



1985

## Representing the Arkansas Timber Owner in Timber Sale Transactions: Some Contract Drafting Considerations

Christopher R. Kelley

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Contracts Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Christopher R. Kelley, *Representing the Arkansas Timber Owner in Timber Sale Transactions: Some Contract Drafting Considerations*, 8 U. ARK. LITTLE ROCK L. REV. 637 (1986).

Available at: <https://lawrepository.ualr.edu/lawreview/vol8/iss4/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

## REPRESENTING THE ARKANSAS TIMBER OWNER IN TIMBER SALE TRANSACTIONS: SOME CONTRACT DRAFTING CONSIDERATIONS.\*

*Christopher R. Kelley\*\**

Timber is Arkansas' most valuable crop.<sup>1</sup> With nearly one-half of Arkansas' annual timber harvest coming from lands owned by farmers and other nonindustrial forest owners,<sup>2</sup> the farm woodlot or other forested acreage represents a potentially valuable investment for its owner.

Generally, the harvest of timber from nonindustrial private forests occurs through the sale of the standing timber, or stumpage, to a buyer who undertakes the actual cutting and removal of the timber. Although not totally dissimilar to the sale of agricultural products or other natural resources, the sale of timber is unique in at least four respects.

First, for the average private, nonindustrial forest owner, timber

---

\* This article is a portion of a thesis submitted in partial fulfillment of the requirements for the Master of Laws degree.

\*\* Mr. Kelley practices law with the firm of Arens & Alexander in Fayetteville, Arkansas and is a member of the Arkansas and Minnesota Bars. He received his B.A. from Louisiana State University (1969), his J.D. from Howard University (1975) and his LL.M. from the University of Arkansas (1986). The author wishes to express his appreciation to William C. Siegel, Esq., Project Leader and Chief Economist, Forest Resource Law and Economics, Southern Forest Experiment Station, USDA Forest Service, New Orleans, Louisiana; Searcy W. Harrell, Esq., Roberts, Harrell, Lindsey & Foster, Camden, Arkansas; Jim Neeley, Neeley Forestry Service, Camden, Arkansas; William E. Bustin, Forest Management Service, Haleyville, Alabama; Travis C. Cork, III, Cork Forestry & Appraisal Company, Conway, South Carolina; Frank O. Brooks, Jr., Forest Management Associates, King William, Virginia; T. R. Scott, Jr., Pomery & McGowin, Monticello, Arkansas; Eley C. Frazer, III, F & W Forestry Services, Inc., Albany, Georgia; Carolyn Hardin, James M. Vardaman & Co., Jackson, Mississippi; and Dr. Warren A. Flick, School of Forestry, Auburn University, Auburn, Alabama.

1. F. TROUTMAN & S. BRASHEARS, *FORESTS AND THE ARKANSAS ECONOMY* 3 (1981).

2. The characterization "nonindustrial private forest owner" refers to forest owners who lack processing facilities for their timber and who, therefore, must sell to a timber processor. M. CLAWSON, *THE ECONOMICS OF U.S. NONINDUSTRIAL PRIVATE FORESTS* 34 (1979) [hereinafter cited as *NONINDUSTRIAL PRIVATE FORESTS*].

In 1977, 614.7 million cubic feet of wood was harvested in Arkansas. Of that amount, 277.9 million cubic feet was harvested on lands owned by nonindustrial private forest owners. Harvests from lands owned by timber industry firms totaled 280.6 million cubic feet. The remainder was harvested from public forests. F. TROUTMAN & S. BRASHEARS, *supra* note 1, at 22.

By 1984, the timber harvest had increased to 812 million cubic feet of wood. The harvest from lands owned by nonindustrial private forest owners was 394 million cubic feet. Lands owned by timber industry firms accounted for a harvest of 344 million cubic feet. Unpublished preliminary data provided by Dwight Hair, U.S. Forest Service, USDA, Washington, D.C.

sales are infrequent. With regeneration to harvest cycles ranging from twenty to fifty years or more, timber simply is not marketed with regularity for any but the relatively few owners of large or intensively managed forests.

Second, most timber sales contracts are not negotiated between equals. The source of the inequality is usually twofold. First, the infrequency of sales generally results in the forest owner lacking the degree of knowledge of the timber market as is enjoyed by the prospective purchaser of that timber. Second, in many areas, the lack of competition among timber buyers tends to result in the forest owner being presented with "take it or leave it" propositions.

The third unique aspect of timber sales transactions is the potential for capital gains treatment of the income received from the sale. Unlike the income realized from the sale of crops that is taxable as ordinary income, income from the sale of timber is currently<sup>3</sup> eligible for capital gains treatment if the sale is properly structured or the transaction otherwise qualifies.<sup>4</sup>

Finally, timber sales transactions are unique in that the harvest of timber is inherently more destructive than is the harvest of most agricultural products although certainly less so than certain types of mining operations. Improperly conducted, a timber harvest can not only impair the value of the land and the residual timber, it can also have detrimental environmental consequences to lands and waters beyond the borders of the harvest area.

At this point, a timber sales transaction from the forest owner's perspective can be summarized as an opportunity to sell a valuable commodity that took decades to produce to a buyer who may have both a superior knowledge of the market and a dominant position in it. Coupled with that combination is the potential for the loss of highly favorable tax treatment if the transaction is not properly structured and, perhaps of ultimately greater financial consequences, the potential

---

3. Under the Tax Reform Act of 1986, the provisions entitling taxpayers to capital gains treatment are retained. However, the capital gains rates will increase to the same level as ordinary income rates on January 1, 1987. Tax Reform Act of 1986, Comparison of Tax Reform Provisions of H.R. 3838 as Passed by the House and the Senate, Fed. Taxes (P-H) No. 32 Extra, at 43 (July 17, 1986).

4. For individuals, under current law, sixty percent of long-term (held more than six months) capital gains income is excluded from taxation and the remaining forty percent is taxed at the ordinary tax rate, resulting in a maximum effective tax rate of twenty percent. For corporations, the long-term capital gains tax rate is twenty-eight percent, compared with forty-six percent for ordinary income. Short-term capital gains are taxed at the ordinary tax rate. As used here, capital gains treatment refers to the favorable treatment of long-term capital gains.

for long-term damage to the owner's land and residual forest, and possibly the land and waters outside the harvest area if the harvest is conducted improperly. One might conclude, therefore, that the careful drafting of a timber sales contract would be a matter of relatively high priority for the forest owner and his attorney. Unfortunately, and usually to the regret of the forest owner, the timber sales contract does not always get the attention and careful drafting that it deserves.

A leading commentator on the negotiation of oil and gas leases has observed:

[t]he initial problem an attorney is likely to encounter in negotiating an oil and gas lease is the lack of a client . . . . They, as well as unprepared attorneys, have a tendency to view all lease forms alike except for the agreed-upon bonus and royalty.<sup>5</sup>

Substitute "timber sales contract" for "oil and gas lease" and "stumpage price" for "bonus and royalty," and the observation is equally accurate. In many timber sales, perhaps the majority of them, the timber owner will simply accept the contract presented by the timber buyer. Even in situations where the owner has employed a consulting forester to assist with the sale, the owner may unquestioningly elect to use the standard contract form prepared by the consulting forester. The author has reviewed numerous contracts, many of them printed forms, used by various forestry consultants in the South. Although some of them are very good, others leave much to be desired. Overall, the quality of the contracts simply is not consistent.

There are undoubtedly many reasons for client indifference to the terms of a timber sales contract.<sup>6</sup> One of those reasons, however, should

---

5. Anderson, *David v. Goliath: Negotiating the "Lessor's 88" and Representing Lessors and Surface Owners in Oil and Gas Lease Plays*, 27B ROCKY MTN. MIN. L. INST. 1029, 1032 (1982).

6. Attitudes of timber owners about their forest ownership vary widely, so it should not be surprising to discover differences in attitudes regarding timber sales contracts.

Nonindustrial, private forest owners have been classified in several ways, usually by the size of their forestland holdings or their investment objectives. Professor James Yoho, Professor of Forest Investment at the Duke University School of Forestry and Environmental Studies, has classified nonindustrial, private forest owners in accordance with their investment strategies. He estimates that from ten to twenty percent of private forest owners can be characterized as "custodial" investors. Custodial investors are investors only in the sense that they are willing to pay property taxes, meet other minimal out-of-pocket costs, and sustain the opportunity costs of maintaining a capital investment in timberland. Yoho notes that most of the nonindustrial private forests are, on a cyclical basis, custodial investments at one time or another.

The next intensive category of forest investors is the "sideline forest investor." Yoho characterizes these investors as holding timberland as an "appendage" to another asset such as residential or recreational properties. The holdings of sideline forest investors tend to be small, but the increasing value of the forests on them is beginning to encourage their owners to pay them greater attention in terms of management.

not be the client's perception that his or her attorney shares that lack of appreciation of the importance of the contract.

No drafting guide can cover all of the provisions necessary or desirable for a timber sales contract in every situation.<sup>7</sup> Many of the more critical provisions will need to be site-specific, that is, tailored for the individual harvest area or the particular harvest operation contemplated. The focus here, therefore, will be on the primary and more universal features of the timber sales contract. A checklist is appended to this article for quick reference.

### A. *The Seller's Land—Description and Title*

Without exception, the contract should describe the land on which the timber harvest is to occur.<sup>8</sup> At a minimum, the full legal description should be included. Where the legal description is lengthy or where several separate tracts are covered by the same contract, it may be more convenient to recite the legal description on one or more separate pages to be referenced and incorporated in the contract as attachments or exhibits.

If there is any question concerning the accuracy or completeness of the existing legal description of the property, the question should be resolved. If incursions by the buyer onto adjoining lands are the result of an inaccurate or incomplete legal description, the seller will most certainly be a party to the resulting dispute and may face liability.<sup>9</sup> If

---

Speculators occupy the next category. Generally, speculators try to minimize holding costs and are less interested in marketing timber than they are in retaining the land in anticipation of an increase in its value.

Hobby investors and true investors form the final two categories. Hobby investors are the most active investors in Professor Yoho's ranking. They usually invest their after-tax timber earnings back into timber management with the goal of developing a model forest or an estate for their heirs. True investors, on the other hand, are not only interested in developing an estate but are also interested in current income from their timber. They approach the management of their timber holdings as they would any true investment. Yoho, *Continuing Investments in Forestry: Private Involvement Strategies*, in INVESTMENTS IN FORESTRY: RESOURCES, LAND USE, AND PUBLIC POLICY 155-58 (R. Sedjo ed. 1985).

7. Existing references include N. FALK, JR., *TIMBER AND FOREST PRODUCTS LAW* (1958); O'Connell & Murphy, *Check List for Use in Drafting Timber-Sales Instruments*, 36 OR. L. REV. 270 (1957); 6 R. HOBGET & K. SIMON, *NICHOLS CYCLOPEDIA OF LEGAL FORMS* §§ 6.250-6.257 (1975); 12 AM. JUR. LEGAL FORMS 2d, *Logs and Timber*, Forms 168:11-168:37, 168:41-168:75 (1973).

8. Of course, the contract should include and adequately identify all the parties to it and should state the place and date of its signing.

9. ARK. STAT. ANN. § 54-201 (1971) provides that before timber may be harvested in the state, the harvest site must be surveyed by the county surveyor unless the land has already been surveyed and its boundaries are known. Violation of that provision is a misdemeanor. ARK. STAT. ANN. § 54-202 (1971). The statute, however, has been construed to be for the protection of ad-

it appears necessary that a survey will need to be completed before the harvest can begin, the contract should specify who is to select the surveyor and bear the cost of the survey. In some situations, the buyer may request that the contract specify that the seller is to mark or designate the boundaries of the seller's land. Often, that designation can be accomplished simply by reference to fence lines. Similarly, the buyer may request that the seller warrant the accuracy of the boundary designations.<sup>10</sup>

From the seller's perspective, consideration should be given to including a representation in the contract by the buyer that he is familiar with the boundaries or, more basically, that it is his responsibility to locate the boundaries and to confine his operations within them. An example of such a provision is as follows:

The Buyer acknowledges that he has been given the opportunity by the Seller to determine the boundaries of the Seller's lands by survey or otherwise, and that he is solely responsible for confining his activities and operations within the boundaries of the Seller's land.

