications for both timber sales and service contracts. As the variety of ecosystem management objectives to be achieved on the ground increases, along with the ability of contractors to
utilize non-traditional or low-value forest products, the distinction between services and sales becomes less clear. This has created a need to consider strategies by which elements of services and sales might be combined within single contracting instruments which would allow for more effective implementation of ecosystem management goals.

There may be opportunities through these types of contracts to make use of the value of materials which are not targeted for sale, but are to be removed in the process of achieving stewardship objectives. Examples include forest stands in need of thinning for the purposes of small fuels reduction, certain prescriptions for fisheries or wildlife habitat improvement, or prescriptions to restore forested areas to desired stand structures or species composition. Each of these projects may involve the removal of materials that have some commercial value. This is especially true as new markets for previously unmarketable material (such as small-diameter wood and special forest products) are created. The use of these products presents not only a means of helping to offset costs of ecosystem management services, but often also helps to provide material to new and growing markets for specialty products.

Guidebook Format

This guidebook covers a range of issues pertaining to new and innovative methods for contracting and community involvement in forest stewardship on national forests. These issues were identified through a series of regional workshops¹ and a national scoping session², each of which included representation from federal and state agencies, forest industry, independent contractors, local communities, conservation organizations, and universities. The issues are divided into three general sections: contracting authorities, funding stewardship activities, and community involvement. Each section contains several chapters, each of which focuses on a single

¹ Regional workshops, which were convened and facilitated by the Pinchot Institute in cooperation with local partners, were held in Kalispell, MT (June 26-29, 1996), Redding, CA (October 3-5, 1996), and Durango, CO (November 7-9, 1996).
² The national scoping session, which was convened and facilitated for the Forest Service at the request of the Department of Agriculture Under Secretary of Natural Resources and Environment, was held in Washington, DC (October 30-31, 1996).
issue of interest. The chapters begin with a number of questions which have been asked regarding Forest Service authorities related to the issue. This is followed by a narrative discussion of answers to these questions. Emphasis has been placed on providing specific answers to what is and is not allowable under existing authority\(^\dagger\). The narrative includes references to relevant case examples (see below) as well as the use of hypothetical situations, where helpful, to more clearly describe an issue. Endnotes provide the texts of relevant laws (as contained in the United States Code), regulations (Code of Federal Regulations), and policies (Forest Service Manual [FSM] and Forest Service Handbook [FSH]) that have been discussed in the narrative (see Glossary for information on all of these terms). In order to provide context, excerpts have been avoided wherever possible. Those portions of the endnotes that are most relevant to the issue have been underlined. Because regulations and policies are subject to frequent update and change, the most recent revision date has been placed in parenthesis at the end of those citations. All citations are current as of the publication date of this guidebook.

Following the issues sections are a series of case examples which describe existing land stewardship projects. The projects were chosen to provide the reader with a range of examples of the contracting, funding and community involvement issues discussed in the preceding sections.

Much of the terminology used in this guidebook has a very specific meaning when used in the context of federal regulations and procedures. The glossary has been included to help the reader more clearly understand these terms, as well as to provide a quick reference to the acronyms which occur throughout the Guidebook. Although most of the terms and acronyms have been defined at some point in the text, the glossary will enable the reader to look up these terms whenever they occur, and provides a reference to the portion of the guidebook which describes a term in most detail.

\(^\dagger\) The intent of this guidebook is to describe existing authorities, and not to develop recommendations for changes to laws, regulations and policy. However, the Pinchot Institute is currently drafting a white paper on the issue of community stewardship, part of which will provide an analysis of the potential implications of changes to laws, regulations and policies which affect National Forest management.
The first three Appendices contain reprints of sections from a draft Forest Service white paper on contracting authorities ("Current Forest Service Contracting Authorities," 3/26/98 draft). These chapters are in a format that explains timber sale contracts (Appendices A and B) separately from service contracts (Appendix C), and have been included to provide a more detailed understanding of these two distinct processes. For those interested in the complete text of the document, further information may be obtained from the Forest Management staff in the Washington Office of the USDA Forest Service. Appendix D contains a list of internet resources for obtaining additional information on local stewardship initiatives, federal agency programs and projects, legislative and regulatory updates, and forest stewardship in general.
CONTRACTING AUTHORITIES

Appraisal Process and the Marketing of New Materials

- What authority does the Forest Service have to sell at less than appraised value (or to reduce the appraisal value) when other services will be performed?
- If an appraisal is negative, what authority does the Forest Service have to use the value of products to subsidize treatment?
- Under what conditions can administrative use permits be used instead of a sales contract?
- For material not considered merchantable by the Forest Service, but merchantable by a contractor through creative marketing or a manufacturing activity, can the Forest Service make the material available to the land management contractor for low or no cost?
- What authority does the Forest Service have to market new materials, such as special forest products?

Limits Established by Appraised Value

Current law prohibits the sale of timber at less than appraised value (see endnote 16). Therefore, the Forest Service does not have the authority to reduce the minimum acceptable bid rate on timber sales to reflect the value of any services that may result. Services must be treated separately (other than the exceptions mentioned in Exchange of Goods for Contractor Services, p. 49), and must be paid for with appropriated funds. The intent of the appraisal legislation is clearly to prevent uneconomic sales of federal property. This statute prevents timber sale value from being reduced to reflect a beneficial service provided by the contractor. However, in some situations, it is possible to use low-value commodities to reduce the cost of service contracts. (see Contracts Involving Salvage of Low-Value Materials, p. 19)

In addition to statutory prohibitions on selling property below appraised value, current federal regulations (see Glossary) require that appraisals determine fair market value. Therefore, there is also no authority for the
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Forest Service to reduce the appraisal value of materials to be sold to account for the value of services to be performed the sale.

Negative Appraisals

When the appraised value of products is negative, the Forest Service does have limited authority to offer these materials as salvage to the contractor. In a timber sale, the salvage of this material may be required, but only if its removal is necessary to meet the overall sale objective. In such a situation, the removal of this negative value material by the purchaser would be subsidized by the positive value material in the sale. There is also authority to offer the material as salvage to a contractor performing a service. However, the intent of the activity is important to define in such cases. The primary management objective for such activities must be to have a service performed, and not to sell materials. There is specific language contained within the Forest Service Handbook (FSH) for including salvage privileges in a service contact if it is to the advantage of the Government.

If the total expected costs of a timber sale exceed the total expected revenue, there is limited authority to proceed with the sale as a forest stewardship purpose sale. Two criteria must be met in such cases. First, the sale of timber must be secondary to achieving the stewardship objectives of the project (such as ecosystem health, recreational/visual/cultural resource enhancement, wildlife habitat management, fisheries habitat management and watershed improvement). Second, timber harvest must be the most financially efficient way of achieving the stewardship objectives of the project; that is, it produces the least net cost when both current costs and revenues are considered. The revenue produced from a forest stewardship purpose timber sale is considered an offset to the cost of accomplishing the stewardship project.

Administrative Use

In some cases, trees or other forest products which have value may be disposed of under an administrative use permit. Administrative use and administrative free use sales are only allowed under limited conditions, generally in relation to research (see Case Examples 4 - Research Administrative Use, p. 81 and 5 - Research Administrative Free Use, p.85;
see also: Research and Demonstration Authority to Test New Concepts, p. 38), or when disposal protects the forest from injury or improves conditions of growth. There is specific language contained within the administrative use section of the FSH for the conditions under which administrative use is authorized. The removal of products under administrative free use provisions is additionally limited to cases where there are compensating benefits to Government.

Non-Merchantable Material

In determining whether or not material is considered merchantable by the Forest Service, the primary issue is fair market value (see endnote 1). If there is evidence that the material has value, then this evidence will be used for an appraisal. Otherwise, the material will be considered to be unmerchantable.

Special Forest Products

Special forest products produced or existing on national forests may be sold (see endnote 16). The current delegation of authority for sale of special products, administrative use sales, and other product sales is shown in Exhibit 01 of FSM 2404. Special Forest Products include materials ranging from herbs and decoratives, important to local custom and niche markets, to products that support multi-million dollar industries trading in global markets. Examples of special forest products include: wild berries, fruits, and nuts; tree foliage, bark, and cones; ornamental shrubs and plants; tree seedlings; mushrooms; grasses; and pine straw.

Special forest product resources must be managed in an ecologically responsible, economically viable, and socially acceptable way so that communities can use these natural resource-based assets to diversify and strengthen their economies. Whether or not special forest products can be added as a major program on the national forests depends on a number of factors. Forest plan requirements and ecosystem management needs are the basis for management activities which are undertaken by a national forest. For significant special forest product actions there must be changes to the plan before projects can be approved. Site specific analysis will need to be done for many projects.
Bidding and Negotiation Processes

- Under what conditions can a timber sale be negotiated rather than bid?
- How do timber sale and service contracts differ in this regard?
- Can the Forest Service require pre-qualification of bidders (as opposed to equipment and methodology requirements on a timber sale)?
- What authority exists for potential contractors and the Forest Service to cooperatively develop work specifications?
- When can the Forest Service award contracts on other than a low bid basis?
- Can the Forest Service limit the geographic scope of the bid market for any kinds of service contracts to the minimum area necessary to achieve adequate competition under the Federal Acquisition Regulations?

Limitations on Timber Sale Bidding Process

The current authority to negotiate timber sale contracts is limited, when compared with similar authorities for the negotiation of service contracts. As required by the National Forest Management Act‡ (NFMA), all timber sales appraised at $10,000 or greater must be advertised§. NFMA does not contain restrictions concerning specific bidding and award procedures; however, there are a number of existing regulations which do contain such restrictions. Current regulations require that these sales be competitively bid¶. Sales appraised at less than $10,000 are required to be advertised for competitive bid when sufficient local interest in such sales is likely¶. Upon receipt and review of competitive bids, regulations require that the sale must be awarded to the responsible bidder‖ submitting the highest bid that conforms to the conditions of the sale, subject to a few exceptions¶¶. As specified in Subsection (f) of 36 CFR 223.8 (see endnote 8), the Chief of the Forest Service does have the authority to test and evaluate alternative bidding methods.

