

Good Neighbor Authority in Oregon: Comparison of State and Federal Contracting Provisions

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In January of 2014, Congress expanded and extended the existing “Good Neighbor Authority” (GNA), which allows the U.S. Secretary of Agriculture and the U.S. Secretary of the Interior to enter into cooperative watershed restoration and protection agreements or contracts with States. Under these GNA agreements, state agencies can perform “forest, rangeland, and watershed restoration services” on Forest Service or Bureau of Land Management (BLM) land.¹ “[F]orest, rangeland, and watershed restoration services” is defined as including:

- “activities to treat insect- and disease-infected trees;”
- “activities to reduce hazardous fuels; and”
- “any other activities to restore or improve forest, rangeland, and watershed health, including fish and wildlife habitat.”²

The 2014 expansion of the GNA was enacted in two different versions—one in the 2014 Farm Bill and the other in the 2014 Consolidated Appropriations Act. GNA was first authorized as a pilot program in 2000, and was limited to the State of Colorado and later expanded to include Utah and to include BLM lands. In both versions of the 2014 expansion, GNA

is no longer restricted by state and is authorized nationwide with an expanded scope.

The two versions of GNA are virtually identical to each other, with three notable exceptions:

1. The Farm Bill version does not have an expiration date, while the appropriations version expires on September 30, 2018;
2. The Farm Bill version excludes “construction, reconstruction, repair, or restoration of paved or permanent roads or parking areas” and “construction, alteration, repair or replacement of public buildings or works” from the definition of “forest, rangeland, and watershed restoration services,”³ while the appropriations version does not include these exclusions;
3. The appropriations version of the GNA is worded in terms of allowing the state to perform “restoration and protection services” on federal land when “similar and complementary” services are being performed by the state on “adjacent State or private lands.”⁴ The Farm Bill version, on the other hand, is worded in terms of the state or the federal government performing “similar and complementary” “restoration services” on “Federal land and non-Federal land.”

Comparison of the federal contracting pathway with the GNA pathway

The purpose of this paper is to examine similarities and differences between treatment of forest workers and small and disadvantaged businesses performing the same work in Oregon:

- a.) under existing federal pathways for accomplishing forest restoration work, and;
- b.) under the Good Neighbor Authority pathway, which allows for the use of state procurement law to accomplish work on federal land.

Within each of these two (federal and state/GNA) main pathways, there are three main categories into which restoration work may fall: (1) general “service work,” (2) timber sales, and (3) construction work. At this point, the majority of work to be performed under Good Neighbor Authority would be either via a timber sale or service contract, and there is likely to be very little construction work (as noted above, the Farm Bill GNA excludes construction).

Broadly speaking, at both the state and federal levels, service work and construction work are contracted under government procurement laws (more specifically, procurement of services), while state and federal timber sales are treated as the sale of goods by the government to purchasers, and are therefore governed by a different set of state and federal laws than procurement.

Wages and fringe benefits

1. Service work

Federal: As long as a service contract meets a minimum threshold amount of \$2,500, the federal Service Contract Act⁵ applies, which means that workers must be paid a “prevailing wage” set via wage determinations issued by the U.S. Department of Labor for the type of work and the relevant geographic area. A 2014 Executive Order set a minimum service contract hourly wage of \$10.10 effective January 1, 2015, and this minimum increased to \$10.15 on January 1, 2016,⁶ i.e., even if the applicable wage determination indicates a prevailing

wage below this minimum, workers must be paid the new minimum. The current wage determination for forest restoration work in Oregon has a range of prevailing wages (ranging from \$9.81 (\$10.15 under the Executive Order mentioned above) to \$27.12) depending on the applicable occupation code, with the hourly wage for “General Forestry Laborer” set at \$12.29, and the hourly wage for “Brush/Precommercial Thinner” set at \$15.25.⁷ See Table 1, opposite, for a broader list of forestry job titles and applicable hourly wage rates. Service Contract Act wage determinations also include fringe benefits, and the forestry wage determination discussed above includes a health and welfare benefit of \$4.27 an hour, along with vacation and holiday provisions.

State/GNA: Oregon’s prevailing wage laws are fairly narrow compared to federal prevailing wage laws, and apply only to public construction contracts, and do not apply to non-construction service work. GNA work contracted by the state would therefore be subject to Oregon’s minimum wage of \$9.25 per hour, with no fringe benefits.