A more inclusive version of such a provision is as follows:

The Buyer shall be solely responsible for determining the boundaries of the Seller's land and for confining his activities and operations within those boundaries. Should it be desirable or necessary for the buyer to enter upon lands not owned by the Seller, the Buyer shall be solely responsible for securing the necessary permission to do so. The Buyer shall be solely responsible for any trespass and damage upon or to the lands or property of another resulting from his activities or operations and shall indemnify and hold the Seller harmless for any and all damages and costs arising out of his trespass or damage to the property of another, including the reasonable attorneys' fees and costs of the Seller's defense of any action arising out of such trespass or damage.

One way to attempt to reduce the risk of trespass or confusion over boundaries is to refer to and incorporate in the contract a map of the seller's land or the specific harvest area. The incorporation of a map in the contract can serve several purposes. As will be discussed in

---

joining landowners, and compliance with it can be waived by the seller and buyer of a particular tract of timber. *Rice v. Moudy*, 217 Ark. 816, 233 S.W.2d 378 (1950).

10. A suggested provision for the seller's warranty of the boundary lines is as follows: The Seller will be liable to the Buyer to determine the boundary lines of the lands hereinabove described. Should the Buyer become liable for trespass on any timber cut within the boundary perimeter pointed out or determined by the Seller, then the Seller will assume liability for such trespass.

sections that follow, a map can also be used to identify or designate access routes and areas where access or logging operations are prohibited. To avoid clutter or confusion on a single map, separate maps might be used for each purpose.

Aerial photographs provide an excellent format for the preparation of a map. In many counties, aerial photographs have already been made of rural areas for the Soil Conservation Service or other agencies. Forest landowners who have employed the services of foresters to assist them in timber management already may have aerial photographs of their property because of the increasing use of aerial photography, particularly infrared photography, to monitor management efforts.<sup>11</sup> As the following example illustrates, the incorporation of a map in the contract is a simple matter:

The area from which the trees sold by this Agreement are to be cut and removed is more particularly delineated on the attached map prepared by \_\_\_\_, dated \_\_\_\_, 19\_\_\_\_, and designated and incorporated herein as Exhibit A.

In addition to describing the boundaries of the seller's land, it is generally advisable for the contract to address matters relating to title or ownership of the land and the timber on it. In Arkansas, the Uniform Commercial Code (U.C.C.) governs the sale of standing timber.<sup>12</sup> Under the U.C.C., the seller impliedly warrants that the title conveyed is good and that the timber sold is free from any security interest, lien, or other encumbrance not known to the buyer at the time of contracting.<sup>13</sup> The seller's implied warranty of title under the U.C.C. can be excluded or modified only by specific language or by "circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have."<sup>14</sup>

Notwithstanding the implied warranty of title under the U.C.C., many, if not most, buyers will insist upon including in the contract an express warranty of title by the seller. The following is an example of such a warranty of title:

The Seller, for himself, covenants that (i) he is fully authorized and empowered to enter into this agreement and to offer for sale and to

---

11. Kerr, *Monitor Site Prep from the Air*, FOREST FARMER, Sept. 1985, at 8-9.

12. Williams v. J.W. Black Lumber Co., 275 Ark. 144, 150, 628 S.W.2d 13, 16 (1982); Davis v. Kolb, 263 Ark. 158, 159, 563 S.W.2d 438, 439 (1978). Both cases interpret ARK. STAT. ANN. § 85-2-107 (1961).

13. ARK. STAT. ANN. § 85-2-312(1) (1961).

14. ARK. STAT. ANN. § 85-2-312(2) (1961).

sell the timber subject to this agreement; (ii) that the timber subject to this agreement is free and discharged and unencumbered from any and all former and other grants, titles, charges, estates, judgments, encumbrances, and claims of whatever kind or nature, except for state and county ad valorem taxes, as may accrue and be due from time to time during the period of this agreement, which said taxes the Seller agrees to assume and pay in full; and (iii) he, his heirs, and assigns, shall and will forever defend title to the timber subject to this agreement.

If the seller desires to limit his warranty of title, whether it be implied or express, he should make the limitation explicit and specific. In the example above, the parties have expressly excluded ad valorem taxes from the warranty that the timber is free from encumbrances, but, at the same time, they have expressly obligated the seller to pay those taxes.<sup>15</sup>

Presumably, most sellers will be willing to impliedly or expressly warrant their title to the timber being sold. Some sellers, however, may desire to limit their liability for any failure of title or to otherwise modify the buyer's recourse. For example, in the following provision, the parties have limited the buyer's remedy to the return of the purchase price for the timber:

The Seller warrants title to the timber conveyed, but the obligation is limited to the return of the purchase price in the event of a failure or partial failure of title.

Consideration should be given to other alternatives in the event of a failure of title. In the following provision, the seller has the option of substituting timber if the failure of title occurs prior to harvest:

In the event that title and ownership of timber marked for sale under this contract on any particular cutting unit, or on any portion thereof, is challenged or contested in such a manner as to subject the Buyer to damage for the harvesting and cutting thereof, and that challenge or contest is asserted prior to the Buyer's harvesting of such timber, or if the Buyer is denied access to any cutting unit, the Seller may provide the Buyer with cutting rights on other or different land having timber of equivalent value. In that event or if by reason of such contest or

---

15. Arkansas' favorable ad valorem tax treatment for timberland formerly found at ARK. STAT. ANN. §§ 84-483 to -486 (1980) was ruled unconstitutional in *Arkansas Pub. Serv. Comm'n v. Pulaski County Bd. of Equalization*, 266 Ark. 64, 582 S.W.2d 942 (1979). In Arkansas, timber rights are classified as personal property. ARK. STAT. ANN. § 84-204 (1980). The parties may desire to allocate the particular year's tax prior to the date of sale or passage of title to the seller and the remainder to the buyer.



challenge or denial of access, the Buyer would be prohibited by reason of delay from harvesting the timber on the affected or alternate lands, then the Seller covenants and agrees that the Buyer shall have a reasonable, sufficient, and additional time beyond the expiration of this agreement as may be required to harvest said timber standing on the affected or alternate tract.

Of course, providing for the substitution of timber in the event of failure of title on one or more of the original tracts is problematic at best. It is unlikely that a buyer would agree to allowing the seller to unilaterally select the alternate or substituted tract. In addition, because of the many variables in timber values between tracts, it might be difficult for the parties to settle on any standard of equivalency. Moreover, as suggested by the illustration above, there are a host of other considerations, such as time to harvest, which would need to be taken into account and for which provision would need to be made. The illustration is presented primarily to underscore the desirability of at least considering the specification of remedies for the failure of the seller's title in the contract.<sup>16</sup>

### B. *The Description of the Timber to be Sold*

In negotiating and drafting timber sales contracts, "the main objective of the attorney should be the elimination of uncertainty so as to avoid future disputes and litigation."<sup>17</sup> Unfortunately, many timber contracts fall short of that objective by completely or ambiguously describing the timber to be sold. The problem most frequently arises from the use of the terms "timber" or "merchantable timber" without an accompanying definition.

Despite the workhorse role given to these terms by drafters of timber sales contracts, neither "timber" or "merchantable timber" have indisputable meanings. Contracts employing the terms, however, have been the subject of enough litigation to result in the evolution of gener-

---

16. The U.C.C. permits the contractual modification or limitation of remedies. ARK. STAT. ANN. § 85-2-719 (1961). Of course, the buyer may seek to specify an expansive range of consequential damages such as is found in the following example:

In case of the failure of title to any portion of the land embraced herein, the obligation of the Seller under the warranty contained in this agreement is that the Seller shall not only pay the Buyer for the timber actually located on the land, or the timber severed therefrom for which the Buyer is required to make restitution, the title to which shall fail, at its fair stumpage market value, but shall reimburse and pay the Buyer for any damages of any nature and kind it might suffer as a result of the failure of said title.

17. Anderson, *supra* note 5, at 1033.

ally accepted definitions for each term.<sup>18</sup> Nevertheless, when a less ambiguous alternative can be just as easily negotiated and drafted, exclusive reliance on "timber" or "merchantable timber" is a needless invitation to subsequent disputes.

There are alternatives to describing the trees to be cut merely as the "timber" or "merchantable timber" located on the specific tract of land. Greater specificity can be achieved in at least two ways. First, reference can be made to marked trees or to designated harvest area boundaries. Second, the terms "timber" or "merchantable timber" can be defined in the contract. Usually, such a definition would contain minimum size or quality standards or both. Tree species should also be included if there is more than one species on the tract to be harvested.

With respect to references to marked trees or boundaries of harvest sites, the degree of specificity that can be achieved relative to the individual trees to be sold will vary with the harvest method contemplated by the contract. There are four harvest methods commonly in use in Arkansas: selection, shelterwood, seed-tree, and clearcutting. Marking practices vary with each method.

For example, where the harvest is to be selected on an individual or single tree basis,<sup>19</sup> a common practice is to designate with paint the individual trees to be cut.<sup>20</sup> The contract may then refer to the paint markings in its description of the timber to be harvested as in the following provision:

The Seller agrees to sell and the Buyer agrees to buy all trees marked in blue marking paint at the ground line and eye level located in the areas designated on the attached map which is marked Exhibit A.

Paint markings or flaggings are also often used to mark the boundaries of areas to be cut, rather than the trees within those areas,<sup>21</sup> when

---

18. Generally, "timber" excludes "saplings, undergrowth, and shrubs." *McMillan v. Gurdon Lumber Co.*, 189 Ark. 628, 632, 74 S.W.2d 631, 633 (1934). "Merchantable timber" ordinarily has "reference to such timber as would bring the ordinary market price at the time the deed was executed." *Liston v. Chapman & Dewey Lumber Co.*, 77 Ark. 116, 120, 91 S.W. 27, 28 (1905).

19. The selection method of harvest involves the removal of timber either on a single tree basis or in small groups, the latter usually not exceeding one acre in area. Selective harvests are usually employed where the goal is to maintain an uneven-aged stand, with trees of different ages or sizes intermingled singly or in groups. USDA FOREST SERVICE, AGRICULTURAL HANDBOOK No. 596, SILVICULTURAL SYSTEMS FOR THE MAJOR FOREST TYPES OF THE UNITED STATES 185 (1983) [hereinafter SILVICULTURAL SYSTEMS].

20. The individual marking of trees is generally most cost-effective when the harvest is being undertaken to enhance the future productivity of the site. It is usually employed when the stand is being managed for sawtimber production rather than pulpwood. See D. SMITH, THE PRACTICE OF SILVICULTURE 222-25 (1962).

21. Because of the costs involved in marking, the trees in the minority are usually marked.

the harvest is either by group selection or clearcutting.<sup>22</sup> In such cases, the contract should refer to the marked boundaries in describing the timber to be harvested. As suggested by the provision above and as noted earlier, it is always helpful and often advisable to refer to and incorporate in the contract a map showing the harvest areas.

Defining "timber" or "merchantable timber" in the contract is also an easy way to achieve clarity and certainty. The definition could designate the size of the trees subject to the contract. The measurement generally used in designating trees by size is the tree's diameter at breast height, d.b.h., a distance four and one-half feet above ground level. If appropriate, reference could also be made to additional criteria of size or quality or both. The following clause illustrates such a definition:

For purposes of this contract, the designated "merchantable timber" to be cut and removed by the Buyer shall be defined as follows:

(a) All pine trees measuring nine and six-tenths (9.6) inches and larger in diameter outside bark at four and five-tenths (4.5) feet above the ground, and containing at least one log sixteen (16) feet in length that is suitable for manufacture into lumber, that are located on those lands of the Seller which are particularly described in attached Exhibit A hereto. All trees will be utilized by the Buyer to a six (6) inch top diameter outside bark where merchantable.

