

<p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>LOUISIANA-PACIFIC CORPORATION,</p> <p>v.</p> <p>Respondent:</p> <p>GRAND COUNTY BOARD OF COMMISSIONERS.</p>	
<p>Attorney or Party Without Attorney for the Petitioner:</p> <p>Name: Alan Poe, Esq. Holland & Hart LLP</p> <p>Address: 8390 E. Crescent Parkway, Suite 400 Greenwood Village, Colorado 80111</p> <p>Phone Number: (303) 290-1616</p> <p>E-mail: apoe@hollandhart.com</p> <p>Attorney Reg. No.: 7641</p>	<p>Docket Number: 41190</p>
<p style="text-align: center;">ORDER</p>	

THIS MATTER was heard by the Board of Assessment Appeals on August 11, 2003, Rebecca Hawkins and Karen E. Hart presiding. Petitioner was represented by Alan Poe, Esq. Respondent was represented by Anthony J. DiCola, Esq.

PROPERTY DESCRIPTION:

Subject property is described as follows:

**Possessory Interest – United States Forest Service Timber Sales
(Grand County Schedule Nos. R301571, R301572, R301573, R301574, R30157,
R301579)**

Petitioner is requesting an abatement/refund of taxes on the subject properties for tax years 2001 and 2002. The subject properties consist of six U.S. Forest Service timber leases at various locations within Grand County.

ISSUES:

Petitioner:

Petitioner contends that the subject properties are leases for tree harvesting on U.S. Forestry Service land, but that the trees remain in the ownership of the government until they have been harvested, removed, scaled and paid for. The subject properties do not meet the three factors necessary to meet a possessory interest definition: 1) revenue-generating capability to the private owner; 2) the ability to exclude others from making the same use of the interest; and 3) of sufficient duration to realize a private benefit therefrom. The subject properties are timber sale contracts for the sale of timber only, with incidental access to Forest Service land necessary to remove the timber.

Respondent:

Respondent contends that it has correctly valued the subject properties as possessory interests in accordance with the Division of Property Taxation's established procedures for Forest Service contracts.

FINDINGS OF FACT:

1. Petitioner's witness, Mr. Bill Crapser, Forest Resource Manager for Louisiana-Pacific Corporation (LP) testified that LP manufactures products for construction. They purchase logs from individuals that have already cut the logs, and they also buy and harvest stumpage logs. Once purchased, the logs go into inventory.

2. Mr. Crapser testified that he is familiar with timber sale contracts. He is the purchasing representative on all Forest Service contracts in Colorado and Wyoming. He is familiar with the six Forest Service contracts in Grand County; only one contract is still open.

3. Petitioner's witness testified that, when individual Forest Service projects come up, they develop a timber sale prospectus (30 days) and LP inspects the timber and calculates a price to bid. LP looks at current sales prices for 2x4's, what their conversion and transportation costs are for lumber, what their transportation costs are from the forest, and what other logging costs will be at the site. They then compare the stumpage price to the Forest Service's advertised price. The Forest Service lists minimum prices in the advertisements, as well as the volume of timber available. LP considers the value of the logs; no consideration is given to the land.

If LP's bid is successful, they must post performance and payment bonds. They are issued a contract and must annually submit a plan for harvesting each harvest unit. They harvest with small crews and the Forest Service closes the contract when finished.

There are two types of contracts. A scale sale is used when the estimate is not very accurate, so payment is based on scaling of the actual logs sold. The second type of contract is based on the standing estimated, pre-measurement sale. The contracts are in three parts: Part A contains the contract requirements; Part B is the contract boilerplate; and Part C includes maps, road specifications and other environmental specifications, including use restrictions.

LP is the purchaser in the contract and the timber to be removed is designated; trees are individually painted for cutting or remaining, clear-cut boundary cutting, or cutting according to tree size limitations. LP pays for the volume of timber removed only. On scaled sales, title does not pass until the logs are delivered to the mill site in Saratoga, Wyoming. If a contract is terminated, and logs are cut but still located on the land, the Forest Service will auction the timber to other purchasers. The title changes once the timber has been cut, paid for and removed from forest service land. They do not pay for the right to use or occupy Forest Service land. They cannot exclude others from the area. Only the Forest Service can remove other people from the area. Other activities, such as hiking, fishing, bird watching, snowmobiling, firewood gathering, etc. also take place in the area. The cutting units are only a portion of the sale area. LP generates revenue by turning the purchased logs into lumber products and selling those products to their customers. Cutting and delivering the logs to the mill is a cost to LP.

