

In the Matter of
MIKE L. SULFFRIDGE,
Mike Sulfridge Contracting, Inc., and A & B Cutters, Inc.

Case Numbers 11-98, 12-98
Final Order of the Commissioner
Jack Roberts
Issued February 3, 1999.

SYNOPSIS

Respondent A & B Cutters Inc. violated ORS 658.410(1) and ORS 658.417(1) by operating as a farm/forest labor contractor without a proper license or indorsement. All Respondents violated ORS 658.417(3) and ORS 658.440(1)(g) by failing to provide timely certified payroll records, by failing to enter written agreements with some workers, and by entering written agreements with other workers that did not contain all required elements. As majority shareholder of A & B Cutters, Inc., and sole shareholder of Mike Sulfridge Contracting, Inc., Respondent Mike Sulfridge is equally responsible for the violations committed by those corporate respondents and is jointly and severally liable for the resulting civil penalties. The Commissioner ordered Sulfridge and A & B Cutters, Inc. to pay \$12,000.00 in civil penalties and ordered Sulfridge and Mike Sulfridge Contracting, Inc. to pay \$12,500.00 in civil penalties for the various violations of the farm/forest labor contracting statutes.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 9, 1998, in the conference room of the Oregon Employment

Department, 846 SE Pine Street, Roseburg, Oregon. The Wage and Hour Division of the Bureau of Labor and Industries ("the Agency") was represented by Alan McCullough, an employee of the Agency. Respondents all were represented by Harry Gandy, Attorney at Law. Mike Sulfridge, of the corporate Respondents, was present throughout the hearing.

The Agency called as witnesses Respondent Mike Sulfridge and Agency compliance specialist Katy Bayless.

Respondent called as witnesses Respondent Mike Sulfridge, as well as former Respondent employees Rick Sulfridge, Angela Sulfridge, Ben Sulfridge, Marie Knapple, Carl Sylvester, David Vasquez, and Melvin Ganger.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-29 and Agency Exhibits A-1 to A-70 and A-72 to A-82. Respondents offered no exhibits.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) On July 1, 1997, the Agency issued a "Notice of Intent to Assess Civil Penalties" to Respondents Mike L. Sulfridge, Mike Sulfridge, dba A & B Cutters, and A & B Cutters, Inc. (the "A & B Respondents"). This Notice of Intent (hereinafter, the "A & B Notice of Intent") cited twelve bases for the assessment of a total of \$131,000.00 in civil penalties for alleged violations of ORS 658.410, 658.415, 658.417, and 658.440. The A & B Notice of Intent further stated that Respondents had 20 days from the date they received the Notice to request a contested case hearing.

2) The A & B Notice of Intent was served on Mike Sulfridge, registered agent for A & B Cutters, Inc., on July 3, 1997.

3) By letter dated July 11, 1997, Alan McCullough, case presenter for the agency, confirmed to Harry Gandy, attorney for the A & B Respondents, that those Respondents had an extension of time through August 1, 1997,¹ in which to file an answer and request for hearing. McCullough granted the A & B Respondents another extension of time on July 30, 1997, bringing the deadline for filing an answer to August 15, 1997.

4) The Hearings Unit received the A & B Respondents' Answer, Affirmative Defenses, and Request for Hearing on August 15, 1997. The A & B Respondents denied each of the alleged violations and asserted an affirmative defense as follows:

"For an AFFIRMATIVE DEFENSE, Respondents generally deny performing services as a farm labor contractor, as such services are defined in the Oregon Revised Statutes and the attendant administrative rules, with regard to forestation and reforestation without a valid farm labor contractor's license. Respondent A & B Cutters, Inc. admits providing on a temporary lease basis, and in exchange for compensation, employees to Mike Sulfridge Contracting, Inc. which did perform such services, but which was validly licensed to do so."

The A & B Respondents requested a contested case hearing.

5) On September 5, 1997, the Hearings Unit received the Agency's request for a hearing in Case No. 11-98. On October 15, 1997, the ALJ issued to the A & B Respondents and the Agency a "Notice of Hearing" for Case No. 11-98, which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to the A & B Respondents a "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-050-0000 through 839-050-0440.

6) On July 1, 1997, the Agency issued a separate "Notice of Intent to Assess Civil Penalties" to Respondents Mike L. Sulfridge and Mike Sulfridge Contracting, Inc. (the "MSC Inc. Respondents"). This Notice of Intent (hereinafter, the "MSC Inc. Notice of Intent") cited eight bases for the assessment of a total of \$142,000.00 in civil penalties for alleged violations of ORS 658.417 and 658.440. The MSC Inc. Notice of Intent further stated that Respondents had 20 days from the date they received the Notice to request a contested case hearing.

7) The MSC Inc. Notice of Intent was served on Mike Sulfridge and Mike Sulfridge Contracting, Inc., on July 3, 1997.

8) By letter dated July 11, 1997, Alan McCullough, case presenter for the agency, confirmed to Harry Gandy, attorney for the MSC Inc. Respondents, that those Respondents had an extension of time through August 1, 1997,² in which to file an answer and request for hearing. McCullough granted the MSC Inc. Respondents another extension of time on July 30, 1997, bringing the deadline for filing an answer to August 15, 1997.

9) The Hearings Unit received the MSC Inc. Respondents' Answer, Affirmative Defenses, and Request for Hearing on August 15, 1997. The MSC Inc. Respondents denied each of the alleged violations and requested a contested case hearing.