(b) All hardwood trees measuring eleven and six-tenths (11.6) inches and large in diameter outside bark at four and five-tenths (4.5) feet above the ground and containing at least one log suitable for manufacture into lumber, that are located on those lands of the Seller which are particularly described in the attached Exhibit A hereto. All trees will be utilized by the Buyer to a ten (10) inch top diameter outside bark where merchantable.

Three things should be noted about the quoted provision. First, it clearly states that the diameter measurement is to include the bark, thus obviating disputes over whether the bark is to be included.

Second, the provision also contains utilization requirements, an important protection for the timber seller when the contract price is based on the cubic foot volume or board feet of wood delivered to the mill or

---

That is, if more trees will be cut than left, the trees to be left will be marked. If all the trees within an area are to be cut, then the only alternative is to mark the boundary of the harvest area. *Id.* at 222.

22. Clearcutting involves the harvesting of all the trees in an area in one cut. Together with the shelterwood and seed-tree system of harvesting, clearcutting is used where the goal is to maintain or develop an even-aged stand. SILVICULTURAL SYSTEMS, *supra* note 19, at 1.

other destination.<sup>23</sup> Utilization requirements also provide an incentive for the buyer to reduce waste in the logging operation.

Third, a specification that the quoted provision does not contain, but should, is the time at which the measurement governs. Where the contract grants to the buyer a considerable length of time to harvest, trees that had not grown to the minimum size at the time the contract was negotiated and signed may attain the minimum size at some time during the life of the contract. In Arkansas, absent a provision to the contrary, the measurements govern as of the time of the signing of the contract.<sup>24</sup> In most situations, however, that rule is not what the parties intended. Therefore, the contract should specify the time at which the measurements are to be determined. If the contract imposes a harvest schedule and does not permit the buyer to return to relog an area, the time of measurement should coincide and be coordinated with the harvest schedule. Otherwise, permitting the qualifying measurement to be made at any time during the life of the contract might be construed as implicitly authorizing the buyer to relog an area logged earlier in the life of the contract.

Several other considerations warrant attention when describing the timber to be harvested. First, the contract might specify that all of the described timber must be harvested. For example, an owner may want a particular tract clearcut so that it can be converted to a different species or to pasture. If the contract does not require that all of the standing trees are to be cut or, for that matter, if the contract merely employs the all-too-frequent undefined "timber" or "merchantable timber" designations, the buyer may leave standing defective or inferior trees as well as noncommercial species. The owner will then be faced with the cost of removing those trees.<sup>25</sup>

---

23. Another example of a provision designating the timber to be harvested by its size and containing a utilization requirement is as follows:

The Buyer shall cut all trees covered by this agreement larger than five (5) inches in diameter, four and one-half (4-½) feet from mean ground level that have at least ten (10) feet of length up to a four (4) inch diameter outside the bark. All trees shall be cut up to four (4) inch diameter outside bark unless due to fork, rot, crook, or other obvious reasons it would be impractical to do so.

24. *McMillan v. Gurdon Lumber Co.*, 189 Ark. 628, 631, 74 S.W.2d 631, 632 (1934). It should also be noted that there are statutory prescriptions for timber measurement in Arkansas, including the specification that the Doyle stick is the standard for timber measurement. ARK. STAT. ANN. §§ 79-119 to -122 (1981).

25. Of course, if the harvest area contains an abundance of inferior trees which must be harvested, the seller may receive a lower price for the superior trees on the site to offset the buyer's costs in harvesting the inferior trees. Contracts involving clearcutting should also impose debris-removal requirements as discussed in Section D, *infra*.

A similar problem may occur in harvests where selective or single-tree cutting is to occur. Timber buyers are often tempted to "high grade." A buyer who "high grades" removes only the most valuable trees, leaving the owner with a stand consisting solely of inferior trees. "High grading" is antithetical to good timber management because it degrades or impairs the genetic stock of the stand and removes trees without regard to the dispersal or distribution requirements of the trees within a stand as may be needed to enhance future productivity. The best way to protect against "high grading" is to mark either those trees that are to be harvested or those that are to be retained, whichever are less numerous. The contract should then mandate that the trees designated for removal must be removed so that the desired thinning of the stand will be accomplished. Liquidated damages clauses<sup>26</sup> should be included to provide for compensation to the seller both for the failure to harvest trees designated for harvest<sup>27</sup> and the cutting of or damage to

---

26. Care should be taken in drafting liquidated damages clauses so as not to jeopardize qualification of the transaction under I.R.C. § 631(b)(1954) discussed in Section C, *infra*. Liquidated damages specified for marked trees not being cut cannot exceed actual damages, that is, damages capable of being described and quantified by a forester. These damages might include, for example, the loss of productivity of the residual stand because of overstocking where trees marked for removal were not harvested.

The Internal Revenue Service has indicated in at least one instance that one-third of the stumpage value may be a reasonable liquidated damage estimate for uncut marked timber. Rev. Rul. 78-104, 1978-1 C.B. 194. The provision quoted in note 27, *infra*, employs such an estimate. However, in all cases, the amount should be a reasonable estimate of the damages that the seller will likely incur if the trees marked for cutting are not actually cut. In other words, even the use of one-third of the stumpage value must be supportable. See Burnett, *Plan for Capital Gains on Advance Payment Timber Sales*, FOREST FARMER, Nov.-Dec. 1983, at 14.

27. A provision for liquidated damages for trees not cut as required is as follows:

In the event that the Buyer fails or refuses to cut and remove all of the timber made available to the Buyer under this agreement within the time period stipulated in Paragraph \_\_\_\_, the Buyer shall pay to the Seller a sum of money equal to one-third (1/3) of the value of all such marked unharvested timber based on those prices set forth in Paragraph \_\_\_\_\_. The volume of such unharvested timber by species and products to which such prices shall be applied shall be determined by a timber cruise performed by the Seller or his agent. The amount so determined to be due from the Buyer, together with the cost of the cruise shall be due and paid immediately upon presentation of the cruise figures by the Seller to the Buyer. It is further understood and agreed that the Seller shall be entitled to recover any and all such sum or sums due from Buyer from any sums of money held by Seller as an advance payment from Buyer. It is expressly covenanted and agreed that such sum or sums due from Buyer is (are) a reasonable estimate of the probable damages to be suffered by the Seller as a result of such failure by the Buyer to cut any or all of those trees marked for sale, and it shall not be construed as of or held to be in the nature of a penalty.

For a discussion of the income tax consequences of the receipt of liquidated damages see Section C *infra*. That section also discusses the per-unit pricing contemplated by this provision. In this provision, the liquidated damages are based on the loss of the per-unit price value of the contract rather than the impairment of the future productivity of the stand. Obviously, the former is easier

trees not marked for cutting.<sup>28</sup>

Finally, provision should be made for the inclusion or exclusion of dead or windfallen timber and the time of inclusion or exclusion should be specified. If the contract authorizes only the cutting of standing timber without reference to time, a windstorm following the contract's signing may result in a dispute over the buyer's right to salvage the timber felled by the storm.

### C. *Obtaining Capital Gains Treatment of the Income Derived from the Sale*

The owner of timber can achieve capital gains treatment of the income realized from the disposition of timber in three ways, two of which are potentially available to an owner who conveys standing timber to be cut and removed by a buyer.<sup>29</sup> First, the owner can sell the timber pursuant to a contract in which he retains an economic interest within the meaning of section 631(b) of the Internal Revenue Code. Second, the owner can make an absolute or "lump sum" sale and attempt to qualify the timber as a "capital asset" within the meaning of I.R.C. section 1221, or as a "quasi-capital asset" as contemplated by

---

to estimate than the latter. However, see *supra* note 26 for a cautionary note about taking this approach.

28. A suggested provision for damages for the cutting of undesignated trees is as follows:

For cutting any trees not designated, payment shall be 150% of the per-unit cutting and handling price stated alone or at 150% of fair market value for timber not covered above.

Provisions for liquidated damages are enforceable in Arkansas provided that the damages would be indeterminate or difficult to ascertain and the sum is a reasonable prediction of just compensation. *Alley v. Rodgers*, 269 Ark. 262, 599 S.W.2d 739 (1980); *McMaster v. McIlroy Bank*, 9 Ark. App. 124, 654 S.W.2d 591 (1983). Arkansas' treble damages statute for timber trespass may justify the provision illustrated above. ARK. STAT. ANN. § 50-105 (1971).

29. One of the alternatives, that authorized by I.R.C. § 631(a) (1954) does not apply to conveyances of standing timber for cutting and removal by the buyer. Under that section, an owner of timber may elect to treat the cutting of timber for sale or use in his trade or business as a "sale or exchange," albeit a fictional one. So long as the requisite holding period has been satisfied and the timber is cut for sale or for use in the taxpayer's trade or business, the owner of the timber (or of a contract right to cut it) may elect to realize gain or loss from the cutting, in the year of the cutting, as if a sale had occurred. In effect, the owner is treated as if he had received income at the time of the cutting. The gain or loss is the difference between fair market value of the timber as of the first day of the taxable year in which it is cut and its adjusted basis for depletion for the taxpayer. Ordinarily, or at least for the purpose of the limited discussion of I.R.C. § 631(a) here, that adjusted basis for depletion will equal the taxpayer's capital investment in the timber.

All section references in this discussion are to the Internal Revenue Code of 1954, as amended. For those interested in a more detailed analysis of the sections discussed here, the following publications are recommended. Burnett, *Timber Transactions*, TAX MGMT. (BNA) 457 and C. BRIGGS & M. CONDRILL, *TAX TREATMENT OF TIMBER* (6th ed. 1978).

I.R.C. section 1231.

Neither approach is risk free, and each has potential advantages as well as disadvantages. Reduced to its simplest terms, a sale qualifying under I.R.C. section 631(b) requires that payment be based on the volume of timber harvested, in other words, a per-unit sale. On the other hand, an absolute or "lump sum" sale is one in which a single, fixed price is paid without reference to or dependence on the number of units or volume harvested. Certainty of capital gains treatment is the asserted advantage of a sale structured to meet the requirements of I.R.C. section 631(b). Although these requirements are strict, a sale can be planned with the assurance that if the requirements are met, capital gains treatment will result.

Attempting to qualify a "lump sum" sale under either I.R.C. section 1221 or I.R.C. section 1231 involves a determination of whether the timber was being held by the taxpayer as an investor or as a dealer, a fact question with numerous variables. Only if the taxpayer is considered an investor rather than a dealer will the sale qualify. Accordingly, an asserted disadvantage of that alternative is uncertainty of tax consequences.<sup>30</sup> Lump sum sales are generally considered to bring the owner a higher sale price than per-unit sales, although that advantage may be more than offset by the failure to qualify the proceeds for capital gains treatment.<sup>31</sup> The only solution for the attorney representing the timber owner is to understand the operation of each of the Code sections and to help plan each sale in accordance with the owner's circumstances.

---

30. See Burnett, *supra* note 29, at A-29. "As a result of general guidelines of imprecise application and the factual value of the question to be resolved [the investor versus dealer issue under 1221 and 1231], a taxpayer making an absolute sale of standing timber is encountering potential tax risks that otherwise would be avoided by the use of a qualifying § 631(b) transaction." *Id.* See also Siegel & Ballou, *The "Primary for Sale" Provisions of Sections 1221 and 1231 of the Internal Revenue Code as Related to Timber Transactions*, 39 ARK. L. REV. 73, 78 (1985). "The prerequisites for qualifying under section 631(b) are much stricter and more difficult to satisfy than those for sections 1221 and 1231." *Id.*

31. Siegel & Ballou, *supra* note 30, at 79, 83; Flick, *Economics of Timber Sales Decisions*, 9 SOUTHERN JOURNAL OF APPLIED FORESTRY 146 (1985). The following table illustrates the price increases necessary to offset the loss of capital gains status:

<u>Marginal Tax Rate (Percent)</u>	<u>Corresponding Price Increase (Percent)</u>
20	15
25	20
30	26
35	32
40	40
45	49
50	60

*Id.* at 148.