Full and free competition is the standard rule for all advertised sales of forest products, and pre-qualification of bidders is normally considered to be an undue restriction in this regard. It is permitted only in very limited

‡ This statute is the principal authority by which the Forest Service conducts timber sales.
Contracting Authorities

circumstances which relate to: 1) disclosure requirements for export of timber in the western United States; and 2) resales of timber on uncompleted contracts, barring those bidders who have defaulted on previous sales. However, there are cases in which regulations authorize that certain requirements be placed on purchasers to process timber to at least a stated degree within a stated area or, when appropriate, by machinery of a stated type when necessary to promote better utilization or to facilitate protection and management of forest resources.

Cooperative Development of Work Specifications in Service Contracts

For service contracts, the authority to negotiate prices and to cooperatively develop work specifications with potential contractors is much broader. With the goals of flexibility, cost-efficiency and product value in mind, recent statutes have broadened this authority even further, making it possible to use a simplified acquisition process on procurements with expected costs of as high as $100,000 (see Simplified Acquisition Procedures below). For commercial items, which are generally defined as any item (other than real property) that is customarily used for non-governmental purposes, or any service of a type offered and sold competitively in substantial quantities in the commercial marketplace, the limit for the use of a simplified acquisition procedure is $5,000,000 (5 million dollars). Although it is fairly clear what constitutes a commercial good, the process of defining a commercial service is very complex. For this reason, there should not be an assumption that just because an item is available commercially, a specific use or application will be considered to be commercial.

One tool that has often been used to increase efficiency of service contracts, as well as add to the effectiveness of management outcomes, is the Request for Proposal (or RFP). This is a request for interested bidders to submit proposals for how they would carry out a set of activities defined by the Forest Service, and how much they would charge to do the work. The RFP may use specifications or a statement of work, and can range from broad to very detailed in its expectations of offerors. It allows field personnel and contracting officers to review a range of options for having a

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*This is a distillation of a very complex definition contained in FAR 2.1. For further clarification on the existing definition of commercial items, see endnote 13.*
management service performed, based on the skills and equipment of interested bidders. This is not a process guided by potential contractors, as the Forest Service has already determined its management objectives through the public planning process and also has the final decision authority in awarding the contract.

This option may be especially helpful in those cases where the Forest Service is interested in testing a new management technique (such as utilization of very small diameter wood from thinning as a means of reducing fuel loads). In such cases, an RFP might be developed which describes the overall goals of the management activity, as well as preferred techniques. Following the receipt of proposals, the Forest Service could review options and engage in discussions with the contractors who submitted them. A contract conforming to the selected proposal can then be awarded as a result of this process. Proposals submitted in response to an RFP are considered “offers” and, if accepted, bind the offeror to perform the resultant contract.

If a more simplified and less formal format is desired, a Request for Quotation (RFQ) can be used. The RFQ differs from an RFP in that it generally contains specifications for how the work is to be performed, and asks only for a contractor’s quotation of cost. Quotes submitted in response to an RFQ are considered informational, and are not potentially binding. However, an RFQ can also be crafted for awarding a performance based service contract by asking the quoter to propose a method of activity. For purchases of $100,000 or less (see Simplified Acquisition Procedures below), action can then be taken on received quotes as long as there is reasonable competition. The award is made in the form of a Purchase Order (P.O.), which is a written request for contractor services. The P.O. becomes a binding document if and when the contractor either accepts the order in writing or starts performance of work. Conversely, the contractor can reject the P.O. either in writing or through not performing the work requested.

Simplified Acquisition Procedures

16
Recent laws have significantly changed the way that the federal government buys its goods and services. With the goal of promoting more effective and less costly delivery of services to agencies (to the ultimate benefit of taxpayers), the administrative process used for purchases up to $100,000 have been simplified in a number of ways. A negotiated submittal process is allowed for simplified acquisitions, subject to the following restrictions:

1) The purchase of supplies and services under $2,500, and construction under $2,000, is now called micro purchasing. These purchases will normally be made without obtaining competition as long as the price is reasonable.

2) The purchase of supplies, services, or construction over the micro purchasing amount, but under $100,000 must be competed as follows:

   - if over $10,000 but under $25,000, notice of solicitation or copy of solicitation will be posted in the procurement office.

   - if over $25,000, the acquisition will be synopsized in the Commerce Business Daily (see Appendix D - Directory of Internet Resources, p. 136 of this Guidebook for information).

   - for services and supplies under $25,000, the preference will be to use oral quotations. For projects over $25,000, written quotations may be more practical. However, the contracting officer should be using written or oral requests for quotations up to $100,000 depending on the situation.

   - for construction over $2,000, written solicitations shall be used. Construction projects over $25,000 require some form of payment protection; payment bond, irrevocable letter of credit, certificate of deposit, etc.

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In addition to these new standards for when competition is required, the necessary extent of competition itself has changed. In order to reduce the expense of mailings to numerous and often unresponsive bidders, the focus of solicitations for quotes has been narrowed to the local trade areas in which the contracts will be let. While any bidder can still request and respond to any RFQ that has been posted, the practice of sending RFQs to all vendors may not necessarily continue. Generally, quotes sought from three vendors who are in the local trade area are considered to be sufficient competition within the Federal Acquisition Regulations.

Another concept incorporated into the simplified acquisition process is the use of "best value" purchasing. This allows the Forest Service to use other factors in addition to price when making decisions on the award of procurement contracts. These other factors include past performance, quality, delivery, and experience. In making award decisions, the Forest Service may, among other techniques, compare offers and hold discussions, and may make awards to more qualified firms at a higher price. As a result, those vendors who have performed well in the past, provided quality work, complied with wage requirements, and have high standards of workmanship will have a competitive advantage.

Information that vendors may receive is also changing. Sealed bids are still public and abstracts are available to everyone. However, simplified acquisitions minimize the amount of information available. Although individual contracting personnel may reveal additional information, the regulations now direct that only information similar to that available in formal negotiated acquisitions be provided. Basically, the Forest Service will only reveal the name and the pricing of the successful offeror. Information that is incorporated into the awarded contract will generally also be releasable. Any vendor may request information on the strengths and weaknesses of their own proposals -- and until they are familiar with the process this is a very good practice.
Contracts Involving Salvage of Low-Value Materials

- What authority does the Forest Service have to allow contractors to salvage materials which may have value?
- How does this authority differ between timber sale and service contracts?
- What is the allowable extent of salvage activities?
- What materials can be given as salvage?
- What is the contractor allowed to do with salvaged material?

Salvage Authorities

The Forest Service currently has limited authority to allow contractors to salvage materials which may have value under certain conditions. Prior to a discussion of the conditions under which this is allowed and the contracting mechanisms that are involved, some issues need to be clarified. First, is the definition of “value.”

For any proposed management activity which involves the disposal of Government property, the materials to be removed must be appraised to determine their value\(^6\) (see also: *Appraisal Process and the Marketing of New Materials*, p. 11). In cases where the market value of the material is less than the cost of getting it from stump to market, the appraisal value will be negative\(^\dagger\). In such cases, advertisement of the material for sale would be unlikely to draw competitive bids, because a prudent contractor would be faced with paying more to obtain the material than he would receive by selling it. However, if the same material is being removed as a part of a service contract (such as a fuels reduction thinning), a prudent contractor would bid on the service, and, to be competitive, would likely reduce his bid to reflect any value he could accrue through salvage of the material.

In such situations, there is a clear benefit to the Forest Service in that the value of otherwise unmarketable materials helps to reduce the cost of

\(^\dagger\) An alternate definition for such material is that it is not able to “pay its way out of the woods.”
LAND STEWARDSHIP CONTRACTING IN THE NATIONAL FORESTS

services\textsuperscript{17}. It is important to note that the Forest Service's primary management objective for such projects must be to have a service performed, and not to sell materials. Otherwise, the offer of such material as salvage under a service contract would be tantamount to paying the contractor to buy the material. However, if the contractor is performing a desired management service, and realizing some value from the materials removed, the implication is that the value of this material is helping to offset the cost of the service. An additional incentive to use salvage rights when appropriate is found in the Forest Service policy which encourages the use of any merchantable by-products of pre-commercial thinning activities, to the extent that removal of this material does not conflict with other timber or non-timber resource management objectives\textsuperscript{18}.

The authority to provide contractors with salvage materials of any value is limited primarily by language in NFMA, which clearly establishes that all projects involving material with a total appraisal value of $10,000 or greater must be advertised for sale (see endnote 7). This means that if the appraised value of material involved in a project is $10,000 or greater, the material must be disposed of through the use of a timber sale (regardless of whether the intent is to sell the material or perform a service). Additionally, regulations require that sales of forest products having value less than $10,000 be either advertised or informal bids solicited from potential purchasers (see endnote 9). However, this material may be incorporated as salvage within a service contract, as long as bid negotiations demonstrate that the Government will be receiving compensation for the salvageable material in the form of a reduced contract price. (see Case Example 1 - Salvage Rights in Service Contract, p. 64)

As a matter of policy, timber sale contracts are normally only used to sell timber in situations where the value of the products removed exceeds the cost of timber harvest. This cost includes any construction and/or maintenance of roads or other facilities necessary for the removal of timber (including allowance of purchaser profit). It does not include Forest Service sale preparation and administration costs. When a timber sale includes low or negative value material (see Glossary) that must be removed, the value of higher value material is bearing the cost of removal. Situations where the positive value material does not cover such costs are called “deficit sales,” which, although legally permitted, are discouraged. Additionally, the removal of any negative value material under a timber sale
contract must be essential to meet timber management objectives. If it is not part of the timber management objective, then it is a separate project that must be paid for using appropriated funds.