The contracts are three to five years in length, with extensions available. The extensions provide additional time to remove the timber, not for increasing the timber volume to be removed. No rent is paid; they only pay for the timber. The timber is put into the inventory yard and is held there until it is turned into lumber products.

If a successful bidder is permanently closed or out of business, they can enter into a third party agreement. This is the only time someone else can have the timber, and it requires Forest Service approval.

4. Under cross-examination, Mr. Crapser testified that the contracts have legal descriptions, which are the sale areas. The contract says they can construct improvements needed to log the "Included Timber." Most of the subject contracts were extended because the Forest Service needed more time to deal with other issues. He admitted that LP occasionally builds roads.

5. Under redirect, Mr. Crapser testified that approval is required for the construction of improvements. LP did not construct any improvements on the six subject leases.

6. Petitioner's witness, Mr. Bruce Short, Timber Staff Officer from the USDA Forest Service, testified that he develops programs for forest sales, plans, etc. Each National Forest has a management plan developed through a public process over a period of five to six years. Certain areas are designated for forest harvest. Advertisements are put out based on the timber for bid and the sale is usually awarded to the highest bidder, unless there is a business issue such as a company that is not able to accomplish the bid. Once awarded, the company moves forward with the

accomplishment of the sale offering. Extensions may be granted based on the market, on long-term weather conditions that restrict harvesting for more than 10 days, or on other conditions such as a threatened or endangered species. A timber sale is a management tool; they must provide a variety of goods and services, as well as ecological stability. An example is the Routt blow-down and the advance of spruce beetles in the forest, so the Forest Service moved quickly on the blow-down timber sale.

7. Mr. Short testified that a minimum bid price is determined by a “transaction evidence appraisal” using a three-year rolling average based on prices of similar species and sizes of offerings, as well as some modifiers such as the distance to the nearest mill. It is a regional offering involving Colorado and Wyoming, east of the Continental Divide. It is raw stumpage value as modified by the Western Wood Products Index, which is only utilized for price adjustments during the course of the contract. It is based on a certain product and the price of the product. Possessory interest taxes are not considered in setting minimum prices. Title is given to the harvested timber, which are the trees designated by the Forest Service. Each contract is different. The purchaser has an obligation to harvest the trees. Title transfer occurs when the trees have been removed from the site and paid for. There are no rights to the land. Facilities may be constructed as required to facilitate the removal of the timber, and have historically been very limited in scope; he cannot recall when a permanent structure was allowed to be built in Colorado. The purchaser cannot sell or lease the sale area. The sale is strictly for stumpage or specific improvements such as a road that the Forest Service may wish to have constructed.

8. Petitioner’s witness testified that the permit system is for low value harvesting (a total contract value of \$300) and is primarily for personal use, transplants, firewood, and Christmas trees. Second tier contracts are under \$10,000.00 and for less than a one-year duration, usually for a nursery operation or someone wanting to build a log home. The third tier is commercial sale contracts. Mr. Short’s office provides the timber sale contracts to the Division of Property Taxation (DPT), which was interested only in the last two tier contracts. A purchaser cannot occupy the property at will. A contract logger working on the contract can occupy the lands during the period of time they are working on the contract. There are restrictions on when operations can be conducted; maybe due to nesting birds, calving elk, soil compactions, etc. and they vary from year to year. The contractors cannot exclude others from the sale area; other activities can occur such as hiking, horseback riding, pleasure driving, snowmobiling, etc. unless there is a safety issue. During the course of the contract, the purchaser might be allowed to camp for the period of the contract versus the private camper limit of 14 days. The right to camp beyond the usual 14-day private camper limit requires a separate agreement with the Forest Service. Selling other products from the site, such as personal use firewood and Christmas tree cutting, is allowed but not encouraged.

9. Under cross-examination, Mr. Short testified that a large sale would be 1,000 acres. A purchaser can 1) cut trees; 2) build specified roads that will probably stay after the sale and temporary roads which must be obliterated once operations are finished; 3) ask to build improvements – although in his experience he has never seen anything other than a scaling shack constructed; they have the right to construct what they need to harvest the timber, subject to Forest Service approval. The Forest Service has requirements for slash and its particular disposal and there can be road specifications. The purchaser cannot exclude people from their area and they cannot put up a gate unless the Forest Service wishes to restrict access to the area, such as for wildlife security.