10) On September 5, 1997, the Hearings Unit received the Agency's request for a hearing in Case No. 12-98. On October 15, 1997, the ALJ issued to the MSC Inc. Respondents and the Agency a "Notice of Hearing" for Case No. 12-98, which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to the MSC Inc. Respondents a "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy

of the Agency's administrative rules regarding the contested case process -- OAR 839-050-0000 through 839-050-0440.

13) On October 20, 1997, the ALJ issued discovery orders to the participants in both Case No. 11-98 and Case No. 12-98 directing them each to submit a summary of the case, including: 1) a list of the witnesses to be called; 2) the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence; and 3) a statement of any agreed or stipulated facts. The summaries were due by February 13, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summaries.

14) On December 4, 1997, the Agency asked the ALJ to issue a discovery order allowing the Agency to depose Mike Sulfridge. Respondents did not oppose the motion, and the ALJ issued the requested discovery order on December 5, 1997.

15) On December 4, 1997, the Agency also moved to consolidate the hearings in Case No. 11-98 and 12-98. By letter dated December 5, 1997, the ALJ notified all Respondents that they should respond to the motion by December 15, 1997, if they opposed it. The Hearings Unit received no response by that date, and the ALJ granted the consolidation motion. The ALJ scheduled the consolidated hearing to commence on February 24, 1998, in the conference room of the Oregon Employment Department, 846 SE Pine Street, Roseburg, Oregon.

16) By joint motion dated January 26, 1998, the participants asked for a postponement of the consolidated hearing. The ALJ granted the motion and issued an Amended Notice of Hearing setting the consolidated hearing for June 9, 1998. The ALJ also ordered the participants to submit their case summaries by May 29, 1998. The Hearings Unit received the Agency's case summary on May 29, 1998. The Hearings

Unit did not receive Respondents' case summary, which was dated and postmarked June 1, 1998, until June 3, 1998.

17) On April 24, 1998, the Agency moved for leave to amend the Notices of Intent in Case Nos. 11-98 and 12-98. The ALJ granted that order on May 7, 1998.

18) In Case No. 11-98, the First Amended Notice of Intent alleged six bases for a total of \$31,000.00 in civil penalties against the A & B Respondents:

i) "Acting as a Farm Labor Contractor with Regard to the Forestation and Reforestation of Lands without a Valid Farm Labor Contractor's License or Forestation Indorsement. ORS 658.410; ORS 658.417(1); OAR 839-15-125."

ii) "Acting as a Farm Labor Contractor with Regard to the Forestation and Reforestation of Lands without a Valid Farm Labor Contractor's License or Forestation Indorsement. ORS 658.410; ORS 658.417(1); OAR 839-15-125."

iii) "Failure to Provide a Certified True Copy of All Payroll Records for Work Done as a Farm Labor Contractor at Such Times as Prescribed by the Commissioner. ORS 658.417(3); OAR 839-15-300."

iv) "Failure to Provide a Certified True Copy of All Payroll Records for Work Done as a Farm Labor Contractor at Such Times as Prescribed by the Commissioner. ORS 658.417(3); OAR 839-15-300."

v) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (eleven violations)

vi) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (twelve violations)

The Agency also alleged aggravating circumstances: "Respondent Mike Sulffridge was licensed as a farm labor contractor from 1990 into 1997 and should be well aware of the licensing and certified payroll requirements. Respondents' multiple violations aggravate the seriousness of each violation."

19) In Case No. 12-98, the First Amended Notice of Intent alleged three bases for a total of \$43,750.00 in civil penalties against the MSC Inc. Respondents:

- i) "Failure to Provide a Certified True Copy of All Payroll Records for Work Done as a Farm Labor Contractor at Such Times as Prescribed by the Commissioner. ORS 658.417(3); OAR 839-15-300." (eight violations)
- ii) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (seventeen violations)
- iii) "Failure to Execute a Written Agreement With Workers at the Time of Hiring and Prior to the Worker Performing Any Work. ORS 658.440(1)(g); OAR 839-15-360." (forty-three violations)

The Agency also alleged aggravating circumstances:

"Respondents was [*sic*] licensed as a farm labor contractor from 1990 into 1997. Respondents have been warned by BOLI representatives in the past on several occasions about the necessity of submitting certified payroll records. Respondents were asked by BOLI representatives to submit certified payroll records for the work performed in 1996 and failed to do so until May 23, 1997. Respondents' submission of certified payroll records for work performed in the spring of 1997 was similarly late. Failure to submit certified payroll records and enter into written agreements and/or written agreements conforming to ORS 658.440(1)(g) regarding the workers' rights, remedies, and terms and conditions of employment are all multiple, serious violations. Respondents' multiple violations aggravate the seriousness of each violation."

20) By order dated May 7, 1998, the matter, which had been assigned to ALJ Douglas A. McKean, was reassigned to ALJ Warner W. Gregg.

21) On May 27, 1998, the Agency moved to further amend the Notice of Hearing in Case No. 12-98 to change paragraph 1(2) to read: "Unidentified State or Private Contract (October 1996)." Respondents did not oppose the motion, which the Forum hereby grants.

22) At the start of the hearing, Respondents' attorney said his clients had received and read the Summary of Contested Case Rights and Procedures and had no questions about it.