The primary difference between the federal contracting pathway and the analogous state/GNA contracting pathway with regard to wages and benefits is the applicability of Service Contract Act wages under the federal pathway, and the lack of prevailing wages under the state/GNA pathway. While Oregon’s minimum wage applies under the state/GNA pathway, this minimum wage is less (often significantly less) than the applicable federal prevailing wage for all forestry job titles. See Table 1 (opposite) for a comparison of federal prevailing wages with Oregon minimum wage for various forestry jobs titles, including the amount by which federal prevailing wages exceed Oregon minimum wage on an annualized basis. The difference between the federal pathway and the state/GNA pathway is more pronounced when accounting for the fringe benefit requirement under the federal pathway, and the lack of such a requirement under the state/GNA pathway.

Table 1 Wage comparison between federal and state/GNA pathways

Job Title	Prevailing hourly wage (federal pathway) ¹	State minimum hourly wage (GNA pathway)	Additional wages via federal pathway (annualized) ²
Brush/Precommercial Thinner	\$15.25	\$9.25	\$12,000
Faller/Bucker	\$27.12	\$9.25	\$35,740
Forestry Equipment Operator	\$17.82	\$9.25	\$17,140
Forestry/Logging Heavy Equipment Operator	\$17.82	\$9.25	\$17,140
Forestry Technician	\$19.64	\$9.25	\$20,780
Forestry Truck Driver	\$15.60	\$9.25	\$12,700
General Forestry Laborer ³	\$12.29	\$9.25	\$6,080
Slash Piler/Burner	\$10.15*	\$9.25	\$1,800
Tree Climber	\$10.15*	\$9.25	\$1,800
Tree Planter	\$13.82	\$9.25	\$9,140

1. Job titles and federal prevailing wage rates from Revision No. 51 to U.S. Department of Labor Wage Determination No. 1977-0079, revised December 29, 2015. Available at <http://www.wdol.gov/wdol/scafiles/non-std/77-0079.sca>. Note that this wage determination also requires \$4.27 per hour in health & welfare (fringe) benefits. Employers can meet this requirement by providing benefits, payments in lieu of benefits, or a combination of the two. As explained in the text, Oregon's new sick leave law applies to both pathways.

2. The figures in this column are calculated by subtracting the annualized state minimum wage (based on 2,000 hours (\$9.25/hour x 2,000 hours = \$18,500/year)) from the analogous annualized federal prevailing wage. E.g., for "Brush/Precommercial Thinner," the annualized state minimum wage rate of \$18,500 is subtracted from the annualized federal prevailing wage of \$30,500 (\$15.25/hour x 2000 hours), equaling an additional \$12,000 of wages via the federal pathway over the GNA pathway.

* Because the wage determination specifies an hourly rate of \$9.81 for this job title, the federal service contract minimum of \$10.15 applies instead.

2. Timber sales

Timber sale purchasers are not subject to the Federal Service Contract Act, the Federal Davis-Bacon Act (applicable to public works contracts), Oregon's Davis-Bacon law, or Oregon's Public Contracting Code. Regardless of whether timber is harvested on federal, state, or private land, forest workers must be compensated in accordance with Oregon's minimum wage of \$9.25 per hour. Therefore, required wages are the same for timber contracts regardless of federal or state/GNA pathway.

3. Construction work

As discussed above, it appears unlikely that much construction work will be performed pursuant to GNA, and if it is, it would have to be pursuant to the appropriations version of the GNA, and road construction would be the most likely type of such

work. Construction work under federal contracts of at least \$2,000 is subject to prevailing wages under the federal Davis-Bacon Act. The Oregon Davis-Bacon equivalent generally requires prevailing wages for projects costing at least \$50,000 (not the particular contract, but the project as a whole).⁸ In both instances, hourly wages would be determined via consulting a wage determination, and would vary depending on the specific occupation code. If a project is subject to both the state and federal prevailing wage laws, the higher of the wage rates applies.⁹

The primary difference between state and federal law for construction work is federal law's significantly lower threshold for triggering prevailing wage law (\$2,000 versus the state/GNA threshold of \$50,000).