*I.R.C. Section 631(b)*

There are four requirements that must be met before a sale will qualify under I.R.C. section 631(b):

(a) the taxpayer must be the owner of the timber;

(b) the taxpayer must have held the timber for the requisite holding period;<sup>32</sup>

(c) the taxpayer must transfer that timber pursuant to a contract; and

(d) the taxpayer must retain an economic interest in the timber.

In most cases, it is the last requirement, the taxpayer's retention of an economic interest in the timber, that warrants the most attention in structuring the sale. All of the requirements, however, will be briefly addressed here.

An "owner" of timber for purposes of I.R.C. section 631(b) includes any person owning an interest in the timber and, in addition, sublessors and holders of contract rights to cut timber. The required interest in the timber must include the right to cut the timber for sale on the owner's own account or for use in his or her trade or business. In other words, if one acquired an interest in timber without acquiring the right to cut that timber or transferred the right to cut the timber prior to his acquisition of the timber, the ownership requirement of I.R.C. section 631(b) would not be satisfied.<sup>33</sup>

Currently, the requisite holding period is "more than six months."<sup>34</sup> In computing the holding period, the first day counted is the day after the taxpayer requires the requisite interest in the timber. The last day included is the day on which the first timber is deemed "cut" under the contract.<sup>35</sup> As contemplated by I.R.C. section 631(b), the time of cutting is not the moment the standing timber is felled. Rather, timber is considered cut at the time when, in the ordinary course of business, the quantity of the timber felled is first determined, that is, when it is first scaled or weighed.<sup>36</sup>

---

32. Under the Tax Reform Act of 1984, the holding period for timber acquired after June 22, 1984, and before January 1, 1988, is six months. Timber acquired after 1987 will have to satisfy the "more than one year" holding period that previously had been in effect since 1977. Pub. L. No. 98-369, 98 Stat. 1012 (1984).

33. For an excellent discussion of the ownership requirement, see Burnett, *supra* note 29, at A-12, A-13.

34. See *supra* note 32.

35. Under Treas. Reg. § 1.631-2(b)(1) (1983), the taxpayer may elect to treat the date of payment as the date of disposal if payment is made prior to cutting. See Burnett, *supra* note 29 at A-16.

36. Burnett, *supra* note 29, at A-13. See also Treas. Reg. § 1.631(b)(2) (1983). Not surpris-



The third requirement of I.R.C. section 631(b) is that the owner must "dispose" of the timber pursuant to a "contract." The disposal must include a transfer of the owner's ownership or control of the standing timber and the right to cut it. It is not advisable for the seller to cut the timber because of the substantial risk that such an arrangement would not be considered a disposal. On the other hand, postponing the passage of title to the timber until its actual severance or until payment is made for it will not defeat satisfaction of the disposal requirement. Contract provisions to that effect are commonly made to allocate risk of loss or to provide security.<sup>37</sup>

The disposition must be made pursuant to a mutually binding and enforceable contract. Not only must the owner surrender his right of ownership to the standing timber and the right to cut it,<sup>38</sup> the buyer must assume and be bound by an obligation to purchase and cut it. If the buyer is permitted to exercise his discretion as to how much timber to cut or whether to cut any timber at all, I.R.C. section 631(b) is not satisfied.<sup>39</sup> Although an enforceable bilateral oral contract is sufficient for purposes of I.R.C. section 631(b), in Arkansas the Uniform Commercial Code governs timber sales contracts.<sup>40</sup> Accordingly, the writing requirement of Arkansas Statutes Annotated section 85-2-201 is applicable.

The fourth requirement, the owner's retention of an economic interest in the timber, warrants special attention. The retention of an economic interest in the timber has two prerequisites.<sup>41</sup> First, the taxpayer

---

ingly, the Internal Revenue Service disapproves of the manipulation of scaling times for the purpose of securing a tax advantage. Burnett, *supra* note 29, at A-9.

37. Burnett, *supra* note 29, at A-14. See *infra* note 68 and the accompanying text for a discussion of the creation of security interests in timber.

38. Although the seller must surrender his ownership and right to cut the timber, in most contracts qualifying under I.R.C. § 631(b) (1954) the seller retains certain obligations, such as risk of loss, until severance.

39. Rev. Rul. 77-229, 1977-2 C.B. 210. For a discussion of the uncertain tax status of license arrangements giving the buyer or licensee the right to enter the seller's land to cut and pay for only such amounts of timber as the licensee desires, see Burnett, *supra* note 29, at A-14, A-15.

40. Williams v. J.W. Black Lumber Co., 275 Ark. 144, 150, 628 S.W.2d 13, 16 (1982); Davis v. Kolb, 263 Ark. 158, 159, 565 S.W.2d 438, 439 (1978).

41. Despite its requirement of the retention of an economic interest in the timber sold, I.R.C. § 631(b) (1954) does not define the concept. Accordingly, reference must be made to another Code provision that employs the concept, specifically, I.R.C. § 611 (1954) and a regulation promulgated under it, Treas. Reg. § 1.611-1(b)(1) (1960). I.R.C. § 611 permits a deduction for the depletion of certain natural resources. Under I.R.C. § 611, the concept of an economic interest is used to identify the taxpayer entitled to claim the deduction. Although there are differences between the "depletable economic interest" held by one entitled to claim a deduction under I.R.C. § 631(b), the essence of the two concepts are similar. Burnett, *supra* note 29, at A-16, A-17. See generally K. Littlejohn, *The Taxation of Timber as a Natural Resource: The Economic Interest*

must have acquired an interest in the timber. If the taxpayer has satisfied the "owner" requirement of I.R.C. section 631(b), this initial requirement of a retained economic interest will have been satisfied.<sup>42</sup>

The second prerequisite is that the income received by the timber owner must be derived exclusively from the severance of the timber. Conceptually, I.R.C. section 631(b) treats the income derived from the severance of the timber as the taxpayer's return on his investment in that timber. For that reason, the income must have the following two attributes:

(a) it must be completely contingent or dependent on the severance of the timber; and

(b) it must be derived exclusively from the timber itself.<sup>43</sup>

In essence, a sale with a retained economic interest is a per-unit sale. A simple, straightforward way to structure such a sale is to state the price with reference to the units in which the timber to be severed will be measured and to provide for the making of payments as or after the measurements occur after severance. The following provisions demonstrate two methods of per-unit pricing:

1. The Buyer shall pay to the Seller the following prices for the trees described in paragraph \_\_\_ above:
  - (a) Pine Sawtimber: \_\_\_ per thousand board feet (MBF) (16,000 lbs. being the equivalent of one thousand board feet)
  - (b) Hardwood Sawtimber: \_\_\_ per thousand board feet (MBF) (18,000 lbs. being the equivalent of one thousand board feet)
2. The Buyer agrees to pay Seller at the rate of \_\_\_ per ton for the trees described in paragraph \_\_\_ above.

The following is an example of a provision requiring payment to be made after the measure of the unit is determined subsequent to harvest:

The Buyer shall make weekly payments to the Seller on the first day of each calendar week, commencing \_\_\_, in an amount based on the quantity of all timber cut during the preceding calendar week based on the prices stated in paragraph \_\_\_ above. Each payment shall be accompanied by a listing showing (i) each truckload, (ii) loaded and

---

Perspective (Jan., 1983) (unpublished LL.M. thesis available at University of Arkansas Law School Library).

42. Burnett, *supra* note 29, at A-17, A-18.

43. *Id.*

empty weights of the truck for each load, (iii) calculation of the board feet, and (iv) copies of all weight and scaling tickets designated by the truck. The expense of scaling and the costs of the preparation of the listing referred to in this paragraph shall be borne solely by the Buyer.

In the per-unit sales provisions above, the units harvested are determined by physical measurement of the severed trees.<sup>44</sup> A variant of the per-unit sale, one which provides for before- and after-harvest cruises or inventories of the standing timber in the harvest area, also can satisfy the retained economic interest requirement.<sup>46</sup>

Sales of timber involving before- and after-cruises of the harvest area, as well as other types of sales transactions, frequently involve advance payments to the seller. Advance payment arrangements are permissible so long as the contract provides that the payments are to be applied as payment for subsequently cut timber on a per-unit basis. Of course, as noted earlier, the contract must impose on the buyer an obligation to cut the timber.<sup>46</sup> An example of contract provisions providing for measurement by a before- and after-harvest cruise is as follows:

1. Contemporaneously with the signing of this agreement, the Buyer has paid to the Seller a down payment of \$\_\_\_ which is 100% of the appraised value, as determined in paragraph 3.

2. The Buyer and the Seller agree to the cruise volumes in paragraph 3, as the initial timber volumes.

3. The Buyer and the Seller agree that the volume on which the down payment is calculated shall be determined by multiplying the volumes of each product cruised by [consulting forester] by the per-unit price specified below:

<u>Products</u>	<u>Volume</u>	<u>Per-Unit Price</u>	<u>Total Value</u>
Pine Pulpwood	___ cords	___/cord	___
Chip-in-Saw Pine	___ MBF	___/MBF	___
Pine Sawtimber	___ MBF	___/MBF	___
Pine Topwood	___ cords	___/cord	___

4. The Buyer and the Seller agree that the volume removed during the contract period will be the difference between the initial

44. Because of the potential for disputes over scaling, consideration should be given to inclusion of provisions giving the seller a reasonable opportunity to scale the wood either in the woods or at the delivery point and, if differences arise, the right to stop all cutting operations until the differences can be reconciled.

45. The Internal Revenue Service has indicated that amounts received under a timber cutting contract for cut timber, the quantity of which is based on a cruise rather than scaling, qualifies under I.R.C. § 631(b) (1954). Rev. Rul. 78-104, 1978-1 C.B. 194. In the facts of that ruling, the cruise was a 100 percent cruise.

46. Rev. Rul. 77-229, 1977-2 C.B. 210.

volumes in paragraph 3 and any remaining standing volume cruised by [consulting forester] at the end of the contract period.

5. If upon completion of the cutting by the Buyer and after a final inspection of the cutting area, both the Buyer and the Seller determine and agree that all trees described in paragraph — above have been severed by the Buyer, then the Seller will be released from any obligation in paragraphs 8 and 9.

6. If upon final inspection by the Buyer and the Seller, it is determined that all trees sold hereunder were not removed, the volume removed shall be determined pursuant to paragraph 4. This removed volume shall be used to determine the value of the timber harvested. The value removed shall be the product of the volume removed and the per-unit prices in paragraph 3. The Seller shall then be obligated to pay to the Buyer the difference between the down payment and the value removed. This payment to the Buyer by the Seller shall be subject to and modified by the damages provided for in paragraph 7. This payment by the Seller to the Buyer shall be made within 10 working days of the receipt of notification by [consulting forester], provided that the Buyer has the right to arbitration as provided in paragraph 8.

7. The Buyer agrees to pay the Seller his actual damages for any timber not removed during the contract period. The damages will be determined by [consulting forester] subject to the arbitration provided for in paragraph 8.

8. The Buyer shall have the option to employ, at the Buyer's expense, a registered forester to verify [consulting forester's] estimate of the volume remaining. If this volume differs from the remaining volume determined by [consulting forester], the Buyer's agent and the Seller's agent, —, shall appoint a mutually agreed upon registered forester to determine the actual volume remaining. Both parties shall abide by the volumes so determined, and the expense of the mutually agreed upon forester shall be allocated to either or both parties as determined by the mutually agreed upon forester.

If paragraph 6 in the foregoing example had not required the seller to return to the buyer any sums representing the price of timber not harvested and had the seller retained that sum, that portion of the advance payment would be treated as ordinary income. Any amounts retained or received attributable to uncut timber will be treated as ordinary income.