Type and Use Limitations on Salvage Material

The only limitations on what types of materials may be salvaged are: 1) they meet the low or no-value appraisal requirements as described above; and 2) their removal is consistent with the management plan for the activity area. The contractor is allowed to do anything he wishes with the salvaged material, as long as it is within the limits of the law, and its removal conforms to the specifications set forth in the service contract. This includes personal manufacture or sale of the raw product. One careful distinction which must be made here is between material taken via salvage rights versus material taken under free use permits. In the latter case, the free wood cannot be resold by the permittee.

Hypothetical Examples

The following hypothetical situations are provided to help clarify how these authorities would apply to the planning and implementation of a management project. For each of these situations, assume that the management goal is to conduct a range of forest stand improvement activities, including the removal of a portion of the material contained in the stand.

Hypothetical #1: the total appraised value of products to be removed is $10,000 or greater.

The only option for the disposal of these materials is through a competitively bid timber sale contract. Although a timber sale would contribute to part of the management goal, current policy dictates that only those activities which relate to the removal of the sale product can be required under the contract. Requiring any other non-related activities is generally contrary to laws prohibiting the augmentation of appropriations and the exchange of goods for services (see Exchange of Goods for Contractor Services, p. 49). Any other stand improvement activities would be performed separately through the use of a service contract or other mechanism, such as a force account (see Glossary).
Hypothetical #2: the total appraised value of products to be removed is less than $10,000.

In addition to disposing of these products through a competitively bid timber sale, two other options are available in this case. First, the management activity could be performed under a service contract, with the product to be removed included as salvage to the contractor. Informal negotiations with prospective contractors (see Simplified Acquisition Procedures in Bidding and Negotiation Processes, p. 17) would determine the amount by which the product value is lowering the cost of services. The Forest Service would then make the determination as to whether the lower service cost warrants giving the product as salvage, or instead could offer the product for sale if it was determined that a competitive market for the product might give the Forest Service a better price. If the product is offered for sale, it could be advertised for competitive bid or informally negotiated, at the contracting officer’s discretion (see endnote 9).

Hypothetical #3: the total appraised value of products to be removed is negative. (see “Negative Value” in Glossary).

As described earlier in this section, unless the removal of this material is a part of the timber management objective, a contractor cannot generally be required to remove it under a sales contract, and the removal must be performed separately under a service contract using appropriated funds. Since the appraised value of the material is negative, it can be given as salvage to the contractor without any advertisement for competitive sale.

A distinction to be made here is that the value of the material where it currently sits (i.e. “on the stump”) is negative. However, the fact that this material may have value to a contractor who is being paid to remove it is important. A contractor may be able to market material removed in a service contract (if given salvage rights) that would otherwise have had negative value if offered for sale under a timber sale contract.

For instance, consider a situation in which the management objective is to reduce fire hazard in a forest stand through the removal of a given quantity of fuels, such as dead and small-diameter material. If the value of these materials at the market is $1,000, and the total cost of harvest, manufacture and transportation is $1,100, their total value “on the stump” is negative. A stumpage sale of this material would be unlikely to attract
any bids. However, if a service contract is used to meet the desired management objective, the harvest and removal of these materials from the stand is being paid for with appropriated funds. These materials might then have value to the contractor as salvage. These are obviously quite narrowly defined conditions; however, they should help in explaining the potential value of salvage material under a service contract.

In all three of the above cases, one other available alternative would be for the Forest Service to contract separately for logging services, and then sell timber in log form at the roadside, or delivered to a sale yard. However, this option is limited by the availability of appropriated funds, and increases both administrative responsibilities and risks inherent in the marketing of delivered logs. For further information on the benefits, disadvantages, and limitations of this option, see *Use of Contract Logging as an Alternative to Stumpage Sales*, p. 28.
**Long-Term Contracts**

- Can contracts extend beyond the appropriations period during which they are initiated?
- What is the maximum time allowed for performance of timber sale and service contracts?
- What is the authority for task-order and multi-year service contracts?

Among the desired goals of stewardship projects is the ability to engage contractors in long-term management services. Numerous theories underlie this concept. Among these is the belief that operators who provide services within a given management area over a long term are likely to develop a stronger sense of stewardship for that area. Additionally, the use of long-term contracts may help to provide more stability for the contractor, as well as administrative continuity for Forest Service contract supervisors. Finally, long-term contracting is one component of the broader proposal to develop comprehensive stewardship contracts that allow one or more contractors to perform a range of ecosystem management services within larger ecologically defined or perhaps landscape scale boundaries (such as watersheds).

**Time Limitations on Timber Sale and Service Contracts**

Although both timber sale and service contracts can extend beyond the appropriations period during which they were initiated, there are limitations that apply to each. For timber sale contracts, the primary law regulating contract length is the National Forest Management Act, which limits the length of such contracts to 10 years\(^\text{20}\). Additionally, the Renewable Resources Planning Act requires all harvested areas to be restocked within 5 years\(^\text{21}\), in order to ensure that these areas are put back into productivity in a timely manner.

The length of service contracts is limited by the requirement that, with a few exceptions (see Multi-year Contracts below), appropriated funds must be available for the entire contract at the time of contract initiation. The legal basis for this requirement is the anti-deficiency clause of the Money and Finance Act\(^\text{22}\), which states that a government employee may not
authorize an expenditure that exceeds the amount currently appropriated for that expenditure. The intent of this requirement, similar to the augmentation theory of appropriations (see Exchange of Goods for Contractor Services, p. 49), is to avoid agency over-spending or the spending of funds not authorized by Congress. Aside from these mandates, there is no specific limit on the allowable length of a service contract. However, because limited annual appropriations must be carefully allocated to fund the more immediate, high priority management needs, there is rarely enough remaining to allow for commitment of funds to long-term, higher risk contracts.

**Task Order Contracts**

One mechanism that allows for the long-term use of one or more contractors is the task-order contract\(^{23}\). This type of contract allows the Forest Service to acquire an indefinite amount of services (generally within pre-established minimum and maximum limits) over a defined time period, and provides for the issuance of orders to perform these tasks when needed. Task-order contracts can be in two distinct forms:

1) a **requirements** contract, which provides for one contractor filling all actual requirements of designated service activities during a specified contract period, with performance scheduled by placing orders with the contractor.

2) an **indefinite-quantity** contract, which provides for one or more contractors filling an indefinite quantity (within stated limits) of services within a specified contract period, with performance scheduled by placing orders with the contractor(s). This contract type must contain some form of guarantee to be binding.

The requirements contract may be used in situations where the government anticipates recurring service requirements, but cannot predetermine the precise quantities of services that it will need. In these cases, a realistic estimate of the quantity of specified services required over the contract period is developed. This becomes the basis for bid solicitations. The contract is awarded to a single operator, who is then obligated to respond to task-orders for services under the contract. The
contract will generally state the maximum amount of services that can be ordered by the government.

The indefinite-quantity contract may be used when the government cannot predetermine (above a specified minimum) the precise quantities of supplies or services that will be required during the contract period, and it is inadvisable for the government to commit itself for more than a minimum quantity. In these cases, a minimum quantity of specified services is developed, and becomes the basis for the solicitation. It is encouraged that these types of contracts be awarded to multiple bidders, wherever possible. In these conditions, the Forest Service would develop a set of procedures and selection criteria that will be used to provide awardees a fair opportunity to be considered for each order.

The indefinite-quantity contract is very useful for the development of long-term working relationships between the Forest Service and a pool of contractors. It allows for selection of specific contractors for specific kinds of task orders under contract that defines a range of activities. There is no statutory time period limitation for either requirements or indefinite-quantity contracts\(^\dagger\); however, these contracts are still limited by the requirement that appropriations sufficient to cover the entire cost of the contract be available for commitment during the year in which the contract is initiated.

Multi-year Contracts

Recent amendments to the Federal Acquisition Regulations have provided an additional mechanism in the form of longer term contracts which do not require a commitment of appropriations beyond the initial year of the contract period. These multi-year contracts\(^2\) allow for the purchase of supplies or services for not more than 5 years, generally provided that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds. If funds are not available during those subsequent years, these contracts may provide for a cancellation payment to be made to the contractor. The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts buy more than 1 year's requirement of a product or

\(^\dagger\) The exception to this is task order contracts for advisory and assistance services (such as professional consulting or employee training services), which may not exceed 5 years unless specifically authorized by a statute which relates to that contract.
CONTRACTING AUTHORITIES

service without having to exercise an option for each program year after the first. This contracting method may be used with sealed bidding or contracting by negotiation (see *Bidding and Negotiation Processes*, p. 14).
Use of Contract Logging as an Alternative to Stumpage Sales

- Does Forest Service have the authority to contract for logging services, and sell logs separately?
- How would special accounts and payments to states be affected?

Contracting for Logging Services

There is no legal mandate which prevents the Forest Service from using a service contract to harvest forest products, followed by a separate sales contract. However, it is current Forest Service policy not to do so. There are several reasons for this.

First, in order for the Forest Service to contract for logging services, appropriated funds must be available at the time of contract initiation. There is currently no funding category within the annually appropriated budget for this type of activity, and it would likely be difficult to request an expanded budget which would accommodate such funding. One of the primary reasons for this is the issue of risk involved in paying for harvest services in advance of receipt of payment for products removed under contract. Under the current stumpage sale system, the contractor who pays for the product is also responsible for its removal, and (unless there are corollary activities which cannot be required of the sale purchaser) the Forest Service is not faced with having to administer both a log sale contract and a logging service contract. Additionally, if the Forest Service were to market its own logs, it would need to ensure that adequate storage is available for logs which are not immediately purchased. This could be developed through programs such as sort yards and roadside sales of lower-value material. Although certain problems, such as danger of log theft and log deterioration, may need more attention under such an option, there are also a number of potentially positive outcomes, such as: 1) the ability to gain higher product revenues through targeted sales; 2) the ability to control harvesting to more specifically suit resource requirements; and 3) the ability...
to terminate contracts when necessary (for reasons such as endangered species requirements) with less liability to the Government.