23) In addition, the participants stipulated that: 1) references to Mike Sulfridge, dba A & B Cutters (or just "A & B Cutters") were to be removed and replaced with "A & B Cutters, Inc." (hereinafter, "A & B"); 2) A & B was not a licensed contractor;

3) all of the contracts identified in Case No. 11-98 were contracts of Mike Sulfridge Contracting, Inc.; 4) in Case No. 11-98, workers used by Mike Sulfridge Contracting, Inc., were leased from A & B in those instances where A & B was involved, and that was the extent of A & B's involvement; 5) A & B did not submit any certified payroll records; and 6) the Agency would not seek "double penalties" for failure to timely submit certified payroll records for United States Forest Service Contract No. 53-04-N7-5-26; in other words, it would not seek to penalize both the A & B Respondents and the MSC Inc. Respondents for any such violation.

24) The Agency's case presenter also informed the ALJ and Respondents that Exhibit A-74 contained typographical errors to be corrected as follows: after the name Javier Hernandez, the phrase "A-1 through A-18" should be "A-12 to A-18"; after the name Cary Nash, the phrase "A-1 through A-14" should be "A-12 through A-14"; and the exhibit should indicate that Mel Ganger did sign a WH-153 agreement.

25) The Agency moved to amend the First Amended Notice of Intent in Case No. 11-98 by removing Mel Ganger's name from paragraph 5. The Agency made a corresponding motion to reduce the amount of penalty by \$1000.00. The ALJ granted these motions.

26) The Agency also moved to amend the First Amended Notice of Intent in Case No. 12-98 by: adding Mel Ganger's name to the list of workers in paragraph 3 (and increasing the penalty by \$250.00); removing Juan Cardenas's name from the list of workers in paragraph 2 (reducing the penalty by \$1000.00); and removing Chad Conley's name from paragraph 3 (reducing the penalty by \$250.00). The ALJ granted the motions.

27) The Agency further moved to amend the First Amended Notice of Intent in Case No. 12-98 to add the names of three workers (Hien Clausen, Todd Wisbey,

Eulalio Aguilar) to paragraph 3 and to add the names of three other workers (Teddy Steele, Richard McCoy, and Michael Takhbar) to paragraph 2. Respondents objected to these motions, and the ALJ denied them as untimely

28) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

29) On November 20, 1998, the ALJ issued a proposed order that included an Exceptions Notice allowing ten days for filing exceptions to the proposed order. After receiving extensions of time, Respondent filed timely exceptions on January 13, 1999, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) Respondent Mike Sulfridge owns 100% of the shares of Respondent Mike Sulfridge Contracting, Inc. ("MSC Inc."), which he incorporated in 1984. At all material times, Sulfridge and MSC Inc. were licensed as farm/forest labor contractors in Oregon and employed one or more persons within the state. Reforestation is MSC Inc.'s main business.

2) Since he became licensed as a farm/forest labor contractor, Sulfridge has been aware that Oregon law requires such contractors to submit certified payroll records ("CPRs") at least once every 35 days. Sulfridge delegated that responsibility to his bookkeeping service.

3) In 1990, the Agency sent a letter to MSC Inc. and Mike Sulfridge stating that they had not submitted CPRs for reforestation contracts as required by Oregon law. The Agency notified Sulfridge and MSC Inc. that this violation could result in serious penalties, including license revocation or denial.

4) In February 1991, the Agency sent another letter to Sulfridge stating that his bookkeeping service was "sending in extremely late, and defective certified payrolls * * *." The Agency reminded Sulfridge that the law required payrolls to "be sent in at least every 35 days." The compliance specialist who signed the letter stated that she had, "on more than one occasion," explained the reporting requirements to Sulfridge's bookkeeping service.

5) At some point, Sulfridge's bookkeeper told him that A & B Cutters, Inc., another reforestation company, was going out of business. On January 5, 1995, Sulfridge purchased the majority of A & B shares³ and became its president. Sulfridge acquired A & B because its workers' compensation premiums were considerably lower than those paid by MSC Inc.

6) For a period of time, Sulfridge had A & B pay the wages of individuals who performed labor on contracts held by MSC Inc., so that A & B's lower workers' compensation rates would apply to the work done on those jobs. When MSC Inc. was paid on a contract, it would transfer enough money to A & B to cover the wages of the individuals who had worked on the contract. Sulfridge viewed this arrangement as having A & B "run the payroll" for MSC Inc.; he did not view the individuals working on MSC Inc. contracts as A & B employees. At the hearing, however, Sulfridge agreed that the individuals paid by A & B had been employees of A & B.

7) A & B did not provide or lease employees to any entity other than MSC Inc. It never bid on a contract. It had no transactions or business other than supplying laborers to MSC Inc.

8) A & B did not execute any written agreements with workers.

9) Mike Sulfridge or an MSC Inc. foreman generally was present at each MSC Inc. job site, whether the workers received their paychecks from MSC Inc. or from A & B.

10) MSC Inc. entered Contract No. 53-04-N7-5-26 with the United States Forest Service ("USFS") to perform labor in the Rogue River National Forest, and work on that contract was performed from October 9th through 20th, 1995.

11) MSC Inc. did not submit CPRs for the payroll periods August, September, and October 1995 until February 20, 1997. Those CPRs stated incorrectly that all work performed in those months had been done on land owned by the USFS, on Contract No. 53-04-N7-5-26.