In paragraph 7 in the example above, the amounts received by the seller as damages for the buyer's failure to cut timber would also be treated as ordinary income.<sup>47</sup> A clause providing for reasonable dam-

---

47. The foundational provisions governing capital gains are I.R.C. §§ 1221 and 1231 (1954).

ages for failure to cut all the trees required to be cut under the contract will not preclude the retention of an economic interest. If, however, the clause provides for or has the effect of guaranteeing the seller the same sum irrespective of whether the timber was harvested, no economic interest will have been retained by the seller.<sup>48</sup>

### *I.R.C. Sections 1221 and 1231*

The second approach to securing capital gains treatment of income from the proceeds of a timber sale is through reliance on I.R.C. section 1221 or 1231. This alternative is the only choice for sellers who receive a lump sum for their timber that is not contingent on the units or volume of timber harvested.<sup>49</sup>

To be considered a "capital asset" under section 1221, standing timber initially must meet the same holding period requirement imposed by I.R.C. section 631(b).<sup>50</sup> Having satisfied the holding period requirement, it then must not be excludable under one of the five categorical exclusions listed in I.R.C. section 1221(1)-(5).<sup>51</sup> Of those exclusions, only the first, I.R.C. section 1221(1), is likely to exclude standing timber from qualification as a capital asset. That exclusion denies capital asset status to property held for sale to customers in the ordinary

A "sale" is a crucial element of capital gains under either section. Under I.R.C. § 631(b) (1954) the receipt of liquidated damages is not considered a sale. Without a sale, there are no capital gains.

I.R.C. § 631(b) (1954) does not operate independently of I.R.C. §§ 1221 and 1231 (1954) since § 1231 is ultimately the provision that provides the possibility of capital gains treatment under § 631(b). By the terms of § 631(b) if the disposal satisfies its requirements, any resulting gain or loss will be treated as resulting from a "sale" of the timber. I.R.C. § 1231(b)(2) (1954) provides that timber with respect to which § 631(b) applies qualifies as "property used in the trade or business" for purposes of § 1231. Capital gains would result where the gains on the sale of all "property used in the trade or business" for a particular taxable year exceed losses from sales of such property.

48. Burnett, *supra* note 29, at A-20, A-21.

49. For a complete and excellent discussion of I.R.C. §§ 1221 and 1231 as they relate to timber transactions see Siegel and Ballou, *supra* note 30.

50. See *supra* note 32.

51. Of the five exclusions, only I.R.C. § 1221(1) and (2) (1954) apply to timber transactions. Excluded under those provisions are:

(1) stock in trade of the taxpayer or other property of a kind which would probably be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; [and]

(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business.

I.R.C. § 1221(1)-(2) (1954).

course of the taxpayer's trade or business. The practical effect of this exclusion is to deny capital gains treatment for income received by one whose timber sales are frequent enough or whose other activities evidence that he is a dealer with respect to his standing timber.

The test for determining whether one is a dealer with respect to his standing timber and, hence, that his timber constitutes property held for sale to customers in the ordinary course of business is necessarily imprecise. The resolution of the question requires the consideration of numerous factors, not one or any combination of which is necessarily determinative. Generally, however, frequency, substantiality, number, and continuity of sales are given greater weight than other factors.<sup>52</sup> In other words, if one is frequently selling timber, deriving a substantial portion of income from timber sales, making numerous and regular sales, or any combination of the above, it is likely that he will be considered a dealer and the proceeds of his lump sum sales will be disallowed capital gains treatment.

The same problem that may be encountered in qualifying the proceeds of a sale for capital gains treatment under I.R.C. section 1221 may also be encountered when trying to accomplish the same result under I.R.C. section 1231. I.R.C. section 1231 property, often referred to as "quasi-capital assets," also excludes property held primarily for sale to customers in the ordinary course of the taxpayer's trade or business.<sup>53</sup>

Because of the inherent uncertainty in anticipating how either the Internal Revenue Service or a court will resolve the issue of whether

---

52. One commentator has listed the following factors as being relevant to the issue of whether one is a dealer with respect to the property at issue:

1. the frequency, substantially [sic] and continuity of sales;
2. the reason, nature, purpose, and intent of the taxpayer's acquisition;
3. the duration of the taxpayer's ownership;
4. the taxpayer's principal business and vocation and the time and effort habitually devoted to sales;
5. the extent of the taxpayer's activities;
6. the extent and nature of the taxpayer's efforts to sell the property;
7. the use of a business office to sell the property; and
8. the character and degree of supervision or control exercised by the taxpayer over any agent or representative selling the property.

Burnett, *supra* note 29, at A-28.

53. I.R.C. § 1231(b)(1)(A), (B) (1954) provides for the following exclusions from eligible § 1231 property:

(A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, [and]

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

the standing timber being sold is a capital asset under I.R.C. section 1221 or quasi-capital asset under I.R.C. section 1231, the attorney assisting in the structuring of the sale might find it preferable to encourage the client to choose the certainty of I.R.C. section 631(b). In that way, the time, expense, and worry attendant to a questioned attempt to qualify under I.R.C. section 1221 or 1231 is avoided altogether.

#### D. *Protecting Your Client's and His Neighbors' Property*

Logging is destructive. Some degree of destruction is inevitable in any harvest operation. Probably the most common source of complaints of landowners who sell their timber is the condition of their land after the loggers have departed. In some cases, the problem simply may be the trash, oil cans, and other debris left behind. In other cases, serious, long-term harm may have been done to the land and the residual stand of timber on it. It is in this area that a well informed attorney can be of particular assistance to a client.

There are at least two obstacles to preventing unnecessary waste and damage in logging operations. The first obstacle may be the timber owner's failure to request or to insist upon protective provisions in the contract. In many instances, timber owners simply do not appreciate or understand the potential for damage. In other cases, the timber owner's concern may be only with the immediate economic return. To the extent that insistence upon certain protective measures might lower his return because of increased sale preparation or harvest costs, the timber owner may choose to discount the long-term costs of an environmentally destructive but economically efficient harvest or to consider only the short-term costs and benefits.

Although most experienced loggers have an awareness of the potential for destruction, their interest, unless modified by incentives or coercion, usually is to harvest as economically and efficiently as possible. Often logging crews are paid by the volume of the timber they cut and remove. Accordingly, they may not temper their harvest methods with environmental considerations, particularly if those considerations might slow operations, increase cost, or require practices which differ from past custom.

For those reasons, the logging crew, its members' respective skills and attitudes, and the economic constraints of the system under which the crew operates may be the second obstacle to preventing unnecessary destruction during the timber harvest.

At a minimum, the attorney assisting the timber owner with the

sale should suggest the inclusion of contract clauses designed to protect the client's property and that of his neighbors. The attorney should be fully acquainted with the characteristics of the harvest area and with the other uses the client makes of the land so that the provisions can be site-specific.

For purposes of this discussion, the problems of waste in logging operations will be separated from the problems of destruction in logging operations. Generally, the problems of waste are best approached by using the "utilization" requirements mentioned earlier.<sup>54</sup> In approaching the problems of destruction, it is helpful to begin by categorizing them in the following four ways:

1. destruction of residual growing stock;
2. damage to soil as a result of log transportation;
3. degradation of water quality; and
4. damage to roads, fences, gates, and other improvements.<sup>55</sup>

Residual growing stock can be damaged or destroyed in several ways. The cutting, breaking, or crushing of trees that interfere with the harvest causes most of the damage. Additional trees may be wounded and left susceptible to disease by felling and skidding operations. Still other trees may be used for roads, bridges, and other uses incidental to the logging operation.<sup>56</sup>

To provide for the protection of the residual growing stock, the

---

54. See *supra* note 23 and accompanying text. The problems associated with waste have been classified as follows:

1. material left in the tops through the failure to utilize the trunk up to the minimum merchantable top diameter;
2. material left in unnecessarily high stumps; and
3. material left in partially unmerchantable trees including windfalls and dead trees, through failure to utilize the merchantable portions of such trees.

D. Smith, *supra* note 20, at 227.

55. By way of background, it should be noted that modern harvesting operations are becoming increasingly reliant upon machinery and heavy equipment and that each harvesting method has unique environmental advantages and disadvantages. When reduced to their components, however, most harvest methods share the following operations: planning, felling and bucking, yarding, loading, transportation, and unloading. Another component, roadbuilding, usually occurs in conjunction with all the components between planning and unloading. Variations in the type of methods used during each component are usually dependent upon or arise from the piece-length of the logs handled and on terrain, weather, and other factors. In addition to becoming acquainted with his client's land and its characteristics, the attorney representing the timber owner also would be well advised to become familiar with the timber buyer's contemplated harvest system. See generally S. CONWAY, LOGGING PRACTICES 50-65 (1982).

56. D. Smith, *supra* note 20, at 228. An excellent discussion of the possible ways in which the residual stock can be damaged is found in Shigo, *Wounded Forests, Starving Trees*, 83 JOURNAL OF FORESTRY 668 (1985).



timber owner should consider including in the contract a requirement that the buyer compensate him for damage to trees not designated for cutting. The following is an example of such a provision:

The Buyer agrees to cut and remove the timber covered in this sale agreement in such a manner as to cause the least possible damage to trees and saplings remaining. Should any trees not conveyed herein be cut or unnecessarily damaged, the Buyer shall pay the Seller for those trees at the rate of \_\_\_ per thousand board feet, Doyle log rule, for pine sawtimber; \_\_\_ per standard cord for pine chip-n-saw; \_\_\_ per standard cord for pine pulpwood; and \_\_\_ per thousand feet, Doyle log rule, for hardwood and cypress sawtimber. The Buyer shall also compensate the Seller for unnecessary damage to nonmerchantable trees and other residual growing stock.

With respect to the use of trees by the logger to construct roads, bridges, or for other incidental purposes, the permissible limits of such cutting should be specified. Some owners may want to require that, to the extent possible, only tops or other unmerchantable portions of trees designated for harvest be used for those purposes. In other cases, such as contemplated in the following example, the owner may want to designate specific trees available for uses incidental to the harvest:

The Buyer may cut bridge timbers, skid poles, and any other materials normally required to log such timber, provided such are marked or designated by the Seller or his agent, and provided further that all bridges and crossings are left intact by the Buyer upon completion of logging.

Skidding and other forms of log transportation, including roadbuilding, present the potential for unnecessarily damaging the residual growing stock and accelerating soil erosion. Damage to the residual growing stock may occur as a result of such stock being struck by logs being skidded or the skidding equipment and as a result of the soil compaction. Soil compaction, in particular, is a serious problem because it can significantly impair the long-term productivity of the soil.<sup>57</sup> Wet weather operations or harvests in low-lying areas enhance the likelihood of serious soil compaction as well as the severe rutting of roads and trails.<sup>58</sup>

---

57. Soil productivity is reduced not only by compaction from skidding and vehicle travel, but it is also reduced by the churning action that raises the infertile soil layer to the top. S. CONWAY, *supra* note 55, at 79.

58. For a detailed analysis of soil compaction variables and intensities, see Lockaby and Vidrine, *Effect of Logging Equipment Traffic on Soil Density and Growth and Survival of Young Loblolly Pine*, 8 SOUTHERN JOURNAL OF APPLIED FORESTRY 109 (1984).

Road construction and skidding, particularly the skidding of tree-length logs, also present a significant potential for causing soil erosion and stream and watercourse siltation. Where erosion and siltation result, the possibility for damage to adjoining lands increases.<sup>59</sup>

There are several approaches that a timber owner might take to attempt to minimize damage resulting from skidding and other forms of log transportation. First, the owner might restrict the length of the logs being handled and require the use of low ground pressure tractors for skidding or other uses off the primary roads. The owner should be aware that the required use of light equipment may reduce the price that the buyer is willing to pay for the timber.<sup>60</sup>

Second, the owner might reserve the right to stop operations when excessive damage occurs or is likely to occur as a result of wet conditions. Where that right is reserved, the owner should understand that fairness dictates, and the buyer may demand, that the owner reciprocate with an extension of the time that the buyer has to harvest if any extension becomes necessary as a result of the owner's exercise of the right to cease operations.<sup>61</sup>

Third, the owner might insist on the inclusion of various specific clauses pertaining to certain of the more critical aspects of skidding, roads, and other facets of the harvesting process. Such clauses could include the restriction on or specification of the location of skid trails, roads, and yarding or decking areas. The use of maps or aerial photographs to designate the restricted or specified areas would be advisable. An alternative would be to specify that the location of roads, decking, or yarding areas be subject to the prior approval of the owner.