Special Accounts (see also: Use of Special Accounts to Fund Stewardship Activities, p. 41)

An additional problem that would need to be resolved under a logging contract/log sale system is how payments to special accounts would be affected. For instance, the wording of the Knutson-Vandenberge (K-V) Act (see endnote 36) would preclude any payment into the K-V account for guarantee of non-reforestation work (such as timber stand improvement and wildlife habitat management) in situations where a logging contract is used. K-V funds for non-reforestation needs can be collected only on lands which were "cut over by the purchaser," and in the case of sales of decked logs, the purchaser has not cut over any land. The wording of the Brush Disposal (BD) Act (see endnote 37) would likewise prevent any payment into the BD fund for disposal of brush and other debris resulting from cutting operations. Again, because the purchaser of decked logs did not engage in any cutting operations, the Forest Service is not authorized to charge the purchaser for brush disposal, which was caused by another contractor's cutting operations.

Payments to States

In addition to the K-V account, a logging contract/log sale system would affect the Twenty-Five Percent Fund, which is meant to provide an annual payment from National Forest receipts to the states, to be used for schools and roads. This annual payment is meant as a substitute for property taxes on national forest lands, which are exempt from state and local taxation. The legislation which established this fund called for 25% of all receipts deposited into the National Forest Fund to be permanently appropriated for payments to the States. Receipts to the BD Fund and other cooperative deposits are not affected, as they are not first deposited into the National Forest Fund. However, the National Forest Management Act of 1976 expanded the accounting of Forest Service receipts to include K-V deposits and purchaser road credits. Any deposits or credits which might be reduced or eliminated using a logging contract/log sale system would be offset by the increase in revenue received by the National Forest Fund. Hopefully, any increases in revenue using this system would result in
corresponding increases in payment to the Twenty-Five Percent Fund. Therefore, any timber sale contracting mechanism which would change the amount of these deposits would correspondingly change the level of revenue used to account for payments to States.

Another mechanism for compensation to local governments is Payment for Entitlement Land\textsuperscript{26}. This legislation, commonly referred to as Payment in Lieu of Taxes (or PILT), provides for compensation to local governments based on the amount of federal land located within their jurisdictional boundaries (such as municipalities and counties). As opposed to the Twenty-Five Percent Fund, PILT payments are calculated on a per acre basis. A simplified way to draw a distinction between these two mechanisms is that the 25\% payment mechanism approximates an income tax, whereas PILT approximates a property tax.

The PILT program is administered by the Department of Interior, and is the primary mechanism by which local governments are compensated for tax-exempt federal lands managed by DOI agencies (such as the Bureau of Land Management). However, National Forest land is also included in the accountable land base. To avoid double compensation from Forest Service lands, PILT payment calculations for Forest Service land are reduced by an amount equal to the 25\% payment to States (as well as other federal receipt-sharing programs). Because of this, changes in Forest Service 25\% payments are frequently offset by changes in Entitlement payments. The result is that, although the use of a logging contract/log sale contracting mechanism will not affect the base PILT calculation, any negative impact of this contracting mechanism on the 25\% payment fund (as described above) might be offset by increased PILT payments. There are two issues, however, which may complicate this potential remedy:

1) Unlike the 25\% Fund, which is permanently appropriated, PILT payments must be appropriated annually by Congress. Since 1994, Congress has been approving PILT payments at approximately 75\% of total requests. It is unlikely that PILT would be able to offset reductions in 25\% payments to States unless it were appropriated at close to 100\% of requests.

2) PILT is offset by 25\% payments to States only in those cases where the 25\% payment is transferred by the State directly to county.
governments. In some cases, the state transfers payments directly to other local governmental units, such as school districts. These payments do not appear on the offset used for determining PILT. Although this often results in double compensation, any major reductions in 25% payments would not be offset in PILT payment calculations and the net result would be a decrease in overall payments.
**Designation By Prescription**

- What authority exists for the use of designation by prescription as a means of reducing timber sale and service contract preparation costs?

In relation to timber sales, the National Forest Management Act of 1976 makes it explicitly clear that the designation, marking and supervision of timber harvesting activities is to be conducted by federal employees or service contractors who have no prospective ties to the timber sale. The intent of this law is to ensure accountability for products identified to be sold by the government, as well as to prevent the conflicts of interest (i.e., maximization of personal versus public benefits) that are likely to arise if a purchaser of federal property is allowed to designate the materials to be purchased. Keeping this intent in mind, any designation of federal property to be purchased must be clear enough that no “cut or not cut” decisions are made by the purchaser. The most obvious means of achieving this is to physically mark each item to be removed. However, in the interest of reducing administrative costs where appropriate, policy has been established that allows for designation without marking in situations where prescriptions or area designations can be used to clearly describe the silvicultural objective.

It is clear from this policy that, in those cases where a specific prescription for the sale and removal of material is possible, designation without marking may be allowed. Examples include area designations, such as clearcut unit boundaries, as well as designation by species, by dead versus live material, or by a specific stump diameter. Commercial timber sales involving thinning generally must be marked, unless a prescription can be developed which clearly specifies the silvicultural objectives. For example, the use of spacing or basal area designations may be possible in cases where sufficient measures have been taken to assure satisfactory contractor performance, as well as accountability for products removed.

In all cases, it is the responsibility of the Forest Service to determine

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† Examples of such measures include: pre-sale marking of a portion of the stand to provide an on-the-ground sample of the silvicultural prescription; frequent site visits by the contract supervisor to monitor contractor performance; contractor payment based on scaled volume removed rather than lump sum stumpage.
whether marking is necessary or whether designation of material to be harvested can be accomplished without marking.

For service contracts, the authority to use designation by prescription is broader. As long as the desired conditions of the end result of vegetative management services can be clearly defined, such that the service contractor is able to readily and objectively determine the materials to be removed, prescriptive specifications can be used (see Case Example 2 - Designation by Prescription, p. 67). Designation by prescription of spacing or basal area requirements in thinnings, in which purchaser discretion often cannot be avoided, is less limited if the thinning activity is being conducted as a service contract. For instance, pre-commercial thinnings involve the use of a service contract, in which prescriptive specifications are standard accepted practices.
Descriptive End-Results Contracts

- Can the Forest Service use descriptive end-results contracts?
- How does this authority differ between timber sale and service contracts?

Other than requirements pertaining to the designation of timber to be harvested under a timber sale contract (see Designation By Prescription, p. 32) there are no statutes which prevent end-results descriptives from being used as a part of a contract specification. Such descriptives are commonly used for service contracts (such as pre-commercial thinnings, tree planting, etc.). The only barrier would be the potential delay in payments for contractor services, which are generally required as soon as possible following acceptable completion of scheduled work under the service contract. This is addressed fairly easily for short-term end-results descriptives through the use of progress payments, based upon satisfactory completion of treatments in a portion of the project area.

The use of long-term end-results descriptives poses a problem. For example, there is no precedent for, nor is there any contractor incentive to bid upon, a reforestation contract which delays payment for services until a fully stocked, 5 year old stand of healthy, vigorous trees exists. Additionally, such contracts would require determinations of the often complex causes of non-performance of specifications. To build on the same example, if at 5 years a fully-stocked stand of healthy, vigorous trees does not exist, how might it be determined what factors (poorly planted trees or otherwise) are the cause?

The use of end-results descriptives in a timber sale contract is significantly limited, because of the NFMA requirement that all trees to be harvested be designated by the Forest Service (see endnote 27). If the contract involves the sale and removal of material, the designation of this material must be clear enough that there will be no subjective decisions made by the purchaser. Although end-result descriptions can be used to provide additional information about the goals and objectives of the sale, these cannot be used as a substitute for the specific, on-the-ground identification of the material being sold under the contract. The only exceptions to this are those cases where the Forest Service determines that
specific prescriptions can be used to describe the silvicultural objectives (such as the harvest of all material within defined unit boundaries [i.e. clearcut], the harvest of all material of a given species, or the harvest of all material within a specified size range). The use of long-term end-results descriptives in timber sale contracts is limited by the NFMA requirement that those contracts be no more than 10 years in duration (see endnote 20).

The use of end-results descriptives may pose a problem for environmental impact analyses required under the National Environmental Protection Act (NEPA), especially in situations where (at the time of NEPA analysis) it is unclear what kinds of activities will be used to achieve the end-result.

For additional information on the end-results issue, the reader is encouraged to review Designation By Prescription, p. 32.
**Bundling of Diverse Management Activities into Single Contracts**

- Can the Forest Service “bundle” diverse management activities in a single contract?
- What is the ability to mix elements of services and sales within a single contract?
- Is there authority to bundle projects from multiple agencies (BLM, USF&WS, etc.)?
- Can the Forest Service use a task-order contract as an umbrella contract under which a variety of management activities could be performed?

**Bundling of Diverse Activities in a Single Contract**

The authority for the Forest Service to bundle diverse activities in a single contract depends on both the type of activity and the type of contract being used. For example, road-building activities which can be included in a timber sale contract are restricted to what can be required of a “prudent operator.” The specific type and extent of these activities is covered in *Exchange of Goods for Contractor Services*, p. 49.

There is no general prohibition on the bundling of multiple activities within a service contract. As long as there is a pool of available contractors competent in the performance of all activities desired, it is perfectly feasible to use a single contract which encompasses a range of services.

**Mixing Elements of Services and Sales**

There are no specific statutory provisions that authorize the combination of timber sales and service activities within a single contract instrument. However, there also are no specific authorities that would prohibit combining these elements, as long as general statutory provisions are followed.