Small and disadvantaged business preferences

Federal: Federal acquisition law has fairly strong small business¹⁰ set-aside requirements: “Each acquisition of supplies or services that has an anticipated dollar value exceeding \$3,500 . . . but not over \$150,000 . . . is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.”¹¹ Additionally, set-asides are required even for contracts exceeding \$150,000 where “there is a reasonable expectation that . . . [o]ffers will be obtained from at least two responsible small business concerns offering the products of different small business concerns” and the award “will be made at fair market prices.”¹² Preferences extend to subcontracting, and contractors must specify in contracts that they will give small businesses the “maximum practicable opportunity” to participate in the contract.¹³

This commitment to small businesses is also reflected at the departmental and agency levels. Department of Agriculture regulations provide that “It is the policy of USDA to provide maximum practicable contracting and subcontracting opportunities to small business (SB), small disadvantaged business (SDB), HUBZone small business, women-owned business (WOB), veteran-owned small business (VOSB), and service-disabled veteran-owned small business (SDVOSB) concerns.”¹⁴ The Forest Service’s Federal Acquisition regulation handbook provides that “all supply and service contracts, including construction of public works, should be set-aside for small business concerns.”¹⁵

State: Oregon agencies “may limit competition for a public contract for goods and services, or for any other public contract estimated to cost \$50,000 or less to contracting entities owned or controlled by” disabled veterans or by persons “disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability.”¹⁶ Oregon law also requires public agencies to “aggressively pur-

sue a policy of providing opportunities for available contracts to emerging small businesses,”¹⁷ which are defined as businesses employing “fewer than 30 full-time equivalent employees” that also meet average annual gross receipts requirements over the last three years.¹⁸ Agencies may also require contractors to subcontract all or part of a contract to emerging small business.¹⁹

The primary difference between the federal and state/GNA pathways with regard to small and disadvantaged businesses is that federal law requires mandatory set-asides (“shall be set aside”), while Oregon law allows (but does not require) state agencies to limit competition on this basis. Additionally, mandatory federal set-asides apply to contracts of up to \$150,000 (and beyond in certain circumstances), while Oregon’s allowances for limited competition apply only to contracts of up to \$50,000 (and are therefore more narrow).

Bonding requirements

Federal: As in the case of set-asides, the federal government has broad and well-developed bonding requirements. There are a number of different types of bonds or guarantees that may apply to a given contract, including bid guarantees, performance bonds, and payment bonds.

In the case of service contracts (likely the most common type of contract for exercising Good Neighbor Authority, as opposed to timber sale contracts or construction contracts), a bid guarantee in the form of a bid bond is the only bond or guarantee that would normally apply to non-construction service contracts, however the Forest Service has formally waived bid bond requirements for integrated resource service contracts (the type of contract favored for Stewardship Authority projects).²⁰ This waiver applies not only to Stewardship Authority service contracts, but also to Stewardship Authority construction contracts.

Performance and payment bonds are required for federal construction contracts of \$150,000 or more, and while performance and payment bonds are not required for construction contracts between

\$35,000 and \$150,000, “alternative forms of payment protection for suppliers of labor and material” are required for such contracts.²¹ With regard to federal timber sales, the Forest Service has the discretion to require performance bonds, and payment bonds are required and are used to secure the value of timber the contractor has yet to pay for.

State/GNA: Oregon law requires performance and payment bonds for all state construction contracts of more than \$100,000 and for contracts of \$50,000 or more for state highway, bridge, and other transportation projects.²² Oregon law also requires a \$30,000 public works bond for construction projects of \$100,000 or more.²³ The public works bond is intended to cover any prevailing wage claims brought by workers against the contractor. In the

case of sales of timber on state property, state law requires bid security,²⁴ a performance bond,²⁵ and provides for a discretionary payment bond.²⁶

In summary, neither federal nor state law generally require bonding for GNA-type service projects, while federal and state law differ somewhat with regard to bonding requirements for construction contracts and timber sale contracts. The different bonding requirements are compared in the accompanying matrix in Appendix A (page 9). Oregon law also has a wage bond requirement (discussed in the following section) that applies to forest contractors operating under state or federal contracts. Oregon’s forestry wage bond requirement is an instance of state law exceeding federal requirements (though it applies to both state and federal contracts).