12) On December 19, 1997, MSC Inc. submitted amended CPRs for October 1995, the only month during which work actually was performed on USFS Contract No. 53-04-N7-5-26. The documents state, and the Forum accepts, that the following individuals acted as "General Forest Laborer[s]" on USFS Contract No. 53-04-N7-5-26 during the relevant time periods:

Jonathan Alvarez

Thomas Bedell

Tony Carstensen

Jason Farmer

Steve Knighten

Tim Harper

Jose Lozano

David Vasquez

Mike Montooth

Bill Wallace

Clay Plummer

From the description of these individuals' work as general forest labor, Sulfridge's testimony that reforestation work was MSC Inc.'s main business, and his testimony that at least some of the workers were piling slash, the Forum infers that the listed individuals performed labor in the forestation or reforestation of lands. That inference is confirmed by the testimony of David Vasquez, one of the workers, who testified credibly that he performed general forestry work, including building trails, piling slash, and running chain saws. At least some of the listed individuals received paychecks from A & B, and some received paychecks from MSC Inc.

13) The Forum has accepted Sulfridge's testimony that three additional individuals worked on the USFS contract in October 1995: David McCoy, Billy Jackson, and Cary Nash. No documents in the record indicate that these individuals performed general forest labor, and Sulfridge testified credibly that the contract involved some work that did not qualify as forestation/reforestation labor. The Agency did not meet its burden of proving that these three individuals engaged in the forestation or reforestation of lands with regard to this particular contract.

14) The record includes all of the employment agreements with workers that Sulfridge was able to locate. It is possible that MSC Inc. entered some additional agreements that are not in the record, and those agreements were misplaced either by Sulfridge or his bookkeeping service. Given Sulfridge's lack of attention to record-keeping, however, and the legal requirement that he retain the agreements for three years,⁴ the Forum finds by a preponderance of the evidence that, where the record contains no agreement for a particular worker, that worker never entered an agreement with MSC Inc.⁵

15) The following individuals listed in paragraph 12, *supra*, did not sign an employment agreement with MSC Inc. prior to beginning work on USFS Contract No. 53-04-N7-5-26:

Jonathan Alvarez⁶

Thomas Bedell

Bill Wallace

16) Of the individuals listed in paragraph 12, *supra*, the following signed employment agreements prior to beginning work on USFS Contract No. 53-04-N7-5-26, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Tony Carstensen

Jason Farmer

Tim Harper

Steve Knighten

Jose Lozano

Mike Montooth

Clay Plummer

David Vasquez⁷

17) MSC Inc. performed BLM Contract No. P6-0516, a fire trail contract, in April 1996. That contract involved creating fire lanes at clearcuts and digging fire barriers around areas to be burned. No mechanical roadside brushing was done on the fire trails. All employees on that contract were paid by A & B.

18) In January 1997, Respondents' bookkeeper submitted "Payroll Journals" and "Payroll Verification Reports" for pay periods ending 3/31/96 and 4/15/96, a "Payroll Check Register" and a "Payroll Verification Report" for the period ending 4/20/96, and a

"Payroll Journal" for the period ending 4/30/96. Those reports did not indicate what jobs the listed employees had performed or the contracts on which they had worked.

19) On December 19, 1997, MSC Inc. submitted amended CPRs for April 1996. Those reports indicate that some employees had worked on BLM Contract No. P6-0516 (with most working as slash pilers), and some had worked on state or private contracts.

20) The amended CPRs state, and the Forum accepts, that the following individuals performed forestation/reforestation activities during April 1996 on BLM Contract No. P6-0516:

Jonathan Alvarez
Javier Hernandez
Jason Farmer
Clayton Plummer
Steven Knighten
Daniel Moen
Cary Nash
Edward Bracken
Jose Lozano
David Vasquez
Juan Renteria
John Spino

21) The following individuals listed in paragraph 20, *supra*, did not sign an employment agreement with MSC Inc. prior to beginning work on BLM Contract No. P6-0516:

Jonathan Alvarez
Edward Bracken
Daniel Moen
Cary Nash

22) Of the individuals listed in paragraph 20, *supra*, the following signed employment agreements prior to beginning work on BLM Contract No. P6-0516, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

- Jason Farmer
- Javier Hernandez
- Steve Knighten
- Jose Lozano
- Clay Plummer
- Juan Renteria
- John Spino
- David Vasquez

23) During April 1996, MSC Inc. also performed a private contract that included forestation or reforestation activities. A & B paid the workers on that contract. In addition, MSC Inc. performed a contract for mechanical roadside brushing, which is not a forestation or reforestation activity.

24) Some individuals worked on both BLM Contract No. P6-0516 and the private contracts in April 1996. The amended CPRs indicate, and the Forum accepts, that the following individuals worked *only* on one or both of the private contracts in April 1996:

- Bernie Bliss
- Hugo Erly-Arce
- Oren Fackrell
- Jose Hernandez
- Josh Keesee
- Dan Lethlean, Sr.
- Richard McCoy
- Shawn Nash

Jon Powell
Teddy Steele
Michael Takhbar

25) The following individuals listed in paragraph 24, *supra*, did not sign an employment agreement with MSC Inc. prior to beginning work on the private contracts:

Bernie Bliss
Oren Fackrell
Dan Lethlean, Sr.
Richard McCoy
Steele
Michael Takhbar⁸

26) Of the individuals listed in paragraph 24, *supra*, the following signed employment agreements prior to beginning work on the private contracts, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Hugo Erly-Arce
Josh Keesee
Shawn Nash
Jon Powell

27) From Sulfridge's testimony that reforestation work was MSC Inc.'s main business and his admission that at least some employees did reforestation work on a private contract in April 1996, the Forum infers that the individuals listed in paragraphs 25 and 26, *supra*, performed labor in the forestation or reforestation of lands on an MSC Inc. private contract in April 1996.

28) On July 1, 1996, "forest fire suppression by contract crew" was added to the definition of "forestation or reforestation of lands" in *former* OAR 839-15-004(8). See *former* OAR 839-15-004(22).