The contract could also impose a requirement to restore all pre-existing roads to their original condition. This could be done by specifying that all roads "be bladed to allow travel by a pick-up truck" or some other specific standard. The buyer might also be required periodically to maintain roads, drainage structures, and water bars during the harvest period. The required reseeded and mechanical loosening of the soil should also be considered for areas where ground cover has been removed or damaged or the soil compacted.

The protection of streams and watercourses deserves special attention. Degradation of water quality can not only reduce the owner's en-

---

59. See generally Brown and Beschta, *The Art of Managing Water*, 83 JOURNAL OF FORESTRY 604 (1985).

60. Ozier, *Preparing the Timber Sales Contract*, FOREST FARMER, Sept. 1984, at 6.

61. See *infra* section E for a discussion of contract clauses specifying the buyer's time to complete the harvest.

joyment of his lands and waters, but it can also detrimentally affect nearby landowners. Practices designed to protect water quality from degradation by timber harvesting can be required by the contract. Pursuant to section 208 of the Federal Water Pollution Control Act of 1948,<sup>62</sup> states have been required to adopt guidelines or "best management practices" as a part of a voluntary approach to the control of nonpoint source water pollution caused by logging operations. The best management practices for Arkansas have been published by the Arkansas Forestry Commission and are available without charge from any Commission office.<sup>63</sup>

The imposition of a general requirement that the buyer must follow the best management practices established by the Arkansas Forestry Commission or the incorporation of selected, specific guidelines into the contract should be considered. At a minimum, however, stream and watercourse protection provisions should require the removal of tops, limbs, branches, and other logging debris from watercourses, including intermittent streams; a prohibition against the operation of equipment either in or across streams; and the retention of a buffer of trees along streams.<sup>64</sup>

---

62. 33 U.S.C. § 1288 (1982). The act is now known as the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982).

63. At least three pamphlets have been published by the Arkansas Forestry Commission. Unfortunately, no one pamphlet has a complete listing of the best management practices. The three pamphlets are entitled as follows: "Best Management Practices—Arkansas Guidelines for Silviculture," "A Guide to Better Forestry Practices and Water Quality," and "A Guide to Better Logging and Better Water Quality." The address of the Arkansas Forestry Commission is P.O. Box 4523, Asher Station, Little Rock, Arkansas 72214.

64. The concept of "stream management zones" is the cornerstone of Arkansas' best management practices. The size of stream management zones should be site-specific to insure that their purposes of reducing the quantity of logging wastes and debris reaching the stream and preventing water temperature increases will be accomplished.

Some additional protective measures against erosion and sedimentation include the following:

1. designing roads so that no grade will exceed ten percent;
2. planning roads so that, to the extent possible, they will be at least 100 feet from streams;
3. when locating stream crossings, selecting areas with rocky bottoms and avoiding steep banks or areas with deep, soft soil;
4. employing drainage devices such as outsloping at three degree angles, insloping, grade breaks, dips, and berms;
5. using culverts on permanent roads;
6. seeding road cuts and fill slopes as soon as possible;
7. using water bars where road grades are greater than five percent;
8. maintaining roads regularly, keeping road surfaces free of debris.

Newton County Wildlife Ass'n., "Response and Alternative to the Proposed Land and Resource Management Plan and Draft Environmental Impact Statement for the Ozark-St. Francis National Forests," 25 (May 20, 1985) (unpublished correspondence) (citing Lawson, Water Manage-

Also a significant concern to most owners is the protection of improvements on their property, including gates and fences, and the avoidance of interference with other operations on their property during the harvest. Accordingly, consideration should be given to drafting clauses covering the following points:

1. A prohibition against the leaving of tree tops, logs, jumpbutts, or other materials in fields, pastures, rights-of-way, ditches, canals, property lines, or other specific areas. The contract might require that such items be pulled back into the woods at the time of logging or within a specified number of days. An alternative or additional provision might be a prohibition against cutting "edge trees" or trees within a specified distance of the area where debris is to be excluded or removed;

2. A requirement that any and all damage to fences, gates, gaps, or other improvements be promptly repaired or that the buyer reimburse the seller for the cost of repair or replacement;

3. A requirement to keep all gates and fences closed except while entering or exiting;

4. A requirement to repair all rutting of fields and pastures and to restore fields and pastures to their original condition;

5. A requirement that all equipment and other property of the buyer be removed within a specified time and that, upon the failure of the buyer to remove his property, it shall be considered abandoned and become the property of the seller;

6. A requirement that all trash, oil cans, and other debris be removed at the end of the harvest; and

---

ment and Control of Soil Loss in Southern Upland Hardwood Stands, 1980 Proceedings of the Mid-South Upland Hardwood Symposium for the Practicing Forester and Land Manager 134-43).

It is unlawful in Arkansas for timber cutters to leave any tops, trunks, or limbs in any navigable stream or watercourse of any improved drainage project. ARK. STAT. ANN. § 41-4066 (1977). The removal of trees below the normal water mark on certain rivers or streams is also prohibited. ARK. STAT. ANN. § 41-4068 (1977).

Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1982), provides for federal regulation of dredge and fill activities. Subject to guidelines and certain overriding authority of the Environmental Protection Agency, the Army Corps of Engineers has authority over dredge and fill activities, including the issuance of permits. Exempted from 404 compliance are "normal" silvicultural activities involving earthmoving and the construction and maintenance of temporary logging roads provided that they are constructed in accordance with best management practices. 33 U.S.C. § 1344(f)(1)(E) (1982). However, § 208 coverage for nonpoint source pollution still applies to these activities notwithstanding the exemption from section 404 requirements, and the definition of "normal" silvicultural activities continues to be litigated. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (cutting bottomland hardwoods to convert land to cropland not a "normal" silvicultural activity).

7. Where aesthetics are a concern, a requirement that all tops, limbs, and branches be logged so that they do not extend above a given distance from the ground, usually four feet. In addition, buffer zones might be required along roads or elsewhere where scenery is important.

Finally, consideration should be given to protecting den trees and other trees important to wildlife for food or shelter. Many forest owners value the wildlife productivity of their land as much as, or more than, its timber value.<sup>65</sup>

### E. *Time to Harvest*

The contract should specify when the harvest is to begin and end. Because harvesting operations can disrupt or preclude other uses of the land while they are underway, it even may be desirable to impose a tract-by-tract schedule of harvest operations. Any schedule that is imposed should be accompanied by a specification of the consequences of the buyer's failure to abide by it.

A relatively simple approach to regulating the time to harvest is to impose a deadline for the termination of operations and the removal of cut timber and equipment.<sup>66</sup> If the deadline is not met, title to the timber, cut or standing, reverts to the seller. The following is an example of a provision embodying that approach:

The Buyer shall have \_\_\_ (months) (years) from the date of the signing of this agreement within which to cut and remove the timber conveyed in this agreement. All timber, whether standing or fallen, and logs remaining on the Seller's property at the expiration of that period shall be and remain the property of the Seller, its successors, and assigns.

In some circumstances, it may be desirable to have a more complete "time for performance" provision. For instance, if the contract imposes on the buyer certain post-harvest obligations such as the grading of roads, seeding of skid trails, and removal of debris, it would be preferable to specifically delineate those obligations. The following is an example of such a provision:

The Buyer shall have \_\_\_ months from the date of this contract within which to cut and remove the timber from the Seller's property. At the

---

65. Guyann, Jr., *Consider Wildlife Habitat In Forestry Decisions*, FOREST FARMER, March 1985, at 26.

66. Under the general rule, where the contract is silent on the time to remove, the buyer has a reasonable time to do so. *Liston v. Chapman & Dewey Lumber Co.*, 77 Ark. 116, 91 S.W. 27 (1905).

expiration of that period, if the Buyer has not already done so, the Buyer shall have an additional period of sixty (60) days within which to do the following:

- (a) remove any cut timber, logs, or lumber remaining on the Seller's property;
- (b) remove any equipment belonging to the Buyer;
- (c) remove any trash, oil cans, and other debris as specified in paragraph \_\_\_ of this agreement;
- (d) reseed the skid trails and roads designated by the Seller pursuant to paragraph \_\_\_ of this agreement; and
- (e) grade and repair the roads designated by the Seller pursuant to paragraph \_\_\_ of this agreement.

In establishing a harvest schedule, at least two matters in addition to the time of commencement and termination should be addressed. First, the contract should specify whether the buyer must complete all operations, including clean-up, on one tract or site before moving to the next. Second, the contract should state whether the buyer can re-enter and re-log an area during the term of the contract. An example of a harvest schedule addressing both matters is as follows:

The Buyer shall have two (2) years from the date of this agreement to cut and remove the timber from the areas designated sites 1, 2, 3, and 4 on the map attached and incorporated as Exhibit A. The Buyer shall have three (3) years from the date of this agreement to cut and remove the timber from the areas designated sites 5 and 6 on the map attached and incorporated herein as Exhibit A. The Buyer shall harvest each site in ascending numerical order and shall complete all operations and attendant responsibilities as specified in part \_\_\_ of this agreement before proceeding to the next site. The Buyer shall not re-enter or re-log any site after operations on that site have ceased and the Buyer has commenced operations on another site.

A final matter that should be considered is the inclusion of a provision for the extension of time. Additional time may be needed when delays occur as a result of some force beyond the control of either party or when one of the parties delays the performance of the other. For example, the seller may desire to exercise a right granted to him in the contract to direct the buyer to stop harvesting operations when wet conditions are contributing to soil compaction and the rutting of roads, trails, and fields from the passage of heavy logging equipment. The following is a clause providing for an automatic extension of time upon the happening of certain specified occurrences:

In the event that either party is prevented from performing its obliga-

tions or exercising its rights under this agreement by reason of flood, fire, or other occurrence or force beyond control or by reason of the exercise by the right of the Seller to temporarily stop the operations of the Buyer in accordance with paragraph \_\_\_ of this agreement, the time for the performance of the obligations so prevented and/or the exercise of rights shall be extended for a period equal to the period of prevention.

#### F. *Risk of Loss and Passage of Title*

The contract should specify when title to the timber is to pass from the seller to the buyer. In addition, it should assign or apportion the risk of loss during the term of the contract. Where the seller desires that both title and risk of loss pass to the buyer at the time of the signing of the contract, the following clause would be appropriate:

Title to the timber identified and described in this agreement shall pass to the Buyer at the time of the signing of this agreement. The risk of loss of that timber and the insurable interest in that timber shall pass to the Buyer at the time of the signing of this agreement.

Where title is retained by the seller until severance, the risk of loss until severance is usually assigned to the seller. However, as illustrated by the following provision, the seller's risk of loss should expressly exclude the risk of loss or damage caused by the buyer:

The Seller shall retain title to all timber marked for cutting until such time as that timber is severed by the Buyer. The Seller shall bear all risks of loss or damage to the marked standing timber, unless the loss or damage to that timber is caused by the Buyer or the Buyer's agents, servants, employees, or independent contractors. After severance of the marked timber, title to the cut timber shall be in the Buyer who shall also bear all risks of loss to the cut timber.

Where payment is not to occur until after severance, it is not advisable for the passage of title to be deferred until the payment of the purchase price, particularly when the seller is relying on I.R.C. section 1221 or 1231 to qualify the proceeds from the sale for capital gains treatment. In such cases, there is a risk that the buyer would be considered an agent of the seller and, as the buyer made subsequent sales of the harvested timber, those sales might be imputed to the seller. The seller would then be vulnerable to being characterized as a dealer, and thus, the proceeds of the sale would be ineligible for capital gains treat-

ment under I.R.C. sections 1221 and 1231.<sup>67</sup>

The purpose of the seller's retention of title until receipt of payment can be accomplished by providing for the creation of a security interest in favor of the seller in the harvested timber. This approach avoids the agency problem that might result in disqualification of the proceeds for capital gains treatment under I.R.C. sections 1221 and 1231. A security interest would be created by the following clause:<sup>68</sup>

After severance of the marked timber, title to the timber so cut shall be in the Buyer, except that the Seller shall retain a security interest in that timber and the products derived therefrom until it is paid for in full as provided in paragraph — herein.