The combination of service and sale activities within a single contract does present a number of complications. The first of these is conflict of
interest. When a contractor who is performing a required service is also paying for and removing goods under the same contract, there must be a careful consideration of the work specifications. Any such contracts would need to be carefully designed to limit contractor discretion to decisions which would not influence the overall outcome of the desired management activity.

In addition to conflict of interest are the issues of accountability and regulatory conflicts. The combining of sale and service activities under a single contract presents a challenge in clearly separating sale receipts and contract costs. Particular care would need to be taken in assuring that these types of contracts did not allow for augmentation of Congressional appropriations (see *Exchange of Goods for Contractor Services*, p. 49). Regulatory conflicts are also likely to arise, given that timber sale contracts are a specialized subset of government contracts which are specifically designed for the sale of products. Service contracts are governed by separate regulatory authorities contained in the Federal Acquisition Regulations (FARs).

**Bundling of Projects from Multiple Agencies**

Bundling of Forest Service projects with those of other agencies is difficult to achieve under existing authorities. The Forest Service is generally limited to carrying out activities on the national forests. However, the Economy Act of 1982 does provide limited authority to procure services from other agencies, and the Forest Service may, in certain circumstances, perform work off of the national forests under the Granger-Thye Act (see endnote 48).

**Use of Task-Orders as Umbrella for Bundled Activities**

The use of task-orders is possible as a mechanism for acquiring multiple-task, multiple-skill activities over a long term. Using Indefinite Quantity, Indefinite Delivery, or Requirements contracts, it is possible to have open-ended contracts where task orders are issued to perform certain generally specified tasks. This type of contract could run for several years. For more information, refer to Task-Order Contracts in *Long-Term Contracts*, p. 25.
Research and Demonstration Authority to Test New Concepts

- What is the research and demonstration authority to test new contracting methods?
- What are the applicable funding sources and venues?

Research and Demonstration Authority

The Forest and Rangeland Renewable Resource Research Act of 1978 provides authority for the Secretary of Agriculture to implement a program of forest and rangeland renewable resources research. In addition, NFMA authorizes the disposal of forest products, by sale or otherwise, related to research and demonstration projects. As these authorities apply to research on a broad range of forest management activities, including the development of alternatives that will make possible the most effective use of multiple products and services, it is possible that new contracting methods could be included within the scope of activities allowed under this Act. However, testing of new contracting methods is not explicitly mentioned anywhere in the Act. There is regulatory authority which allows the Forest Service to test and evaluate alternative bidding methods for the sale of National Forest timber. Any such tests must be approved by the Forest Service Chief.

Applicable Funding Sources

Many forest research and demonstration projects involve some component of product removal. Depending on the extent to which the research or demonstration component can be incorporated into contract specifications, many of these projects can be accomplished without obtaining supplemental funding. Sales of products to meet research needs are generally conducted under the same approach as normal sales, except that any special requirements (and their resultant costs) are reflected in the appraisal and in the contract requirements. For example, if the purpose of a project is to demonstrate a new silvicultural technique or harvesting system, a contract could be designed which specifies the sale and removal of material using the specific technique or system. As long as the value of
material makes a timber sale feasible, that component of the project could
be conducted as a timber sale contract\(^\dagger\). There is no limitation on the sale
of products which are being removed as part of a research or demonstration
project; however, this sale of products is subject to the same laws and
regulations that apply for a normal timber sale. For instance, all receipts
resulting from the sale would be handled according to normal accounting
procedures (i.e. deposits made to appropriate special accounts, such as K-V
and Brush Disposal, with the remainder of receipts sent directly to the
Treasury). Any supplemental funding for additional research or
demonstration needs (such as monitoring, construction of explanatory signs,
or any other project activity that is not a part of the harvest operation)
would need to come from an appropriated budget.

Many research and demonstration projects do not involve the harvest
and removal of saleable products (see Neo-tropical Migratory Bird
Monitoring and Swan Front Ranger Services Stewardship Contract in Case
Example 3 - Cooperative Agreements, p. 70). These kinds of projects
usually involve the performance of a specialized service by a contractor or
consultant (such as the testing of a new streamside rehabilitation technique,
or a wildlife monitoring project). In these cases, there are a variety of
funding strategies which may be used. Such strategies might include either
the use of appropriated funds which have been designated for the activities
to be conducted in the research or demonstration project, or the use of funds
from private sources. Any research the Forest Service is authorized to
can be performed by others using financial assistance (in the form
of grants and cooperative agreements) to the extent that funds are available.
Assistance includes transfer, exchange, use, or sharing of information,
materials, equipment, personnel, funds, and facilities and means for
disseminating research results and getting scientific knowledge into practice
(see Case Examples 4 - Research Administrative Use, p. 81, and 5 -
Research Administrative Free Use, p.85).

Authority for receiving private funding and using cooperative
agreements for research activities is found in the Forest and Rangeland
Renewable Resource Research Act\(^\dagger\), which is the statutory basis for
specific Forest Service policy in this regard\(^\dagger\). This policy describes the

\(^\dagger\) Most of these projects have a value of timber that is above minimum rates, so they are
sold under standard timber sale contract. If their value is less than minimum rates, they
can be disposed of under administrative use procedures.
authority of the Forest Service to receive private funds to carry out research activities, as well as the Forest Service authority to issue grants or enter into cooperative agreements with any entity or individual to conduct renewable resource research pursuant to the specific requirements of the Act. In addition to receiving outside funds for research, the Secretary of Agriculture is provided with authority under the Granger-Thye Act to advance funds to research cooperators for the purpose of fostering and stimulating their participation with the Forest Service.

Cooperative agreements entered into under the Forest and Rangeland Renewable Resource Research Act require a minimum matching contribution of at least 20 percent of the estimated total direct cost of the project. Also, the Forest Service cannot pay a fee or profit to any cooperator. For information on cooperative agreements that are not necessarily research-related, see Cooperative Agreements, in Local Involvement in Stewardship Projects, p. 54.
FUNDING STEWARDSHIP ACTIVITIES

Use of Special Accounts to Fund Stewardship Activities

- What are the limitations on the total amount that can be annually appropriated or accumulated by each Forest/District out of Knutson-Vandenberg, Brush Disposal, and Salvage Sale accounts?
- What are the limitations on activities that can be funded by these accounts?
- How long are moneys placed into these accounts available for use?
- What are the limitations on project area boundaries for activities funded by these accounts?
- Can a contractor perform services in lieu of deposits to a special account?

A number of special accounts have been established to ensure that adequate funding is available for a variety of management activities. Of greatest relevance to the issue of stewardship contracting are the Knutson-Vandenberg (or K-V) Fund, the Brush Disposal (or BD) Fund, and the Salvage Sale Fund (SSF). These accounts are of special interest in that they are, to various extents, maintained by the agency (unlike the National Forest Fund, which is maintained by the Department of Treasury) and are generally used to pay for activities which are related to forest protection and stewardship. Agency discretion of these funds allows for increased flexibility in the administration of programs associated with these accounts. However, there are limits on both the placement of funds into these accounts, as well as the range of activities for which these accounts can be used.

Although these accounts were initially established to fund work directly associated with timber management activities, recent revisions (such as those included in the National Forest Management Act of 1976) have increased the scope of allowable activities to include a broader range of protection and stewardship work within the sale area, such as watershed and wildlife habitat protection and enhancement.
Knutson-Vandenber Fund

This trust fund was established by the Act of June 9, 1930 (as amended by NFMA)\textsuperscript{36}. The purpose of the fund is primarily to reforest lands which have been harvested by timber sale and to improve timber growth and product quality on residual stands. The 1976 NFMA amendment added the goals of protecting and improving the future productivity of the renewable resources on sale areas, including fisheries, range, recreation, soil and water quality, timber, and wildlife. Work activities that can be performed with K-V funds include site preparation, planting, fertilizing, precommercial thinning, release from competing vegetation, pruning, soil protection and improvement, noxious weed control, and other similar type projects which are consistent with the above stated goals (for further information, see FSH, Part 2409.19.13 - Exhibit 01: Examples of Appropriate K-V Projects).

For each timber sale, a Sale Area Improvement plan is developed which identifies post harvest mitigation, protection and improvement needs for the sale area. Following a calculation of the total amount necessary to implement this plan, the timber sale amount available for K-V fund collection is determined. There is no limit to this amount, except that a minimum of 50 cents per thousand board feet of timber must be returned as receipts to the National Forest Fund. Therefore, the ceiling on the amount of K-V that can be collected for a given sale area is based on the stumpage price, minus required payments to the National Forest Fund. Funds are collected and maintained by the National Forest in which the sale area is located.

Expenditures of K-V funds collected from a given timber sale are limited to those activities identified in the Sale Area Improvement plan for that unit. Additionally, these activities can only occur within the timber sale area boundary of that unit. This boundary is generally defined by the harvesting provisions of the timber sale contract; however, if there are no recognizable ground features it can include the area within \textsuperscript{1}/\textsuperscript{4}\mile of harvesting activity. Unless approved by the Regional Forester, expenditures must occur within 5 years of sale closure or 5 years after the end of the appraisal period. Any excess funds remaining after this period cannot be transferred to another unit, and must be returned as miscellaneous receipts to the Treasury.
Contracts for K-V work can be let for multiple years, provided that the funds have already been collected for the proposed work (see also: Long Term Contracts, p. 24). Also, it is permissible to include multiple sale areas within a single service contract for K-V work, as long as the portion of work for each unit is covered by funds collected from that unit. It is also permissible to combine K-V funds for a given activity with other funds available for that activity in order to develop a more economical contract package.

Brush Disposal Fund

This special account was established by the Act of August 11, 1916 (as amended). The purpose of the account is to fund activities following timber harvest which will reduce fire and insect hazards, improve reforestation efforts, unblock stream channels, and improve aesthetics and recreational access (where desired). Work activities that can be performed with BD funds are limited to the treatment of slash and other debris resulting from cutting on timber sale areas, providing extra protection in lieu of burning, fighting escaped slash fires, and felling snags.