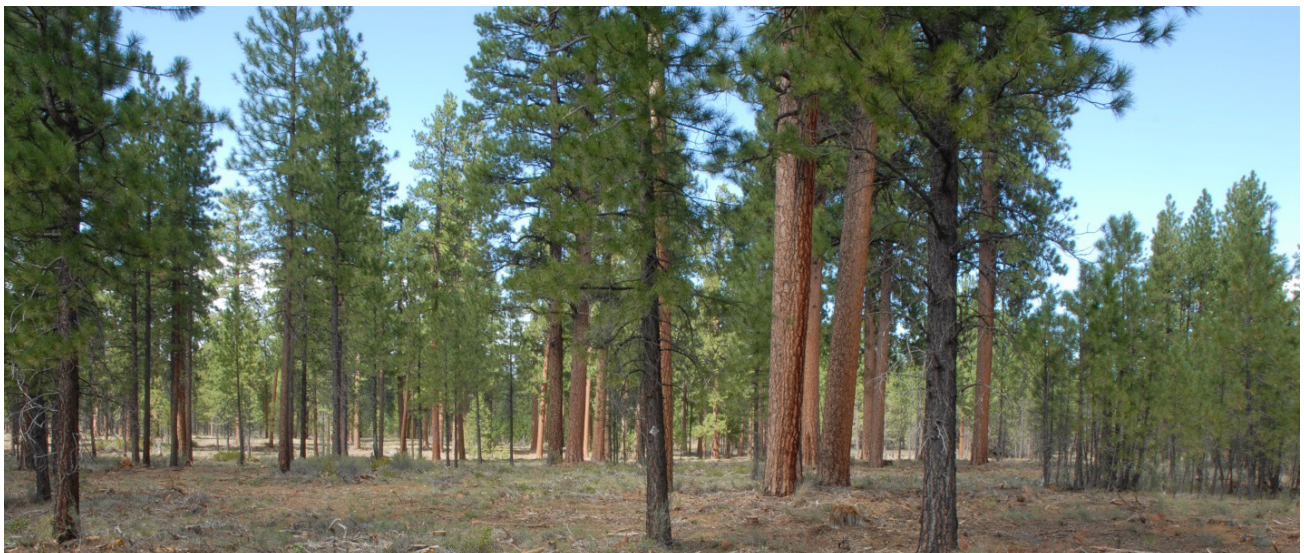


Laws that apply regardless of federal or GNA pathway

As discussed above, there are a number of ways in which worker protections differ depending on whether work is performed pursuant to federal law or whether it is instead performed pursuant to state law under the GNA pathway. It should be noted that there are also a number of worker protection laws that apply regardless of which pathway is chosen. These laws include the following:

- The Migrant and Seasonal Agricultural Worker Protection Act (establishes standards related to wages, housing, transportation, disclosures, and recordkeeping).
- Federal and state occupational safety and health laws: Oregon's Occupational Safety and Health Division regulates workplace safety and health in Oregon pursuant to an agreement with the federal Occupational Safety and Health Administration. In addition to having a set of regulations that apply to most employers in the state, Oregon also has specific set of regulations that apply to forest work. These regulations cover areas such as first aid, protective equipment, and cutting and thinning.
- Workers' compensation laws, which require employers to carry workers compensation insurance that will compensate workers in the event of injury.
- Unemployment insurance laws, which require Oregon employers to pay a state-determined percentage of wages into the state unemployment fund. The state-determined rate is based on the history of unemployment claims associated with the specific employer.
- Oregon's new sick leave law (which took effect January 1, 2016, and generally requires employers with 10 or more employees to allow employees to earn up to 40 hours of paid sick time per year, and employers with fewer than 10 employees to allow employees to earn up to 40 hours of unpaid sick time per year).

Oregon law also requires that forest contractors, in applying for state contractor's licenses, to "show proof of financial ability to promptly pay the wages of employees,"²⁷ which can take the form of a surety bond or deposit.²⁸ This bond or deposit must be in the amount of \$30,000, unless the contractor employs twenty or fewer employees, in which case it must be in the amount of \$10,000.²⁹ These requirements apply to all forest contractors operating in Oregon, regardless of whether the contract work takes place on state or federal land or whether the contract is with the state or federal government.





Conclusion

As discussed above, there are a number of noteworthy differences with regard to contract requirements for projects undertaken by the Forest Service under federal law and those same projects undertaken by the State of Oregon pursuant to Good Neighbor Authority. For service contract type work, the most significant difference between the federal pathway and the state/GNA pathway is Oregon's lack of a law analogous to the federal Service Contract Act. Because there is no Oregon equivalent to the Service Contract Act, workers employed under state service contracts must be paid Oregon's minimum wage of \$9.25, and not the applicable federal prevailing wage.