29) Sometime in late 1996, BOLI learned that MSC Inc. had engaged in firefighting activities that summer. By letter dated November 27, 1996, BOLI compliance specialist Victor A. Muniz informed Sulffridge and MSC Inc. that BOLI had not received CPRs for work performed as a farm/forest labor contractor. Muniz asked Sulffridge and MSC Inc. to provide BOLI with CPRs for July, August, and September 1996 by December 12, 1996. Sulffridge gave a copy of this letter to his bookkeepers.

30) In the last two weeks of September 1996 and the first two weeks of October 1996, MSC Inc. performed at least one contract that involved reforestation work. During the same time period, MSC Inc. performed at least one contract that did not involve reforestation activities. It is not possible to discern from the record which workers performed labor on the reforestation contract; nor is it possible to discern which workers labored on that contract in October, and not only in September. Sulffridge, however, testified credibly that any or all of the employees listed on the mid-September through mid-October payroll may have been performing reforestation activities. The Forum infers from that testimony that at least one individual performed labor in the forestation or reforestation of lands on an unidentified MSC Inc. contract in October 1996.

31) MSC Inc. did not submit a CPR for October 1996 until May 1997. That document does not identify accurately the types of work performed by employees or the contracts on which they worked.

32) In January and February 1997, MSC Inc. performed the "Chaney Creek" contract for a company called Lone Rock. The project involved a "swamper burn," which is a reforestation activity.

33) MSC Inc. did not submit CPRs for the Chaney Creek contract until June 1997. Those CPRs do not reflect the types of work performed by employees. In

addition, the CPRs list one employee -- Angela Sulfridge -- who did not work on the contract. Except for that error, the Forum accepts the CPRs' representation that the following individuals worked on the contract:

- Jonathan Alvarez
- Justin Brown
- Joe Diaz Hernandez
- Jose Jil Morales
- Wade Morgan
- Mike Sulfridge
- Jason Tyler
- Richard Wigle

34) Of the workers listed in paragraph 33, *supra*, the following did not enter into any agreement with MSC Inc. prior to starting work on the Chaney Creek contract:

- Jonathan Alvarez
- Justin Brown
- Mike Sulfridge

35) Of the individuals listed in paragraph 33, *supra*, the following signed employment agreements prior to beginning work on the Chaney Creek contract, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

- Joe Hernandez
- Jose Morales
- Wade Morgan
- Jason Tyler
- Richard Wigle

36) In February 1997, MSC Inc. also performed BLM Contract No. P7-0514,⁹ which involved construction of a fire trail. In December 1997, MSC Inc. submitted CPRs

for that contract. The CPRs state, and the Forum accepts, that the following employees had worked as "General Forest Laborer[s]" on the BLM contract:

Jonathan Alvarez
William Eifert
Atilano Espinoza
Javier Hernandez
Josh Keesee
Steve Knighten
Dan Lethlean, Sr.
Dan Lethlean, Jr.
Wade Morgan
Jason Tyler
Todd Wisbey

37) Jonathan Alvarez did not enter into any agreement with MSC Inc. prior to starting work on BLM Contract No. P7-0514.

38) Of the individuals listed in paragraph 36, *supra*, the following signed employment agreements prior to beginning work on BLM Contract No. P7-0514, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

William Eifert
Atilano Espinoza
Javier Hernandez
Josh Keesee
Steve Knighten
Dan Lethlean, Jr.
Dan Lethlean, Sr.
Wade Morgan
Jason Tyler
Todd Wisbey

39) On February 20, 1997, A & B was involuntarily dissolved. At the June 1998 hearing in this matter, Sulfridge was not aware of the company's dissolution.

40) In March 1997, MSC Inc. performed a contract near Rogue River for the USFS. That contract involved slash burning. In February through April 1997, MSC Inc. also performed contracts called Selma and Butte Falls. Those two contracts did not involve reforestation activities.

41) MSC Inc. initially filed CPRs for the Rogue River, Selma, and Butte Falls contracts in June 1997. Those CPRs were not accurate. In December 1997, MSC Inc. submitted amended CPRs for the three contracts. Those reports state, and the Forum accepts, that the following MSC Inc. employees worked as general forest laborers on the Rogue River USFS contract:

Jonathan Alvarez
William Eifert
Josh Keesee
Steven Knighten
Mike Montooth
Jason Tyler
Bill Wallace
Todd Wisbey

42) Bill Wallace did not enter into any agreement with MSC Inc. prior to starting work on the Rogue River contract.

43) Of the individuals listed in paragraph 41, *supra*, the following signed employment agreements prior to beginning work on the Rogue River contract, but those agreements did not specify the name or address of the owner of the land for each job on which the individual worked. In addition, the employment agreements specified only a single (or starting) rate of pay:

Jonathan Alvarez

William Eifert
Josh Keesee
Steve Knighten
Mike Montooth
Jason Tyler
Todd Wisbey

44) In addition to the contracts discussed above, the Agency charged the MSC Inc. respondents with acting as farm/forest labor contractors with regard to USFS Contract No. 96033 and a 1996 contract with Boise Cascade. No evidence in the record establishes that any Respondent entered into, or performed, either of those contracts.

45) At some point after Sulfridge became aware of the magnitude of the problem with the MSC Inc. CPRs, he hired a new employee -- Karen Hightower -- to handle payroll in-house. Hightower prepared the amended CPRs on behalf of Respondents.