For each timber sale, the estimated cost of brush disposal is determined, and it is then determined by the Forest Service how the activities will be performed. The BD Fund is the only one of these accounts in which a purchaser may perform required services in lieu of monetary deposits. The Forest Service has the option of deciding whether to: 1) require the purchaser to perform these services; 2) require the purchaser to make deposits, which go into the BD account; 3) establish a combination of options 1 and 2; or 4) allow the purchaser to decide between options 1 or 2. Purchasers cannot be required to treat (or pay for the treatment of) slash material that was not created by their operations.

If it is decided that monetary deposits will be made, the funds are collected and maintained on the District where the sale occurs. These funds are thereafter available only for use on the sale area for which they were collected. The amount that can be collected for any given sale is limited only to the total expected cost of brush disposal as defined by the Act. There is also no ceiling on the amount that can be collected for BD on any given District. However, any BD funds collected for a given sale that
remain after the completion of brush disposal activities for that sale area must be returned directly to the Treasury as miscellaneous receipts.

As with K-V funds, contracts for BD work can be let for multiple years, provided that the funds have already been collected for the proposed work. Also, it is permissible to include multiple sale areas within a single service contract for BD work, as long as the portion of work for each unit is covered by funds collected from that unit. It is also permissible to combine BD funds for a given activity with other funds available for that activity in order to develop a more economical contract package.

Salvage Sale Fund

This special account was established by the National Forest Management Act of 1976\textsuperscript{38}. The purpose of the account is to provide a self-sustaining, revolving fund which recovers the direct costs of preparing and administering timber salvage sales\textsuperscript{39}. This fund allows for a more rapid response to immediate salvage needs (such as those cases where the present condition of a forest stand poses a threat to the future health and viability of the ecosystem) by providing a funding source other than annual appropriations, which may take 1-2 years to obtain. The Fund was initially established in FY1977 with a “seed money” appropriation of $3 million. Since that time, the account has been funded through receipts from salvage sales, as well as occasional additional Congressional appropriations (such as in FY1988, when $37 million was added to expand the salvage program due to numerous severe fires in 1987). Activities for which this fund may be used are limited to the preparation, sale and administration of salvage timber sales\textsuperscript{40}. Partial salvage sales\textsuperscript{\dagger} can be funded proportional to the size of the salvage component of the sale, the remainder to be funded from appropriated funds.

For each complete or partial salvage sale, a Salvage Sale Fund Plan is developed, noting both the needs for SSF funding of the sale, as well as the amount of purchaser receipts which will be deposited back into the SSF to maintain this revolving fund. Although the priority in establishing payments is to sustain the salvage sale program, efforts must be made to

\[\dagger\] These sales are conducted where only a portion of the sale meets the salvage definition, but where either biological or administrative conditions dictate that it is not reasonable to sell the salvage portion under a separate contract.
FUNDING STEWARDSHIP ACTIVITIES

collect sufficient K-V funds to allow for reforestation. There is often no limit to the amount which may be deposited into the SSF for individual salvage sales, since the required minimum National Forest Fund deposit of 50 cents per thousand board feet can be waived for individual salvage sales. Salvage Sale Funds are collected and maintained by administrative units, as opposed to proclaimed National Forests (see “Administrative Unit” in Glossary). Regional Foresters have the authority to pool the Salvage Sale Funds for all forests within their respective region as one fund or to apportion the fund by National Forest.

Forests may only expend Salvage Sale Funds to the extent authorized by the annual Appropriations Act, and SSF expenditures may never exceed funds collected to date. Although there is no time limit on the availability of funds within the SSF account, balance reviews are performed annually for each administrative unit to determine if its total funds are in excess of 150 percent of the latest 3-year average annual cost of eligible salvage sales. Any funds in excess of this amount are transferred to the Regional Forester, who may reallocate the funds to the SSF accounts of other National Forests that need the money. Any unallocated funds then go to the Chief for similar reallocation to other Regions. Any unallocated funds remaining must be returned to the Treasury as miscellaneous receipts. As this long series of steps demonstrates, the ability to retain and redistribute Salvage Sale Funds on and among National Forests is much less limiting than it is for either K-V or BD.

Contracts for SSF work can be let for multiple years, provided that the funds have already been collected for the proposed work. Also, it is permissible to include multiple salvage sale areas within a single service contract for SSF work.
Agency Retention of Receipts to Fund Stewardship Activities

- Under what circumstances can some portion of receipts be retained locally?
- Can the Forest Service place multiple-source funds into a revolving trust -- to be managed by whom?

One key element of stewardship contracting discussions has been the issue of whether a portion of the proceeds from the sale of commercial products might be retained at the local level to fund other non-revenue producing activities. In fact, language providing limited authorization for the retention of receipts has been included in most of the stewardship contracting legislation considered to date. From a constitutional perspective, local control by agency field units would seem to violate the principle of separation of powers and the accountability of an executive agency (such as the Forest Service) to the public through Congress. For this reason, current statutes and fiscal policies are very specific in controlling how agencies handle receipts, when they may retain receipts, and when they may decide how they are to be used.

The Forest Service does have limited authority (under such statutes as the Knutson-Vandenbergh Act, the Brush Disposal Act, and the Salvage Sale Fund provisions in the National Forest Management Act) to retain timber receipts for specified purposes (see *Use of Special Accounts to Fund Stewardship Activities*, p. 41). However, in most other cases, receipts must be returned to the National Forest Fund in the federal Treasury. Annual appropriations from the Treasury are then determined through Congressional legislation.

The primary law which guides agency handling of receipts is the "Miscellaneous Receipts Statute"§, which requires that all federal agency revenues must be deposited directly into the federal Treasury, unless the agency has specific statutory exclusions. In addition to this general statute, there is a more specific statute (contained in the Act of March 4, 1907 §), which requires that all money received by the Forest Service for timber and other forest products, as well as use permits, be deposited as miscellaneous
receipts to Treasury. As mentioned above, the intent of both statutes is to ensure that the public, through Congress, maintains control over spending of public revenue.

Although these laws have established strict limitations against agency maintenance of receipts, there has been recent legislation which attempts to establish innovative mechanisms for limited agency control of receipts where deemed appropriate. An example of this is the Recreational Fee Demonstration Program\textsuperscript{44}, a pilot project that allows for limited local maintenance and control of receipts from recreational permits. This legislation calls for the Secretaries of Interior and Agriculture to each implement a fee program to demonstrate the feasibility of user-generated cost recovery for the operation and maintenance of recreation areas or sites and habitat enhancement projects on federal lands.

One of the concerns over such programs has been the impact they might have on reducing the income to the Treasury. This concern is often discounted based on the assumption that the self-sustaining projects created by such programs would have less of a need for external appropriations from Treasury, and therefore would offset any reduction in Treasury income through lessened dependence on Treasury funding. It has yet to be determined what the outcome of such programs will be with respect to federal receipts. In the interim, the approach that has generally been used has been to avoid any reduction in historic levels of income to the Treasury from a given program, yet allow that program to locally retain receipts in excess of such levels. For instance, in the Recreational Fee Demonstration Program, the amounts collected for each project which are in excess of historic revenues to Treasury general fund (see endnote 44 for details) will be placed into a special account dedicated for use in furthering activities on the site from which funds were collected. 20\% of the dedicated amount will be placed in a separate account for use on an agency-wide basis. While this mechanism addresses concerns over reduction in Treasury income, it also places heavy limitations on the amount of revenue which local projects may keep, and may make it difficult for such projects to prove that self-sufficiency (in specific cases) is a viable alternative to dependence on Congressional appropriations. There is currently discussion within Congress to broaden the authority under the Recreational Fee Demonstration Program to allow for local control of 100\% of receipts for
these projects. Such programs may serve as models for future application to stewardship projects in areas other than recreation.

Other than the Recreational Fee Demonstration Program, and the trust funds and special accounts covered previously, there is no authorization for the Forest Service to place multiple-source funds into revolving trusts that are managed by the agency.
Exchange of Goods for Contractor Services

- Under what conditions can goods be traded for services in forest management activities?
- What are the limitations on activities that can be required of the contractor in a timber sale?

The exchange of public resources (such as timber) for forest management services circumvents the normal process of sending receipts to the Treasury and operating on Congressionally appropriated funds. Although such exchanges were specifically authorized in the FY1992 and 1993 stewardship contracting pilot projects, a great deal of concern has been expressed over the implications of such exchanges. Indeed, this may have been a key reason for the discontinuation of appropriations authorization for the pilot projects. As discussed in the previous section, the normal process of agency handling of receipts is meant to ensure adequate public control over the disposition of revenue generated from the sale of public resources. However, we have also seen that there are several exceptions to this process (such as special funds and pilot programs) which have been created to increase agency flexibility and efficiency with the goal of improved resource management. It was determined, in these cases, that limited local control of revenue may be in the best interest of the public. The question then becomes not whether limited local control of revenue should be authorized by Congress, but in which cases and to what extent.

With respect to goods for services trades, the additional concern of accounting has been raised. The existing administrative structure of the Forest Service has been set up to account for the disposal of goods based on receipts, and the purchase of services based on expenditures from appropriated and other special funds. Equitable trading of goods for services would be difficult to monitor under this accounting system. For example, receipts from the sale of timber would become difficult to fully account for if portions were diverted directly to fund other stand management activities. For these reasons, any applications of this

† Although there are special funds that serve such purposes (see Use of Special Accounts to Fund Stewardship Activities, p. 41), these are limited to specific authorized uses and have established mechanisms for tracking the revenue involved. Such accounts are also
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Under the law, the Government's acquisition of services is specifically prohibited without the use of a procurement contract. However, there are conditions (limited by NFMA) in which salvage rights can be used to offset the cost of procurement contracts (see Contracts Involving Salvage of Low-Value Materials, p. 19). The distinction here is that the term "goods for services" has generally been used in relation to timber sales contracts in which the contractor is allowed to reduce the amount he pays for material removed under the contract, based on the value of specific services that the contractor performs.

