

# Government Contracts Blog

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## ***Precision Pine & Timber, Inc. v. United States: An Unexpected Test For Determining Breach Of The Implied Duty To Cooperate And Not To Hinder Contract Performance***

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In *Precision Pine & Timber, Inc. v. United States*, 2010 WL 569733 (C.A. Fed. 2010), the United States Court of Appeals for the Federal Circuit articulated an unexpected test for determining when a party to a contract has breached the implied duty of good faith and fair dealing.<sup>[1]</sup> The court in *Precision Pine* found that the U.S. Forest Service did not breach the implied duty of good faith and fair dealing owed to the contractor because the Forest Service's actions "were (1) not 'specifically targeted,' and (2) did not reappropriate any 'benefit' guaranteed by the contracts." This differs markedly from the objective "reasonableness" standard generally used by courts to analyze whether a party has breached the implied duty to cooperate and not to hinder contract performance.

### Facts

The *Precision Pine* decision arises from a very unique set of facts, which may account for the departure from well established law. Precision Pine & Timber, Inc. ("Precision Pine") entered into multiple contracts with the Forest Service to harvest timber in a national forest in Arizona. All of the contracts except one included a clause entitled "Interruption or Delay of Operations," which stated that the Forest Service could "interrupt or delay operations under [the] contract, in whole or in part, upon the written request of the contracting officer . . . (b) To comply with a court order, issued by a court of competent jurisdiction . . ."

In 1993, the Mexican spotted owl was listed as an endangered species. This listing triggered certain obligations under the Endangered Species Act ("ESA"), including a requirement that the Forest Service engage in formal consultations with the Fish and Wildlife Service. Following a Ninth Circuit decision, *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), which held that all Land Resource Management Plans ("LRMPs") must undergo formal consultation whenever a new species is listed by the Fish and Wildlife Service as endangered or threatened, several environmental groups sued the Forest Service seeking an injunction to halt timber harvesting in the region inhabited by the Mexican spotted owl until the Forest Service completed proper consultations with the Fish and Wildlife Service. The court granted the injunction,

ordering the Forest Service to submit its LRMPs for formal consultation and suspend its contracts in the affected region. *Silver v. Babbitt*, 924 F. Supp. 976 (D. Ariz. 1995).

In August 1995, the Forest Service suspended its contracts with Precision Pine according to the court order and planned to engage in consultations with the Fish and Wildlife Service. The Forest Service waited two months to begin formal consultations and the contracts remained suspended until December 4, 1996, when the court dissolved the injunction. The Forest Service granted Precision Pine time extensions for its contracts, but the contracting officer awarded Precision Pine only \$18,242.78 out of the \$13 million claimed in damages arising from the contract suspensions.

### Implied Duty of Good Faith and Fair Dealing

The court in *Precision Pine* first found that the Forest Service had authority to suspend its contracts with Precision Pine. The “Interruption or Delay of Operations” clause, the court said, gave the Forest Service authority to unilaterally suspend operations under any contract with the clause.

After finding that the Forest Service had authority to suspend the contracts, the court emphasized that, while it was clear that the Forest Service had engaged in inappropriate behavior by failing to uphold its obligations under the ESA and the injunction, this misbehavior did not violate the duty owed by the Forest Service to Precision Pine under its contracts. To define the implied duty, the court stated:

Cases in which the government has been found to violate the implied duty of good faith and fair dealing typically involve some variation on the old bait-and-switch. First, the government enters into a contract that awards a significant benefit in exchange for consideration. Then, the government eliminates or rescinds that contractual provision or benefit through a subsequent action directed at the existing contract. The government may be liable for damages when the subsequent government action is specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the government’s obligations under the contract.

Because the Forest Service’s actions during consultations with the Fish and Wildlife Service “were (1) not ‘specifically targeted’ and (2) did not reappropriate any ‘benefit’ guaranteed by the contracts, since the contracts contained no guarantee that Precision Pine’s performance would proceed uninterrupted,” the court held that the Forest Service did not breach the implied duty of good faith and fair dealing owed to Precision Pine.

When discussing the “specifically targeted” prong of the test, the court focused on the fact that there was no evidence that the Forest Service’s actions “were undertaken for the purpose of

delaying or hampering Precision Pine's contract." Additionally, there was no evidence of bad faith or failure to cooperate with the contractor. The Forest Service's misbehavior, the court said, was directed at the Fish and Wildlife Service, and not Precision Pine, because the Forest Service violated its obligations to the Fish and Wildlife Service under the ESA.

The "benefit" conferred on Precision Pine by the contracts was the "right to harvest timber in a certain place at a certain time." However, because the contracts qualified this benefit and allowed the Forest Service to suspend operations unilaterally, Precision Pine could not have reasonably expected the benefit of uninterrupted contract performance. "If anything," the court said, "[the contract clauses] expressly contemplate and allow the Forest Service to interfere with Precision Pine's performance."

### Analysis

The holding in *Precision Pine* implies that, in order to recover for a breach of the implied duty to cooperate and not to hinder contract performance, the contractor must show that the agency's actions were "specifically targeted" and that the agency re-appropriated a benefit that the contractor reasonably expected to receive under the terms of the contract.

The requirement that the contractor show agency action that was "specifically targeted" in order to recover for breach of the implied duty of good faith and fair dealing is problematic. This language could be interpreted to mean that the contractor must demonstrate government intent to delay the contractor or bad faith, a feat much more difficult than establishing that the government engaged in unreasonable behavior that effected a delay in contract performance.

It seems unlikely that the Federal Circuit meant to limit recovery for a breach of the implied duty of good faith and fair dealing only to circumstances where bad faith can be shown. In order to preserve some semblance of the implied duty to cooperate and not to hinder contract performance established by years of court precedent, a more sensible interpretation of the *Precision Pine* decision would center around the court's statement that "liability only attaches if the government action 'specifically targeted' a benefit of [the contractor's] contract." Therefore, if the contractor can clearly demonstrate a contract benefit that it reasonably expected to receive, government action under the contract that directly interferes with that benefit should give rise to a breach of the implied duty of good faith and fair dealing.

The "benefit" portion of the *Precision Pine* decision hinges on the inclusion of the "Interruption or Delay of Operations" and "Protection of Habitat of Endangered Species" clauses in the parties' contracts. These clauses allow the Forest Service to suspend the contracts according to a court order or in order to comply with the ESA. Because the parties agreed to these clauses, the court said, there can be no reasonable expectation of uninterrupted contract performance. The court emphasized that the implied duty of good faith and fair dealing owed to another party under a contract is dictated by the terms of the contract. To recover, the contractor should demonstrate that "the benefit eliminated by subsequent government action was an 'important part of the contract consideration' and one 'they reasonably expected the government not to withhold.'"

## Conclusion

The *Precision Pine* decision professes a rigorous test for determining when a party to a contract has breached the implied duty of good faith and fair dealing. The contractor must show that Government action was “specifically targeted” and reappropriated a benefit conferred by the contract in order to recover. While evidence of Government bad faith or intent to delay presents a strong case for breach, demonstration of a clear benefit conferred on the contractor by the parties’ contract coupled with action taken by the Government in its capacity as a party to the contract that has a direct impact on the contractor’s benefit should be sufficient to establish a breach of the implied duty to cooperate and not to hinder contract performance.

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[1] The implied duty of good faith and fair dealing is inherent in every contract and encompasses the implied duty to cooperate and not to hinder contract performance.