Mr. Short did not know if any of the subject properties were gated. When someone buys a timber sale, it is exclusive to the purchaser – no one else can cut the trees. The purchaser has the right to cut the trees and make money.

10. The Western Wood Products Index indicates selling prices for lumber. If the index declines by a certain percentage for more than so many consecutive quarters, then a market term adjustment can be allowed; it would be extended to allow the contractor to make a profit. To exclude someone for safety reasons, the contractor would contact the Forest Service, who would get together with the local law enforcement. The Forest Service is ultimately responsible for the exclusion. If someone else removes their trees, such as theft, then the Forest Service is notified to stop whoever tries to cut the trees.

11. Under redirect, Mr. Short testified that, if the Forest Service decides to take action, it is in its own determination for the management of the forest. If there is a requirement to build a road, the Forest Service pays for it and specifies the type of road, location, and all other aspects. The Forest Service must approve improvements.

12. Under re-cross examination, Mr. Short testified that the date reported to the DPT is the date the contract was executed and that the end date is the date of record for the closing date, which is as modified during the contract. The closeout letter is official notification that the contract has been completed. The DPT received the current contract in existence date and the reported ending contract date – if the contract closed out earlier, they would go with the original date. The Forest Service has talked about making an adjustment in their cost-of-operation calculation.

13. Petitioner's witness, Mr. Doug Haertzen, Timber Sale Contracting Officer with the USDA Forest Service, testified that he enters into and administers timber contracts for the Forest Service. The provisions in Part B of the contracts are the standard provisions that apply to all timber contracts. The provisions in Part A of the contracts list areas where some of the B provisions do not apply. The provisions in Part C of the contracts are sale-specific; as well as some updates to the provisions contained in Part B. Written permission is required under a timber contract before improvements can be made. Gate closures are usually by special Forest Service order. The purchaser cannot lease the property and engage in any other revenue-producing activities, other than the cutting of the trees. Of the revenue generated from the contract, 25 percent is paid to the State of Colorado and is to be returned to the counties for roads and schools.

14. Upon questioning by the Board, Mr. Haertzen testified that the closure letter is issued at varying times from the final inspection date. The final inspection date is usually within 10 days of the purchaser's request.

15. Petitioner is requesting that the subject property be removed from the tax rolls for 2001 and 2002, as the property is exempt from taxation; it is not a possessory interest.

16. Respondent's witness, Ms. Judith Kahl, Property Tax Specialist III for the Division of Property Taxation, testified that she oversees Volumes 3 and 5 of the Assessor's Reference Library. She was a co-author of the possessory interest section and an instructor for the possessory interest workshop. The guidelines are applicable to the subject property for the years in question.

17. Ms. Kahl testified that she was directed to include timber sale contracts in the possessory interest procedures, as a fee is paid to the government. A timber sale is a possessory interest. It meets the three criteria 1) it has a revenue generating capacity – a fee is paid for their business; 2) there is an ability to exclude the same use within the property – they exclude other timber contracts; and 3) there is a sufficient duration to derive a benefit.

18. Ms. Kahl testified that the DPT collects all permits in the state and sends them to the counties; they do not determine what permits are possessory. They receive only commercial permits, which include starting dates, ending dates, and the names and addresses of permit holders, from the Forest Service. The DPT has directed assessors to value timber permits.

19. Ms. Kahl testified that she received a list of permits and sent them to the Grand County Assessor. The procedures use actual fees and discounting for all years of the contract. For timber, the bid value is divided by the number of years in the contract to get to an annual fee, and then discount each year over the years of the lease by the county discount rate. The Grand County Assessor followed the DPT procedures. The 2001 lease, let in 2001, should not have been valued for 2001, as it was not in place on January 1, 2001.

20. In cross-examination, Ms. Kahl testified that the Colorado Supreme Court Case, commonly referred to as the Vail case, determined that either all possessory interests are taxable or none are taxable. The DPT reviewed contracts of all types of government and state entities, including a timber sale contract. The timber sale contracts are competitive fees for the purchase of timber. They are commercial operations, fees are paid to the Forest Service, and they must go onto the land to harvest the wood. The beneficial interest is to harvest their commercial product interest (the trees). The DPT directs the counties that if the term of a timber sales contract is extended, it is to the taxpayer's beneficial interest to use the extended contract term.

21. Ms Kahl testified that the Grand County Assessor used the DPT spreadsheet to value the subject property according to the income approach. A market approach can also be utilized if market data is available. Logs are a natural resource, not an agricultural product. She understands that the Forest Service does not believe that timber sale contracts are possessory interests.