Another long-standing federal policy that limits the trade of goods for services is the "Augmentation Theory of Appropriations," which bars federal agencies from operating at a level of funding that exceeds Congressional appropriations. Again, the intent of this legislation is Congressional control over agency spending. This policy, in effect, disallows goods for services trades since the Forest Service cannot contract for services which are not funded through appropriations or other special accounts. The trading of goods for services would potentially allow an agency to fund activities through channels other than those currently authorized.

In addition to a lack of authority to trade goods for services, the Forest Service cannot require the performance of services not directly related to the sale and removal of merchantable forest products as part of a timber sale. To the extent that services fit into the sales process, they may be performed under a timber sale contract. However, any services that are not required in order to meet the timber sale objectives must be performed separately under a service contract and paid for with appropriated funds. An example of a service which is not directly related to the harvest process, yet can be required as it relates to the overall sale objective, is site preparation activity such as brush disposal (see also: Brush Disposal Fund, in Use of Special Accounts to Fund Stewardship Activities, p. 43).

generally included in revenue calculations to determine payments to states (see Payments to States in Use of Contract Logging as an Alternative to Stumpage Sales, p. 29).
The "prudent operator" concept helps to define some services which can and cannot be required under a timber sale contract. The statutory basis for this concept is the National Forest Roads and Trails Act of 1964. In summary, this Act\textsuperscript{46} authorizes the Forest Service to finance the acquisition, construction, reconstruction, and maintenance of forest roads through the use of appropriated funds, requirements on timber purchasers, cooperative financing with other public agencies, private agencies or persons, or by a combination of these methods. Purchasers cannot be required to build roads not needed to remove timber included in the sale. However, the Forest Service is authorized to require purchasers to build roads that are used for sale operations to higher standards than "prudent operator" standards, but must do so by supplementing the sale with appropriated funds.
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Local Involvement in Stewardship Projects

- What authority does the Forest Service have to work with local interested groups to design, implement and monitor stewardship projects?
- To what extent can volunteers be used to conduct such projects?
- Can private contributions be donated to the Forest Service for use on specific projects?
- If activities funded from private contributions generate revenue, can those receipts be retained locally to fund further stewardship projects in the same area?

Authority to Work with Local Community Groups

The Forest Service generally has broad authority to work with local interested groups to design, implement and monitor projects on national forest land. However, the Forest Service has to be the final decision-maker on all projects on National Forest land. There are also limitations on the structure of formal groups which provide advice or recommendations to the agency. These limitations are governed primarily by the Federal Advisory Committee Act (FACA)\(^7\), which is meant to ensure openness in public processes and balanced representation in formal advisory committees. However, FACA should not be viewed as a barrier to the collaborative decision making approach. The most important thing to remember about FACA is that it only relates to formal advisory committees.

FACA applies to collaborative groups if they are either established by or utilized by the Forest Service (or other federal agency). The following decision key will help to define when FACA applies.

1) Does collection of individuals include non-government personnel?
   YES -- go to 2)
   NO -- FACA does not apply
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2) Do individuals have a cohesive organizational structure?
   YES -- go to 3)
   NO -- FACA does not apply

3) Is that cohesive organizational structure a result of agency effort?
   YES -- go to 4)
   NO -- go to 5)

4) Does group render specific advice or recommendations?
   YES -- FACA applies
   NO -- FACA does not apply

5) Is group subject to strict agency management control?
   YES -- go to 6)
   NO -- FACA does not apply

6) Does controlled group render specific advice or recommendations?
   YES -- FACA applies
   NO -- FACA does not apply

The constraints of FACA can often be avoided by creating an informal forum that is open to all participants. As long as the process is open and transparent, and the Forest Service is not receiving formal advice from an organized group, FACA should probably not be considered a barrier.

The Natural Resources Law Center at the University of Colorado School of Law has published a pamphlet which briefly outlines some of the techniques that Forest Service personnel and community groups have found useful for incorporating meaningful public participation into the planning process. This extremely informative document (titled “Innovations in Forestry: Public Participation in Forest Planning”) can be obtained for $1 by contacting the Center’s publication assistant at (303) 492-1272.

Private/Public Partnerships

Partnerships between the Forest Service and outside private (or public) institutions, organizations or individuals are allowed under a variety of conditions (see Case Examples 3 - Cooperative Agreements, p.70, 4 - Research Administrative Use, p.81, and 5 - Research Administrative Free Use, p.85). The following authorities define the variety of conditions under which such partnerships can be created, as well as the limitations on the activities of partners.
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The Granger-Thye Act\textsuperscript{48} grants limited authority for the Forest Service to take funds from outside entities to perform work on the national forests, or to perform work on lands adjacent to the national forests. Additionally, the Forest and Rangeland Renewable Resource Research Act of 1978 (see endnote 30) allows for the contributions of funding from outside sources for research projects\textsuperscript{49}. The Granger-Thye Act does not provide authority to sell public property or to divert receipts from the sale of public property. In other words, the Forest Service can permit outside organizations to perform or pay for work on national forest land (see Case Example 3 - Cooperative Agreements, p. 70), but these organizations cannot engage in the sale of property under such a permit. Any funds received from outside entities as payment or reimbursement for work done by the Forest Service on such projects are deposited to the credit of a Forest Service appropriation for a similar purpose.

Cooperative Agreements

Cooperative agreements\textsuperscript{50} (commonly referred to as partnerships) may be entered into under a variety of statutory authorities. Typically, such agreements involve a joint accomplishment of work, and have direct benefits to both the cooperator and the Forest Service. Specific authorities to enter into partnerships that may be useful to the purposes of forest stewardship projects include:

\textit{Cooperative Funds and Deposits Act of December 12, 1975} \textsuperscript{51}. This Act authorizes the Forest Service to enter into cooperatively performed, mutually beneficial National Forest projects with non-Federal parties in four specific areas: (1) Cooperative Pollution Abatement, (2) Cooperative Manpower, Job Training and Development Programs, (3) Development and Publication of Cooperative Environmental Education and Forest History Materials, and (4) Forestry Protection. Activities permitted under forestry protection include: fire prevention, fuels management thinnings and debris removals, insect and disease control, tree planting and seeding, erosion control, water protection and land restoration among others. (for more detailed information, see Forest Service Manual [FSM] 1587.11)

\textit{Federal Technology Transfer Act of 1986} \textsuperscript{52}. This Act authorizes the Forest Service, where appropriate, to transfer federally owned or
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originated technology to State and local governments and to the private sector. The Act authorizes an agreement between one or more Federal laboratories and one or more non-Federal parties under which the Forest Service provides personnel, services, facilities, equipment, or other resources with or without reimbursement. This Act does not authorize transfer of funding by the Forest Service to non-Federal parties. The non-Federal parties may provide funds, personnel, services, facilities, equipment, or other resources toward the conduct of specified research and development projects that are consistent with the mission of the Forest Service. (for more detailed information, see FSM 1587.14)

*Interior and Related Agencies Appropriations Act of 1992* 53. This Act authorizes the Forest Service to cooperate with other parties to develop, plan, and implement projects that are mutually beneficial to the parties that enhance Forest Service activities. These projects can be financed with matching funds from cooperators (such as challenge cost-share agreements; see *Case Example 3 - Cooperative Agreements*, p. 70). Cooperators may be public and private agencies, organizations, institutions, and individuals. (for more detailed information, see FSM 1587.12)

*National Agricultural Research, Extension, and Teaching Act of 1977* 54. This Act authorizes the Forest Service to use: (1) research joint venture agreements (RJVA) with any entity or individual to serve the mutual interest of the parties in agricultural research, extension, and teaching activities, and (2) research cost reimbursable agreements (RCRA) with State Cooperative institutions for the acquisition of goods or services, including personal services, without seeking competition, to conduct agricultural research, extension, or teaching activities of mutual interest. (for more detailed information, see FSM 1587.13)

For additional information on cooperative agreements, see *Research and Demonstration Authority to Test New Concepts*, p. 38)
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Small Business Concerns

- Can the Forest Service limit the size of firms allowed to bid on certain types of contracts?
- Are there any alternatives to standard insurance and bonding requirements which could reduce the financial burden on small businesses?
- What types of contract work are included in prevailing wage legislation?
- Is it possible to limit the geographic scope of the bid area for a contract?

Small Business Contracting Issues

Under certain conditions, the Forest Service does have the authority to limit the size of firms allowed to bid on timber sale and service contracts. The conditions under which this is possible for timber sales are defined within the Small Business Timber Sale Set-Aside Program, which was designed in 1971. This program, which is specifically meant to set aside a portion of timber sales for small businesses, is operated under a combination of different authorities, including:

1) the Small Business Act, which provides for the use of set-aside sales to ensure that small businesses receive the opportunity to purchase a fair proportion of the total sales of Government property (e.g. National Forest sawtimber);

2) regulations promulgated by the Small Business Administration (SBA) in 13 CFR, Part 121, which provide definitions and processes used by the SBA in administration of the small business program; and

3) an agreement between the Forest Service and the SBA for financial assistance to small business concerns to build roads, which provides for road construction loans to successful small business bidders for National Forest timber sales.

The process used to determine when the Small Business Timber Sale Set-Aside Program must be implemented involves a fairly complex series of

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calculations. The following is a brief and simplified accounting of this process, for the purposes of gaining a basic understanding of the program. First, the “small business share” is determined by the Forest Service’s timber sale officer and the SBA representative for the market area (usually defined as a National Forest or BLM District). This share, which is typically re-calculated every five years\(^5\), is based on the average percentage of sawtimber stumpage purchased by small businesses within the market area during the previous five year period. Every six months, the Forest Service calculates the total amount of sawtimber sold to small businesses (including all set-aside sales) during the previous six months. If this amount falls below the small business share, the set-aside program is triggered, and the Forest Service must set aside a certain amount of its sales for preferential bidding by certified small businesses. The amount which must be set aside is a sum of the small business share for the next six months plus the volume differential from the previous six months period. Once the cumulative volume of the small business share has been offered and sold, the timber sale program returns to open competitive bidding\(^6\).