46) Sulfridge testified that the hourly wage MSC Inc. paid any given employee varied depending on the type of labor the employee performed. Several employees confirmed that they were paid at different hourly rates, depending on the job and whether they worked on a private or government contract. At least one employee also testified that his hourly wage increased as he gained experience. The Forum infers that it is unlikely that any worker identified in this Order was paid at only one rate during the entire time he worked for Respondents.

47) Sulfridge testified, and the Forum finds, that MSC Inc. did not enter new written agreements with workers when their pay rates changed. MSC Inc. rarely entered new written agreements with employees when they started working on new contracts. Sulfridge informed workers verbally of changing pay rates and job locations,

but there is no evidence in the record that workers ever were told the identities of the owners of the lands on which they labored.

48) The testimony of Respondent Mike Sulfridge generally was credible with regard to verifiable historical events. Sulfridge readily admitted that he had funneled money through A & B to pay workers so he could take advantage of A & B's low workers' compensation rates. He also acknowledged that many of MSC Inc.'s contracts involved forestation/reforestation activities and that reforestation was MSC Inc.'s main business. Finally, he admitted that MSC Inc. signed new agreements with workers reflecting changed working conditions only rarely, when it was convenient. Sulfridge's testimony was straightforward, not evasive, and not defensive. The Forum has relied on that testimony in making some of its factual findings.

49) The Forum has not, however, given great weight to Sulfridge's testimony where it was self-serving and conflicted with documentary evidence. For example, the amended CPRs for the 1995 USFS contract indicate that the individuals listed in paragraph 12 performed general forest labor. Sulfridge testified that, despite the "General Forest Laborer" label, not all of the individuals performed reforestation activities. The Forum finds the documentary evidence to be more reliable than Sulfridge's recollection of the specific type of work performed by any given employee. Similarly, where Sulfridge's recollection of which employees worked on a given contract conflicted with credible documentary evidence, the Forum generally gave more weight to the documents (such as amended CPRs).

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondents Sulfridge and MSC Inc. were licensed farm/forest labor contractors, as defined by ORS 658.405(1), doing business in the State of Oregon.

2) A & B employed workers to perform labor for another in the forestation or reforestation of lands on USFS Contract No. 53-04-N7-5-26 (October 1995), BLM Contract No. P6-0516 (April 1996), and a contract with a private party (April 1996). A & B employed the workers for an agreed remuneration or rate of pay -- the amount of money MSC Inc. transferred to A & B to pay the workers. On the October 1995 USFS contract, A & B employed some, but not all, of the workers (the remainder were employed by MSC Inc.). On the two April 1996 contracts, A & B employed all of the workers.

3) A & B was not licensed as a farm/forest labor contractor.

4) With regard to USFS Contract No. 53-04-N7-5-26, BLM Contract No. P6-0516, and the April 1996 private-party contract, MSC Inc. also acted as a farm/forest labor contractor, as it supplied the workers employed by A & B to perform labor for another in the forestation or reforestation of lands. To the extent that A & B did not employ some of the workers on USFS Contract 53-04-N7-5-26, MSC Inc. was their employer and acted as a farm/forest labor contractor.

5) MSC Inc. also employed workers to perform labor for another in the forestation or reforestation of lands on the Chaney Creek contract, BLM Contract No. P7-0514, and the USFS Rogue River contract.

6) The Agency proved the following acts charged against Sulfridge and A & B in Case No. 11-98:

a) Acting as a farm/forest labor contractor without a license, by employing workers to perform forestation or reforestation work for another on USFS Contract No. 53-04N7-5-26. (One violation).

b) Acting as a farm/forest labor contractor without a license, by employing workers to perform forestation or reforestation work for another on BLM Contract No. P6-0516 and the April 1996 private contract. (One violation).

c) For those employees that A & B paid directly on USFS Contract No. 53-04N7-5-26, failing to provide a certified true copy of all

payroll records at such times as prescribed by the Commissioner. (One violation).

d) For BLM Contract No. P6-0516 and the April 1996 private contract (on which A & B paid all the employees), failing to provide a certified true copy of all payroll records at such times as prescribed by the Commissioner. (One violation).

e) For the April 1996 private reforestation contract, failing to enter a written agreement with the following workers as required by ORS 658.440(1)(g):

Bernie Bliss

Oren Fackrell

Shawn Nash

Jon Powell

(Four violations).

7) The Agency proved the following acts charged against Sulfridge and MSC Inc. in Case No. 12-98:

a) Failing to provide certified true copies of all payroll records at such times as prescribed by the Commissioner with regard to the following contracts: the unidentified October 1996 reforestation contract; BLM Contract No. P7-0514; Chaney Creek; and USFS Rogue River. (Four violations).

b) Failing to enter any written agreement with Bill Wallace on the listed workers on the USFS Rogue River contract. (One violation).

c) Failing to provide a written agreement that contained all required elements with the listed workers on one or more of the following contracts: BLM Contract No. P7-0514; the Chaney Creek contract; and the USFS Rogue River contract:

Jonathan Alvarez

William Eifert

Atilano Espinoza

Javier Hernandez

Joe Hernandez

Josh Keesee

Steve Knighten

Dan Lethlean, Sr.

Dan Lethlean, Jr

Mike Montooth

Jose Morales

Wade Morgan

Jason Tyler

Richard Wigle

(Fourteen (14) violations).

8) All Respondents knew or should have known that they were legally required to execute written agreements with their employees that included all of the statutorily required elements. Their failure to execute the required agreements was willful.