In drafting the risk-of-loss provision, one should consider specifying not only the effect of a loss on the price the seller will receive under the contract, but also the effect of a loss on other rights and obligations created in the contract. The following clause does both:

In the event that any timber marked for sale hereunder is damaged so as to be unmerchantable, or is destroyed or blown down, or is damaged, destroyed, or lost by flood, lightning, drought, disease, insect attacks, theft, trespass, condemnation, or other casualty, the party holding title thereto shall bear the loss resulting from such loss, damage, or destruction. In the event such loss, damage, or destruction occurs while title to the timber so lost, damaged, or destroyed is vested in the Seller, the Buyer shall be relieved of his obligations hereunder to cut and buy the timber so lost, damaged, or destroyed, and the Seller shall be under no obligation to mark and sell, or the Buyer to cut and buy, other timber in lieu of that so lost, damaged, or destroyed.

---

67. See Siegel & Ballou, *supra* note 30 at 98. See *supra* notes 29-53 and accompanying text.

68. The basic prerequisites of an enforceable security interest are:

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or *timber to be cut*, a description of the land concerned;

(b) value has been given; and

(c) the debtor has rights in the collateral.

ARK. STAT. ANN. § 85-9-203(1) (Supp. 1985) (emphasis added). Although a separate security agreement may be appropriate in some circumstances, the timber sales contract will usually satisfy the "agreement" requirement of ARK. STAT. ANN. § 85-9-203(1) provided that it evidences the parties' intention that a security interest be created, describes the "land concerned," and is signed by the debtor. The financing statement filed to perfect the security interest must also include a description of the land. See ARK. STAT. ANN. § 85-9-402(1), (5) (Supp. 1985). The description of the land should be the legal description. See generally Nickles, *A Localized Treatise on Secured Transactions—Part II: Creating Security Interests*, 34 ARK. L. REV. 559, 572-93 (1980).



The clause quoted above addresses three matters. First, it provides that the risk of loss is borne by the party having title to the timber at the time the loss occurred. Second, it provides that when a loss occurs, the buyer is not obligated to buy the damaged timber although that timber may have a salvage value. Finally, the clause provides that the seller is not obligated to substitute previously undesignated timber for the timber that may have been damaged or lost and that, even if the seller desires to make a substitution, the buyer is not obligated to purchase the substituted timber.

### G. *Access*

Understandably, buyers of standing timber are concerned about access. The contract should specifically grant to the buyer a right of access to the standing timber sold under the contract. Clauses granting access may do so generally or, where the circumstances dictate it, the grant of access may be limited or restricted to designated routes. As with other site-specific provisions in the contract, reference to a map incorporated in the contract is a useful way to designate specific access routes.

The following clauses grant access in general terms:

1. The Seller grants to the Buyer the necessary rights of ingress and egress over and across the land described in paragraph \_\_\_ herein for the purpose of performing this agreement.
2. The parties to this agreement each recognize the rights of the other to ingress and egress to the property described in paragraph \_\_\_ above and each agrees to conduct its operations with fair and reasonable regard for the convenience and rights of the other.
3. The Seller agrees that the Buyer, its agents, and its employees shall have the right of reasonable access, ingress, and egress during the term of this agreement for the purpose of entering the cutting units and to cut and remove the marked timber on the lands more particularly described in attached Exhibit A, and timber on other lands of the Seller as may be reasonably necessary or required under the terms of this agreement. The Seller further guarantees access to all cutting units.

The second clause quoted above implicitly recognizes that the seller's use of his land and the buyer's logging operations may conflict during the term of the contract. The inclusion of a requirement that each are to respect the rights of the other is important because it in-

sure that the parties will be aware of the potential for conflict during the contract negotiations. Where the parties above are to identify specific sources of conflict, such as the use of a particular road, it would be advisable for the contract to reflect the specific resolutions of the potential conflicts.

Two access issues that are often overlooked during contract negotiations are whether the buyer may grant access to third parties and whether the buyer may hunt on the land or use it for a purpose not related to the harvest. Usually, the seller does not want the buyer to invite others onto his property, and he also may not want the buyer hunting or engaging in other activities not connected with the harvest. Accordingly, the contract should include a provision similar to the following clause:

The Buyer shall not grant any right, license, or permission to any of its agents or employees or other persons to hunt, fish, cut firewood, or conduct any other activity not directly related to the performance of this agreement nor shall the Buyer engage in any such activities on his own behalf.

Where the contract term or the time to harvest is lengthy, the seller may want to make it clear that he retains the right to use the land for certain purposes during the life of the contract by reserving certain rights. The uses most commonly reserved are the right to lease the land for hunting, mineral exploration, and agricultural purposes. Such provisions, in addition to reserving the right to use the land for the purposes specified, should contain a clause to the following effect;

If the Seller requires the exclusive use of any of the land for drilling operations in an effort to discover oil, gas, or other minerals or for geophysical operations with respect to same, or for such purposes as buildings, agricultural cultivation, pipelines, warehouses, or for storage tanks or other accessories of mineral operations and development, and the like, the Seller's rights to such uses shall be paramount to any rights herein conveyed to the Buyer, and the Buyer shall not interfere in any manner with such use, provided, however, that the Seller shall, on demand of the Buyer, pay to the Buyer the value of any timber covered by this sale standing on the land so used.

#### H. *Liability and Indemnification*

The seller's concerns regarding liability to others are essentially twofold. First, the seller desires to avoid liability for any injury to the buyer or damage to the buyer's property as a result of the condition of

the seller's land. Second, the seller wants to avoid any vicarious liability or liability imputed to him through the buyer as a result of the buyer's conduct.

With respect to the first concern, the seller should both disclaim any warranties or representations regarding the condition of the land and seek an acknowledgement or representation from the buyer that he is familiar with the premises and assumes the risks of operating on them.<sup>69</sup> The following is an example of a clause containing both a disclaimer by the seller and a representation by the buyer:

The Seller makes no representation as to the present or future condition of his property. The Buyer warrants that it is familiar with the condition of the property described in paragraph \_\_\_ herein and accepts the same in its entirety in its present condition. The Buyer assumes all risks of personal injury or damage to its property in connection with operations under this agreement.

In addition to disclaiming any representations regarding the condition of his property, the seller may also want to disclaim responsibility for loss of or damage to the buyer's property while it is on the seller's property. An example of a clause containing such a disclaimer is as follows:

The Seller assumes no liability for loss or damage to any personal property or equipment of the Buyer or his employees during the period of this agreement.

In addressing the seller's second concern, the contract should contain both a hold-harmless agreement by the buyer and a promise of indemnification. The provision should include a requirement for the reimbursement of the seller's attorney's fees and costs should any be incurred as a result of the seller's defense of an action resulting from the acts or conduct of the buyer. An example of such a provision is as follows:

The Buyer agrees to indemnify and hold harmless the Seller against all claims or liabilities of any nature including, but not limited to, seller's reasonable costs and attorney's fees incurred as a result of such claims or liabilities, for injury or death of any person or persons, or damage to the property of any third person or persons which may

---

69. In Arkansas, the landowner is under a duty to invitees to use ordinary care to maintain his premises in a reasonably safe manner. *Industrial Park Businessman's Club v. Buck*, 252 Ark. 513, 479 S.W.2d 842 (1972). The advent of comparative negligence in Arkansas has led to the virtual demise of the doctrine of assumption of risk. See *Rogers v. Kelly*, 284 Ark. 50, 679 S.W.2d 184 (1984). Accordingly, the effectiveness of the seller's waiver of liability may be uncertain.

be due in any manner to the operations of the Buyer on or off the premises of the Seller in connection with this agreement.

To complement this indemnification clause, the seller may want to include a provision, such as the following clause, reciting the parties' understanding and intention that the buyer is not to be considered an agent of the seller:

The means and methods employed by the Buyer, who is an independent operator, in the cutting and removing of the timber hereunder, shall be the sole responsibility of the Buyer, and the Seller shall not have, and will not exercise, any kind of control and does not have the right to exercise any kind of control over the Buyer, his agents and employees, except for the limited rights of the Seller to direct the Buyer to temporarily cease operations pursuant to paragraph \_\_\_ of this agreement which grants to the Seller the right to temporarily stop the Buyer's operations during wet conditions in order to protect the Seller's property from damage.

The inclusion of the exception above is appropriate in contracts that grant to the seller the right to stop operations during wet weather to avoid excessive rutting and soil compaction.

If the seller will be employing a consulting forester to assist with the sale, the contract should also provide for the buyer's indemnification of the consulting forester. Usually, the consulting forester will want to be protected from the negligence or other conduct of both the seller and the buyer. The following is an example of such a clause:

The Buyer and the Seller acknowledge that [consulting forester] has acted only in its capacity as a professional forester and is in no way liable to either party for the performance of any terms or conditions of this contract. Should there be a default on this contract and [consulting forester] be made a party to any lawsuit involving the default, the defaulting party shall be liable to [consulting forester] for all attorney's fees and costs involved in [consulting forester]'s defense of that lawsuit.

## I. *Insurance*

The contract should require the buyer to be covered by liability insurance and, where appropriate, by workers' compensation insurance. In seeking to require liability insurance coverage, the seller should consider at least three additional requirements. First, the seller should consider imposing minimum coverage amounts. Second, the seller may want to acquire the right to inspect or, more significantly, to approve

the policy or policies obtained by the buyer. Third, the seller may want to require that the policy contain a provision prohibiting its cancellation or modification without prior notice to the seller. The notice requirement would, of course, allow the seller to take steps to protect his interests before the effective date of the modification or cancellation.

In cases where the buyer will be using employees in the harvest operation, the seller should insist that the contract require that the buyer obtain workers' compensation insurance. In addition, the contract should also specify that the buyer is to pay and withhold Social Security and any other employment-based taxes.

The following is an example of a clause imposing an insurance requirement on the buyer:

The Buyer agrees to carry general liability insurance of at least the following minimum amounts:

- (a) \_\_\_ for the death or injury of one person;
- (b) \_\_\_ for the death or injury of more than one person in the same occurrence; and
- (c) \_\_\_ for damage to property.

The policy or policies shall protect the Seller against loss or damage to any of the Seller's property and against any claims for damages to the person or property of others arising out of the Buyer's acts, conduct, and operations in the performance of this agreement. The policy shall be in a form acceptable to and approved by the Seller, and the Buyer shall not begin any acts or operations in the performance of this agreement until that approval is granted. Each policy shall contain a provision to the effect that the same shall not be cancelled or modified without first giving thirty (30) days written notice thereof to the Seller.

The Buyer also agrees to carry all necessary and required workers' compensation insurance and to pay and withhold Social Security and other taxes during the period of this agreement.

## J. *Taxes*

The contract should require the buyer to pay all taxes assessed as a result of the severance of the timber.<sup>70</sup> As illustrated by the following clause, such a provision is relatively simple and straightforward:

The Buyer shall report and pay any and all severance taxes and any other taxes, licenses, or excises required by law to be paid on account

---

70. In Arkansas, the primary processor of timber is obligated to pay the severance tax. ARK. STAT. ANN. § 84-2102 (Supp. 1985).

of the timber cutting and production of forest products contemplated by this agreement. Should the Seller be required to pay any of such taxes, the Buyer shall promptly reimburse the Seller in amount of such payment.

#### K. *Arbitration*

The arbitration of disputes arising out of timber sales contracts is generally advantageous to both sides of the dispute.<sup>71</sup> By using registered foresters<sup>72</sup> as the arbitrators, the parties can be assured that the disputes will be resolved by individuals who understand forestry and logging practices. Of course, before deciding on using registered foresters as arbitrators, the parties should consider the availability of a sufficient number of qualifying individuals within a reasonable distance and the merits of using foresters rather than non-foresters. The parties may also want to consider limiting the issues to arbitration although this may complicate the resolution of disputes by creating a potential issue in each dispute over whether the issue was within the scope of the arbitration clause. Certainly, as is done in the following clause, it would be simpler to provide that all disputes arising out of the contract are subject to arbitration:

In case of dispute over the terms of this agreement, the final decision shall rest with an arbitration board of three persons, one to be selected by each party to this agreement, and a third to be a registered forester in this state appointed by such two persons. The arbitration shall be conducted in accordance with the Rules of the American Arbitration Association.