22. Ms Kahl testified that a recent statutory revision adds lumber as a statutory exclusion, but it was not retroactive – it is effective as of January 2004. The subject property value is based on the cost to the purchaser, which is income to the government.

23. In re-cross-examination, Ms. Kahl testified that the subject properties' legal description is the situs of the contract. She admitted that the ability of the taxpayer to use the land is restricted, which can also be true of other possessory interests.

24. Respondent's witness, Mr. Stuart Findley, Grand County Assessor, testified that his

recommendation is to a higher value, which he understands cannot be granted. His monthly calculation was incorrect for some of the subject property schedules. He is recommending an abatement for schedule R301572 for tax year 2001.

25. Mr. Findley testified that they value the subject on a monthly basis, using a 13% discount rate. He is valuing the Forest Service contracts for tax year 2001 forward. He received the information to value timber contracts in the spring of 2002.

26. Under cross-examination, Mr. Findley agreed that the Vista timber sale, Schedule No. R301578 and the Co-op timber sale, Schedule No. R301579, should not be taxed for tax year 2002.

27. Mr. Findley testified that he did not make any exclusions to the timber contracts. He is not aware of private timber contracts.

28. Respondent assigned the following actual value to the subject properties for tax year 2001:

<u>Schedule Number</u>	<u>Value</u>
R301571	\$170,750
R301572	\$ 22,830
R301573	\$ 61,690
R301574	\$114,250
R301578	\$ 82,300
R301579	\$147,100

29. Respondent assigned the following actual value to the subject properties for tax year 2002:

<u>Schedule Number</u>	<u>Value</u>
R301571	\$125,040
R301572	\$ 24,410
R301573	\$ 41,880
R301574	\$ 87,470
R301578	\$ 30,140
R301579	\$ 53,900

30. Respondent is recommending the approval of the abatement requests for Schedule No. R301572 for tax year 2001 and for Schedule Nos. R301578 and R301579 for tax year 2002.

CONCLUSIONS:

1. Petitioner presented sufficient probative evidence and testimony to prove that the valuations for the subject properties for tax years 2000 and 2001 were incorrect.

2. The Board was not convinced that the subject properties meet the definition of

possessory interests. The subject properties consist of contracts for the removal of timber from National Forest land. The timber contract prices are based solely on the value of the timber; there is no value placed on the real property. They are contracts for the sale and purchase of “goods” – timber.

3. Petitioner has no rights to the land on which the trees are located other than to construct roads and improvements, when approved by the Forest Service, to allow for the tree harvesting. Petitioner cannot limit access to the property by others; they expressly lack the enforcement authority to keep others from the property.

4. The subject properties do not meet the three factors necessary to meet a possessory interest definition: 1) revenue-generating capability to the private owner; 2) the ability to exclude others from making the same use of the interest; and 3) of sufficient duration to realize a private benefit therefrom.

5. Petitioner cannot generate revenue from the realty underlying the timber; the only revenue comes from the timber itself, which is a product, not realty. Petitioner cannot exclude others from the use of the property, including the removal of the specified contracted trees; only the Forest Service has such authority. The duration of the contracts is only that time needed to remove the trees, there is no other private benefit received from the length of the contracts.

6. The Board concluded that the 2001 and 2002 actual value of the subject properties should be removed from the Grand County tax rolls and that the abatement requests therefore are granted.

ORDER:

Respondent is ordered to cause an abatement/refund to Petitioner for tax years 2001 and 2002 as the subject properties do not have any value as a possessory interest.

The Grand County Assessor is directed to change his records accordingly.

APPEAL:

Petitioner may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

In addition, if the decision of the Board is against the Respondent, the Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law when the Respondent alleges procedural errors or errors of law by the Board of Assessment Appeals.

If the Board recommends that this decision is a matter of statewide concern, or if it results in a significant decrease in the total valuation of the county, Respondent may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

If the Board recommends that this decision is a matter of statewide concern, or if it results in a significant decrease in the total valuation of the county, Respondent may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation for assessment of the county in which the property is located, the Respondent may petition the Court of Appeals for judicial review of such questions with 45 days from the date of this decision.

DATED and MAILED this 10th day of December, 2003.

BOARD OF ASSESSMENT APPEALS

Rebecca Hawkins

Rebecca Hawkins

Karen E Hart

Karen E. Hart

This decision was put on the record

DEC 09 2003

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

Penny S. Lowenthal
Penny S. Lowenthal