9) All Respondents knew or should have known of the legal requirements for filing certified payroll records. Their failure to timely file such records was willful.

10) Respondents A & B and Sulfridge knew or should have known that A & B was required to be licensed as a farm/forest labor contractor, and willfully allowed A & B to operate as a farm/forest labor contractor without the proper license or indorsement.

CONCLUSIONS OF LAW

- 1) ORS 658.405(1) provides, in relevant part:
"Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products * * *."

A & B acted as a farm/forest labor contractor by employing workers to perform work on USFS Contract No. 53-04N7-5-26, BLM Contract No. P6-0516, and the April 1996 private contract.

- 2) ORS 658.410(1) provides, in relevant part:
"Except as provided by ORS 658.425, no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries. No

person shall act as a farm labor contractor with regard to the forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.417 provides, in relevant part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

In October 1995, A & B violated ORS 658.410(1) and ORS 658.417(1) by acting as a farm labor contractor with regard to the forestation or reforestation of lands without a valid farm labor contractor's license or a farm/forest labor contractor indorsement. Sulfridge, as majority shareholder of A & B, shares liability for that violation.

4) In April 1996, A & B committed a separate violation of ORS 658.410(1) and ORS 658.417(1) by acting as a farm labor contractor on BLM contract No. P6-0516 and a private contract without a valid farm labor contractor's license or a farm/forest labor contractor indorsement. Sulfridge, as majority shareholder of A & B, shares liability for that violation.

5) ORS 658.417 provides, in relevant part:

"In addition to the regulation otherwise imposed upon farm labor contractors * * *, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"* * * * *

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

Prior to January 9, 1996, *former* OAR 839-15-300 provided, in relevant part:

"(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified

true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly.

"(2) The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made."

Sulfridge and A & B violated ORS 658.417(3) and *former* OAR 839-15-300 by failing to provide certified true copies of payroll records for the forestation or reforestation work performed on USFS Contract No. 53-04-N7-5-26 within 35 days of the date on which that work first began.

6) Since January 9, 1996, OAR 839-015-0300(1)¹⁰ has provided, in relevant part:

"Forest labor contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly as follows:

"(a) The first report is due no later than 35 days from the time the contractor begins work on each contract and must include whatever payrolls the contractor has paid out at the time of the report;

"(b) The second report is due no later than 35 days following the end of the first 35 day period on each contract and must include whatever payrolls have been issued as of the time of the report;

"(c) If the contract lasts more than 70 days, succeeding wage certification reports must include whatever payrolls the contractor has paid out at the time of the report, with the reports due at successive 35 day intervals, e.g. 105 days, 140 days from the time the contractor begins work on the contract."

Sulfridge and A & B violated ORS 658.417(3) and OAR 839-015-0300 by failing to provide certified true copies of payroll records for the forestation or reforestation work performed on BLM Contract No. P6-0516 and the April 1996 private contract within 35 days of the dates on which that work first began.

7) Sulfridge and MSC Inc. committed four violations of ORS 658.417(3) and OAR 839-015-0300 by failing to provide certified true copies of payroll records for the

forestation or reforestation work performed on the unidentified October 1996 reforestation contract, BLM Contract No. P7-0514, the Chaney Creek contract, and the USFS Rogue River contract within 35 days of the dates on which work first began on those contracts.

8) ORS 658.440(1) provides, in relevant part:

"Each person acting as a farm labor contractor shall:

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with the workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and child care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner.

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

OAR 839-015-0360 provides:

"(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

"(2) The commissioner has developed Form WH-153 which, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, can be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.

"(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. Amended disclosure statements must be provided at any time any of the elements listed in the original statement change. A copy of the agreement must be furnished to workers prior to the workers starting work. Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any representation made by the contractor in recruiting the workers."¹¹

Sulfridge and A & B committed four violations of ORS 658.440(1)(g) and OAR 839-015-0360(4) by failing to provide four employees with the required written employment agreements before they started work on the April 1996 private reforestation contract .

9) Sulfridge and MSC Inc. committed one violation of ORS 658.440(1)(g) and OAR 839-015-0360(4) by failing to provide one employee (Bill Wallace) with a written employment agreement covering his work on the USFS Rogue River contract.

10) Sulfridge and MSC Inc. committed fourteen (14) violations of ORS 658.440(1)(g) and OAR 839-015-0360(4) by failing to provide fourteen employees with

written employment agreements that included all required elements before they began work on one or more of the following contracts: BLM Contract No. P7-0514; the Chaney Creek contract; and the USFS Rogue River contract.

11) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondents. ORS 658.453(1)(c); OAR 839-015-508(1)(h). With regard to the magnitude of the penalties, OAR 839-015-0510 provides:

"(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-015-0512 further provides, in relevant part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) For purposes of this rule, 'repeated violations' means violations of a provision of law or rule which have been violated on more than one contract within 2 years of the date of the most recent violation.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first violation;

"(b) \$1,000 for the first repeated violation;

"(c) \$2,000 for the second and each subsequent repeated violation."

The assessment of the civil penalty specified in the Order below is an appropriate exercise of the commissioner's authority.