This clause could be modified to alter the composition of the panel, assign or apportion the costs of arbitration, or impose time limits within which to request arbitration. Because an arbitration occurring during the harvest might interrupt the buyer's performance, the following provision should be considered:

The period allowed herein for cutting and removal of trees conveyed by this agreement shall be extended automatically for the number of days required for the selection of the arbitrators and to complete the arbitration of the dispute.

---

71. Arkansas has adopted the Uniform Arbitration Act, ARK. STAT. ANN. §§ 34-511 to -532 (Supp. 1985).

72. Foresters are registered in Arkansas pursuant to ARK. STAT. ANN. §§ 71-2401 to -2423 (1979).

### L. *Inspection*

The seller should insist on the specific right to inspect the buyer's operations on the seller's property. Coupled with the right to inspect should be the right to immediately terminate operations if the inspection reveals that the buyer is not complying with the contract's requirements. Where the sale is a per-unit one with measurement of the cut timber occurring off the seller's premises, the seller should secure the right to inspect the activities and the books and records associated with the measurement.<sup>73</sup> If the seller is employing a consulting forester to assist with the sale, the right of inspection should expressly extend to the consulting forester. An example of an inspection clause follows:

The Seller shall have the right to conduct reasonable inspections of the Buyer's cutting and logging operations during the term of this agreement. If the inspection reveals any violation of this agreement, the Buyer shall promptly take measures to remedy the violation. The Seller may terminate the Buyer's operations under this agreement by providing the Buyer with written notification of his demand to terminate operations. Upon receipt of such notification, the Buyer shall cease his operations until the Seller approves the resumption of them.

The parties might also want to provide for a final inspection at the conclusion of the harvest. If that inspection reveals that the buyer has met the contract requirements, including cleanup, the seller could then provide the buyer with a written release from further obligations under the agreement.

### M. *Fire*

Fire is obviously a major concern to forest owners. Every timber sales contract should, at a minimum, impose on the buyer an obligation to take reasonable precautions to prevent the starting and spreading of fires.<sup>74</sup> Several other requirements should also be considered including the following:

1. requiring the buyer to assist in the suppressing and extinguishing of any fire that occurs on the seller's premises, regardless of the fire's apparent cause;
2. requiring the buyer to secure the seller's written permission before starting any fires for any purpose on the seller's premises;
3. requiring the buyer to pay for all damages resulting from any

---

73. See *supra* note 44 and accompanying text.

74. See generally ARK. STAT. ANN. §§ 41-1951 and 1953 (1977 & Supp. 1985).

fire caused by the buyer, together with fire suppression costs; and

4. providing for the resolution of disputes concerning the source of a fire to be made through arbitration either in accordance with the general arbitration clause in the contract or, where such a clause is absent, in a special arbitration provision for that purpose.

Although not embodying all of the considerations mentioned above, the following is an example of a fire prevention clause:

The Buyer shall take all reasonable precautions to prevent the occurrence or spread of any forest fire or other wildfire. If a forest fire or wildfire occurs, the Buyer shall promptly assist in the control, suppression, and extinguishment of the fire. The Buyer shall not start any warming fire or any other kind of fire during the fire season from March 1 to May 15 and shall secure the written permission of the Seller before burning any slabs, slash, or other debris or waste at any time during the term of this agreement. Any damage resulting from fires caused by the Buyer shall be paid for in full by the Buyer including the cost of suppression.

#### N. *Performance Bond*

The seller should at least consider requiring the buyer to secure a performance bond. Whether a performance bond should be required will be dependent upon numerous factors, not the least of which is the buyer's willingness to incur the cost of the bond without reducing the purchase price of the timber to an amount that is unacceptable to the seller. A performance bond may be particularly appropriate when the contract imposes substantial post-harvest obligations such as reseeded and the restoration of roads and skid trails. The following clause provides for the posting of a performance bond:

The Buyer shall secure a performance bond in the Seller's favor in the amount of \_\_\_ to insure its compliance with this agreement. The bond shall be in a form acceptable to and approved by the Seller.

#### O. *Assignment*

In many cases, the buyer will want to assign all, or part, of the cutting rights under the contract to a third party. The buyer, in doing so, will intend both to retain the other rights granted to him in the contract and to remain subject to the obligations imposed on him. This type of assignment, the assignment of all or part of the cutting rights only, should be distinguished from an assignment of the buyer's entire interest in the contract. With either type of assignment, the seller's in-



terests need to be protected.

Where the buyer contemplates assigning all or part of his cutting rights, a clause similar to the following should be included in the contract:

After the marking of the trees subject to this agreement, the Buyer may assign or transfer any portion of the cutting rights to the timber herein described to a third party under the full terms and conditions of this agreement, but the Buyer shall, in all events, be directly responsible to the Seller for all the actions of any contracting third party, employee, assignee, contractor, or subcontractor.

The contract should also provide for any limitations that the seller desires to impose on the buyer's assigning his entire interest. Because most sellers will desire to approve any assignment of the contract by the buyer, the following provision would be appropriate:

The Buyer shall not assign his interest in this agreement without the prior written consent of the Seller, but such consent shall not be unreasonably withheld. All stipulations applying to the Buyer shall also apply to his employees, agents, contractors, subcontractors, and assigns. All the agreements and stipulations herein contained, and all the obligations herein assumed, shall inure to the benefit of and be binding upon the heirs, successors, and assigns of the parties hereto.

#### *P. Miscellaneous Provisions*

It is generally advisable for the contract to include an integration clause. The following clause should suffice in most cases:

It is expressly agreed between the Seller and the Buyer that there is no oral understanding or agreement which in any way changes the terms, covenants, and conditions in this agreement, and that no modification of this contract or waiver of any of its terms and conditions shall be effective unless made in writing and signed by the parties.

A particularly helpful provision in contracts providing for the parties to advise each other of certain acts or activities undertaken in the performance of the contract is a clause specifying how and to whom notice is to be given. The following is an example of such a clause:

Any notice required or permitted by this agreement shall be in writing and sent by registered or certified mail with postage fully prepaid and addressed, as the case may be, to:

*Seller**Buyer*

or to the address as either of the parties may from time to time designate by notice to the other. Any notice so dispatched within the United States shall be deemed to have been received three (3) days after the date of posting, unless actually received earlier.

Finally, a provision providing for the recovery of attorney's fees and costs to the prevailing party in any judicial action necessitated by the other party's breach of the contract is usually desirable. The following is an example of such a provision:

In the event that either party breaches this agreement, the party required to enforce it in any court shall be entitled to recover from the defaulting party, in addition to any other damages allowable by law, his attorney's fees, and other costs and expenses incurred.

### CONCLUSION

As with the preparation of any contract, the attorney's role in the preparation of timber sales contracts is to insure that the document clearly expresses the parties' intentions and specifies the respective rights and obligations with sufficient certainty to avoid subsequent disputes. In that regard, it is essential that the timber sales contract clearly and definitely specify and describe the timber that is to be sold. The stringent requirements of section 631(b) of the Internal Revenue Code require equal care in both the structuring of the sale and in drafting the contract's pricing and payment provisions. And finally, the timber owner's interest in insuring that his land will again produce a timber crop and provide him with the other uses and enjoyments he derives from it requires that the contract be carefully negotiated and drafted to protect those interests.

## APPENDIX

A GENERAL CHECKLIST FOR DRAFTING TIMBER SALES  
CONTRACTS

The following checklist is intended only as a guide for the attorney drafting a timber sales contract. It is not an exhaustive listing of all the items that could, and perhaps should be included in a timber sales contract. The attorney using this checklist is reminded that the Uniform Commercial Code governs timber sale contracts in Arkansas.

## TIMBER SALES AGREEMENT

- I. Introduction
  - A. Identification of the parties
  - B. Date and place of the contract formation
  - C. Legal description of the land
- II. Timber
  - A. Description of the timber to be harvested by species or other specific, defined designation, including time for determining measurements when timber is described by size
  - B. Reference to tree or boundary markings
  - C. Incorporation of map of the harvest area
  - D. Specific instructions for removal of growth in areas to be clearcut
- III. Price and Payment
  - A. Lump-sum sales
    1. Total purchase price
    2. Time and place of payment
  - B. Per-unit sales
    1. Pay-as-cut
      - a. Specification of unit (board feet, cord, ton, etc.)
        - (1) Timber species or type (pine, pine sawtimber, pine pulpwood, etc.)

- (2) Measurements standard (Doyle, weight-to-cord conversion table, etc.)
- b. Price per unit
- c. Time and place of payment
- d. Time and place of measurement
  - (1) Seller's right to "spot check" measurements or to measure independently of Buyer
  - (2) Allocation of costs of measurement, usually the responsibility of the Buyer
- 2. Cruise
  - a. Specification of unit
    - (1) Timber species or type
    - (2) Measurement standard
  - b. Price per unit
  - c. Pre-harvest cruise
    - (1) Cruise volume
    - (2) Pre-harvest cruise price
  - d. Time and place of payment
  - e. Post-harvest cruise and computation method for any refund which may be due from the Seller or the Buyer
  - f. Time and place of refund of portion of payment based on pre-harvest cruise
  - g. Buyer's right to independently verify post-harvest cruise volumes
  - h. Liquidated damages for failure to cut trees designated for harvest

Note: To qualify under section 631(b) of the Internal Revenue Code, the price and payment provisions should clearly specify that payments are to be based on the units of timber cut multiplied by the per-unit price. Advance payments should be less than the total anticipated

contract price, and the Seller must be under an obligation to refund to the Buyer any advance sums allocable to units of timber paid for in advance but not subsequently cut. Liquidated damages provisions for failing to cut trees designated for harvest must be reasonable and must not constitute a "guaranteed" payment.

#### IV. Utilization Requirements

- A. Stump height
- B. Diameter of uppermost merchantable portion of trunk
- C. Ownership of tops for firewood. If Buyer is granted ownership of the tops for firewood, the contract should specify whether the buyer can admit third parties to the premises for removal of the tops.
- D. Dead and windfallen timber

#### V. Time to Harvest

- A. Time of commencement of logging operations
- B. Time of termination of logging operations
  - 1. Time for removal of logs and equipment
  - 2. Ownership of logs and equipment not removed within specified time
- C. Harvest schedule
  - 1. Completion of one area before moving to the next
  - 2. Whether relogging will be permitted
- D. Extensions of time

#### VI. Buyer's Right of Access

- A. Grant of right-of-access for harvesting purposes
- B. Limitations
  - 1. Restricted areas
  - 2. Right to admit third parties
  - 3. Right to use land for purposes not incidental to harvest

#### VII. Passage of Title and Risk of Loss

- A. Passage of title, at or before severance
  - B. Risk of loss
  - C. Creation of security interest in severed timber and proceeds
- VIII. Liability and Insurance
- A. Liability to third parties, disclaimer of agency relationship and requirement that Buyer hold Seller harmless for damage caused by Buyer
  - B. Insurance, including workers' compensation
- IX. Performance of Surety Bond
- X. Arbitration
- XI. Protection of Seller's Property
- A. Compensation for damage to or destruction of trees not designated for harvest
  - B. Construction standards and requirements for the location, maintenance, and rehabilitation of roads, trails, yards, and decks
  - C. Repair and replacement of improvements, gates, fences, etc.
  - D. Closure of gates except when entering or exiting
  - E. Fire protection and suppression
  - F. Compliance with Arkansas Forestry Commission "Best Management Practices"
  - G. Cessation of logging operations in wet weather
  - H. Removal of tops, branches, and debris from fields, pastures, streams, rights-of-way, property lines, etc.
  - I. Removal of trash, oil cans, etc.
  - J. Lopping, buffer zones, and other aesthetic requirements
  - K. Restriction on log lengths and skidding equipment
  - L. Protection of den trees and other wildlife habitat
- XII. Taxes (see ARK. STAT. ANN. §§ 84-2101 to -2123 (1980))

- XIII. Assignability and Successors in Interest
- XIV. Default
- XV. Modification
- XVI. Signatures