As illustrated by Table 1 (page 3), there is a significant difference between Oregon's hourly minimum wage and the federal prevailing hourly wage for all forestry job titles. The smallest gap is for slash pile-ers/burners and tree climbers, who must be paid an hourly wage of \$10.15 under the federal pathway. This is 9.7% more per hour than Oregon's minimum wage, and adds up to \$1,800 on an annualized basis. The wage gap between the state/GNA pathway and the federal pathway is even more significant for other job titles, and when including consideration of hourly fringe benefits of \$4.27 under the federal

pathway. The State of Oregon will need to include consideration of these significant wage differences when analyzing the value of implementing a project under Good Neighbor Authority, because projects under GNA will necessarily involve lower wages than under the federal pathway for the same project.

There are also differences between federal and state law with regard to small and disadvantaged business preferences, and with regard to bonding requirements. Federal law includes mandatory small and disadvantaged business set-asides, while Oregon law allows state agencies to prefer such businesses by limiting competition. Neither federal nor state law require bonding for service work, and federal law and Oregon law differ somewhat with regard to bonding for construction contracts and timber sale contracts. Finally, there are number of areas where requirements are the same regardless of whether a project is a federal project or a state project under the Good Neighbor Authority. The accompanying matrix (Appendix A, page 9) points out differences between federal and state requirements, and also indicates where the requirements are the same.