In addition to the Small Business Timber Sale Set-Aside Program, there is a Special Salvage Timber Sale (SSTS) program. This program is operated independently of the regular set-aside program, and timber volumes from sales set aside under the SSTS program are not included in the six-month analysis for the regular program. The objective of the SSTS program is similar to the regular set-aside program, in that it is meant to make a portion of the timber prepared under salvage sale funds available for harvest by small loggers or forest products firms\(^8\) (see Salvage Sale Fund, in Use of Special Accounts to Fund Stewardship Activities, p. 44). Unlike the regular set-aside program, the SSTS program does not have an analysis and trigger system. It simply encourages that small salvage sales

\(^5\) The share may be re-calculated sooner, if there has been a recent significant change in the market profile (such as a mill closure).

\(^6\) The set-aside program has been criticized by some for not effectively achieving the goals of assisting small businesses. Among recent studies chronicling the local impacts of these programs on small businesses are two reports by Forest Trust, a non-profit organization Santa Fe, New Mexico. The first is a study of the distribution of the small and medium-size business shares for timber sales on national forests in northern New Mexico. The second, which is currently being completed, is a critical analysis of the Small Business Timber Sale Set-Aside program, and seeks to identify the program’s failings as well as offer recommendations for improvement. For more information on either of these reports, contact the Forest Trust at (505) 983-8992.
be set aside when competitive bidding by eligible firms is expected to occur. There are four criteria, all of which must be met for proposed salvage sales to be set aside under the SSTS program: 1) salvage sale funds predominately finance sale preparation activities; 2) the sale period does not exceed 1 year; 3) the sale involves only minor (less than $10,000 in value) road construction or reconstruction; and 4) the sale does not involve significant catastrophic damage, such as fire or windstorm.

The Small Business Program also applies to service contracts, but is managed independently of the timber sale program. For example, the size standards for a "small business" vary, depending on the type of business in which vendors are primarily engaged. The maximum size for small businesses engaged primarily in forestry is $5 million in annual receipts. An extensive table of small business size standards (which establishes thresholds based either on number of employees or annual receipts) can be found in 13 CFR §121.201. Within the Forest Service, approximately 90 percent of procurements are done with SBA-defined small businesses. The only major exceptions are large equipment or supply purchases (computers and office furniture, for example), and other service procurements in which there are no available small business vendors.

The laws pertaining to the Small Business Program have become extremely complex, and cannot be fully described within the scope of this guidebook. For instance, some transactions are now not only set aside for small businesses, but are further reserved for small firms categorized as "emerging small businesses." Additionally, there are programs reserved for struggling firms under the SBA's Minority Enterprise Development program (commonly referred to as the 8(a) program). This program is meant to promote the participation of socially and economically disadvantaged businesses in the free enterprise system.

The Small Business Administration has recently proposed a revision in its regulations governing the 8(a) Business Development program. The proposed revision, which is meant to increase the potential pool of small businesses available to compete for particular procurements, would permit two or more small business concerns to joint venture for a particular procurement and still be considered a small business concern so long as each concern individually was a small business. A large business could not, however, split into two smaller business entities under the same control in
order to joint venture for a particular procurement reserved for small business. This proposed revision could significantly enhance the ability of local small businesses to retain their 8(a) competitive status after forming joint partnerships to pursue a wider range of stewardship activities. (For further information on this proposal, contact the Office of Minority Enterprise Development, at (202) 205-6410.)

Insurance and Bonding Alternatives

Most timber sale and construction contracts require a performance bond to assure that required work is completed by the contractor. In most cases, contracts do not require insurance to protect the Government, as the United States Government is self-insured. However, some contracts require insurance to protect non-Government landowners (such as the owners of a private road which is being used by a Government contractor), as well as Government property in cases where it is highly susceptible to damage (for instance, when the contractor is operating in close proximity to a building or other expensive structure). When insurance is required, there are no alternative options.

There are alternatives to bonding; however, none of these options is without its own set of risks. Cash options are always available, but can often be difficult or impossible for small or struggling firms to obtain. Individual surety options are also commonly available, yet these options merely transfer the risk to another party (usually friends or family). There are also a wide variety of permitted securities, but most of the more innovative ones require a great deal of effort to obtain and document. In many ways, a relationship with a bonding company (as difficult as that may sometimes be) has many advantages over the alternatives.

Prevailing Wage Issues

Most kinds of contract work for the Government are included in some form of prevailing wage legislation. This legislation is meant to ensure that companies are competing for federal contracts based on innovation and efficiency, and not by paying workers less than a defined prevailing wage. There are two prevailing wage laws that are likely to apply to many Forest Service contracting activities: the Davis-Bacon Act\(^9\), which applies to
contracts involving construction, and the Service Contract Labor Act\textsuperscript{60}, which applies to service contracts in general.

The Davis-Bacon Act requires that prevailing wage rates be used for all contracts in excess of $2,000 which involve construction, alteration, and/or repair of public buildings or public works. This law applies to all such contracts in which construction is the dominant goal (including road and bridge building, and construction or repair of other facilities). However, since timber sale contracts are primarily for the sale of federal property (and not construction), any costs of roads specified to be built in a timber sale contract will \textit{not} include Davis-Bacon wage rates. Davis-Bacon wage rates \textit{do} apply to any separate public works contracts that the Forest Service uses if a small business purchaser elects for the Forest Service to construct specified roads (see endnote 56).

The Service Contract Act requires that prevailing wage rates be used for all service contracts in excess of $2,500. This law does not apply to timber sales in any way. An issue which may need future clarification in regard to both Davis-Bacon and the Service Labor Contract Acts is the question of what types of bundled contracts would trigger either of these laws. For instance, it is currently unclear whether a prevailing wage rate would be required for a single contract which involved a variety of activities, including both sale of federal property and a range of services (some of which might involve construction or repair of facilities).

\textbf{Geographic Scope Limitations}

It is possible, under certain very specific circumstances, to limit the geographic scope of the bid area for contracts or to otherwise restrict normal competitive activity. These limited exceptions are contained in Subparts 6.2 and 6.3 of the Federal Acquisition Regulations\textsuperscript{61}. Subpart 6.2 describes how to conduct full and open competition after limiting or excluding certain sources. This includes establishing or maintaining alternative sources, small business set-asides, and 8(a) businesses (see first section of this chapter). Subpart 6.3 describes when full and open competition is not possible or practical. This includes situations involving: only one responsible source and no other supplies or services that will satisfy agency requirements; unusual and compelling urgency; industrial mobilization; specialized engineering, developmental, or research capability;
expert services; international agreement; authorization or requirement by statute; national security; and the public interest. Such limitations are very specific, and require justification according to stringent guidelines. Restricting full and open competition is not the norm, since the basic concept is free and open competition across the United States and with foreign trading partners.
Risk Sharing

- What opportunities exist for a risk sharing venture where the product market is uncertain?
- What authority exists for modification of timber sale contracts in reaction to market changes?

Risk Sharing

There are situations in which the Forest Service and a timber sale contractor can share the risks involved in a new or experimental technique through the option of canceling the contract by mutual agreement under certain adverse conditions.

The Forest Service has authority to cancel timber sale contracts by agreement with the purchaser in those cases where it can be shown that this is advantageous to or not prejudicial to the interests of the United States. Cancellation by agreement is justified under conditions where:

1) continued operation of the sale would result in significant environmental damage;
2) substantial fire damage, insect activity, or other conditions on the sale area change the harvest priorities or the rate of logging when the purchaser is unable or unwilling to accommodate the changes;
3) the remaining timber should remain uncut to serve some better use; or
4) circumstances over which the purchaser has no control make it impossible for the purchaser to continue operations.

In certain cases, such as in experimental sales of marginal value material, conditions may change such that no practical way exists to utilize the material. Forest Service policy permits the cancellation of contracts through mutual agreement in these cases, provided that the cancellation is not detrimental to the public interest. If a portion of the sale area had already been harvested in such a case, the contract would not be canceled until the purchaser completed the full range of activities required under the
contract in the harvested area (such as the removal of material already cut, and mitigation of any resource damage incurred as a result of harvest activity). The Forest Service can also share risk when sales include experimental equipment. For example, some contracts have provided for relief in the purchaser's obligation to harvest if the experimental equipment to be tested did not prove to be practical.

In the above examples, it is important to emphasize the experimental nature of the activity. The loss of a normally existing market is not generally a justification for cancellation, nor is the loss of a given preferred manufacturing facility if alternative means of disposing of the timber (such as log sales to another facility) are available. However, cancellation may be appropriate in some of these cases, especially if the situation is severe enough to make it impossible for the purchaser to continue operations.

**Contract Modification**

Modification of timber sale contracts is authorized; however, such modifications can only apply to uncompleted portions of the contract and must be in the interest of the Government, either from a monetary standpoint or for the protection of the environment. Most modifications require the timber purchaser's consent, and must be made in writing. However, when unforeseen conditions arise after the contract approval, the Contracting Officer may negotiate mutually agreeable modifications. Generally, contract modifications cannot be used to change sale area boundaries.

Most contract modifications require that the amount paid for the timber be adjusted to reflect the increased or decreased work required, or changes in the value of the timber to be harvested. The present timber sale contract recognizes risks associated with fluctuations in the lumber market through the use of Stumpage Rate Adjustments when the market increases or decreases by a certain extent. In addition, when the market declines significantly, a Market Related Contract Term Addition can provide additional contract time to allow the market to improve.