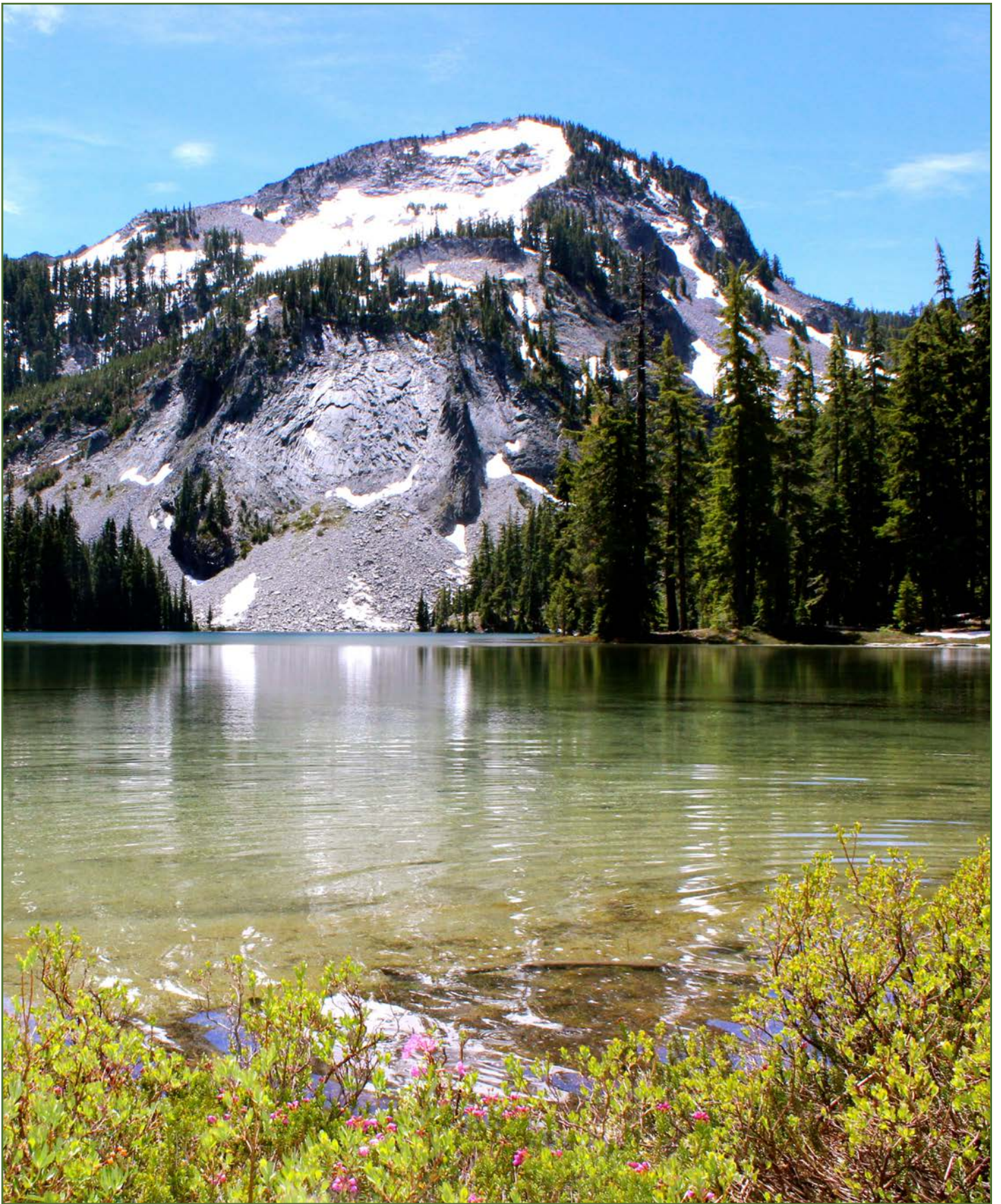


Endnotes

- 1 16 U.S.C § 2113a(a)(1)(A).
- 2 16 U.S.C § 2113a(a)(3)(A).
- 3 16 U.S.C § 2113a(a)(3)(B).
- 4 16 U.S.C § 1011 note.
- 5 41 U.S.C. § 6702(a)(2).
- 6 80 Fed. Reg. 55646 (Sept. 16, 2015).
- 7 <http://www.wdol.gov/wdol/scafiles/non-std/77-0079.sca>.
- 8 ORS 279C.810(2)(a).
- 9 ORS 279C.830(1)(b).
- 10 The federal Small Business Administration uses annual receipts as a means of determining which businesses qualify as “small businesses,” with a \$7.5 million annual receipts threshold for “Support Activities for Forestry,” unless those support activities qualify as “Fuels Management Services,” which has an annual receipts threshold of \$19.0 million.
- 11 48 CFR § 19.502-2(a).
- 12 48 CFR § 19.502-2(b).
- 13 48 CFR § 19.702.
- 14 48 CFR § 19.201.
- 15 Forest Service Handbook (FSH) 6309.32 4G19.501.
- 16 ORS 279A.100.
- 17 ORS 200.090.
- 18 ORS 200.005(9) & (10). For businesses employing between 20 and 29 FTE employees, average annual receipts must not exceed \$3 million for construction businesses, or \$1 million for non-construction businesses. For businesses employing fewer than 20 FTE employees, average annual receipts must not exceed \$1.5 million for construction businesses or \$600,000 for non-construction businesses.
- 19 ORS 279A.105.
- 20 FSH 6309.32 4G37.710-1.
- 21 48 CFR § 13.005(2).
- 22 ORS 279C.380(1) & (5).
- 23 ORS 279C.836.(1) & (8).
- 24 OAR 629-029-0040.
- 25 OAR 629-029-0120.
- 26 OAR 629-029-0125.
- 27 OAR 839-015-0200(1).
- 28 OAR 839-015-0200(2).
- 29 OAR 839-015-0210(1).

Appendix A: Summary of state and federal contracting provisions

Contracting provision	Contract type	Federal	State/Good Neighbor Authority
Wage and fringe benefits	Service	Prevailing wage & fringe benefits REQUIRED	Prevailing wage & fringe benefits NOT REQUIRED
	Timber	Oregon minimum wage REQUIRED; prevailing wage & fringe benefits NOT REQUIRED	
	Construction	Prevailing wage & fringe benefits REQUIRED	
Small and disadvantaged business preferences	Service & Construction	Contracts of \$3,500-\$150K MUST be set aside	Contracts of \$50K or less MAY be limited
Bonding	Construction	Performance bond for contracts of \$150K or more; alternative payment protection for contracts between \$30K and \$150K.	Performance and payment bonds for all state construction contracts of more than \$100K and for state transportation contracts of \$50K or more; \$30K public works bond for construction projects of \$100K or more.
	Timber	Payment bond required; discretionary performance bond	Bid security, performance bond required; optional payment bond
Migrant and Seasonal Agricultural Worker Protection Act	All		
Occupational Safety and Health Laws	All		
Workers' Compensation	All	All apply under either pathway	
Unemployment Insurance	All		
Sick leave	All		
Forest Contractor Wage Bond	All		



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