OPINION

Violations Committed by A & B and Sulfridge

The Forum has found that A & B was the employer of individuals who worked on MSC Inc. contracts in October 1995 and April 1996 because A & B compensated those individuals for their labor. Respondents contend that, despite its employment of laborers, A & B does not fall within the definition of "farm labor contractor" because it made no profit from leasing employees to MSC Inc. This argument has no merit. ORS 658.405(1) states only that a farm labor contractor is a person who employs forestation/reforestation workers to perform labor for another "for an agreed remuneration or rate of pay." It does not require that the arrangement be profitable, or otherwise economically beneficial, to the contractor. Here, A & B received an agreed remuneration for providing workers to MSC Inc. -- the exact amount of money that it paid the employees. Consequently, A & B was a farm labor contractor as defined by ORS 658.405(1). A & B committed two violations of ORS 658.410(1) and 658.417 by acting as a farm/forest labor contractor without a license or indorsement on the October 1995 and April 1996 contracts. Sulfridge, as majority shareholder of A & B, is equally responsible for those violations, and is jointly and severally liable for the penalties

associated with them. See *In the Matter of Manuel Galan*, 15 BOLI 106, 131-32 (1996), *aff'd without opinion sub nom. Staff Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, *rev den* 326 Or 57 (1997).

A & B paid employees directly on USFS Contract No. 53-04-N7-5-26 (October 1995) as well as on BLM Contract No. P6-0516 and a private contract, both performed in April 1996. A & B was, therefore, required to submit CPRs within 35 days of the dates on which work on those contracts began. A & B did not submit any CPRs for the October 1995 contract until February 1997, and did not submit *any* payroll records for the April 1996 contracts until January 1997. A & B and Sulfridge are equally responsible for those two violations of ORS 658.417(3) and are jointly and severally liable for the penalties associated with them.

A & B also failed to enter written agreements with four workers on the April 1996 private reforestation contract, as required by ORS 658.440(1)(g). Two of those workers (Bernie Bliss and Oren Fackrell) signed *no* written agreement. The two other workers (Shawn Nash and Jon Powell) signed written agreements with MSC Inc., not with A & B, which was their employer. Sulfridge is equally responsible for these four violations of ORS 658.440(1)(g), and is jointly and severally liable for the associated penalties.¹²

Violations Committed by MSC Inc. and Sulfridge

MSC Inc. paid the workers on the unidentified October 1996 reforestation contract, BLM Contract No. P7-0514, Chaney Creek, and USFS Rogue River. Consequently, MSC Inc. was required to provide BOLI with CPRs for those contracts within 35 days of the dates on which work on the contracts was first performed. ORS 658.417(3); OAR 839-015-0300. MSC Inc. did not comply with that requirement. With regard to the October 1996 contract, MSC Inc. did not provide CPRs until May 1997. The Chaney Creek contract was performed in January and February 1997, but MSC

Inc. did not provide CPRs for the contract until June of that year. BLM Contract No. P7-0514 was performed in February 1997, but MSC Inc. provided no CPRs until December 1997. Finally, the Rogue River contract was performed in March 1997, but MSC Inc. did not submit any CPRs until June. In sum, MSC Inc. committed four violations of ORS 658.417(3); as majority shareholder of MSC Inc., Sulfridge is equally responsible for those violations and is jointly and severally liable for the penalties associated with them.

MSC Inc. also repeatedly violated the statute requiring it to enter written work agreements with employees. MSC Inc. failed to enter any written agreement with one employee, and its agreements with fourteen other employees did not include all the required elements. First, the agreements did not state the different rates at which workers would be paid for performing different types of work. Second, the agreements did not state the names and addresses of the owners of all operations where the workers would be working.

Respondents contend that the written agreements substantially complied with ORS 658.440(1)(g) because the workers were verbally informed of worksite locations, and so the omission of that information from the written agreements was not significant. Respondents' argument overlooks the significance of the statutory requirement, which is to inform workers of the *identities* of the landowners for whose benefit they will labor. See *In the Matter of Washburn Reforestation*, 17 BOLI 212, 223-24. Reforestation workers may choose not to perform work for certain landowners, and the statute is designed to provide workers with a method by which they may enforce their right not to do so. A & B did not substantially comply with the statutory requirements merely by informing employees verbally of various worksite locations.

Moreover, Respondents' argument does not account for the fact that the written agreements did not state the different rates at which workers would be paid for different

types of work. The fact that A & B gave workers that information verbally does not lessen the magnitude of the violation:

"Subsection (g) [of ORS 658.440(1)] does more than ensure that workers are provided with information -- it requires the farm/forest labor contractor to enter legally enforceable agreements with them. By executing written agreements with their workers, farm/forest labor contractors also provide themselves with a means of defending against false wage claims. *Cf. In the Matter of Clara Perez*, 11 BOLI 181 (1993) ('One purpose of the WH-153 form is to eliminate any confusion or misunderstandings about the agreed pay rate')."

Washburn Reforestation, 17 BOLI at 222.¹³ In short, MSC Inc. committed a total of fifteen violations of ORS 658.440(1)(g). Sulfridge is equally responsible for those violations, and is jointly and severally liable for the penalties associated with them.

Civil Penalty

In determining the appropriate amount of a civil penalty, this Forum may consider the seriousness and magnitude of the violation. In this case, the scope of the violations is staggering. Respondents operated for years without providing their employees with adequate written agreements. After repeated warnings from the Agency about the need to submit timely CPRs, Respondents failed to do so. Respondents obviously did not take all necessary measures to prevent violations; that, too, aggravates the seriousness of the offense. In addition, the Forum has found that Respondents knew or should have known of the violations, in part because of the warnings they received and in part because Sulfridge had been licensed as a farm/forest labor contractor for many years. See OAR 839-015-0510(1)(d). There is one possible mitigating factor -- the Agency did not prove that any worker suffered a wage loss as a result of the violations. Given the magnitude of the violations, however, the Forum still concludes that the maximum penalty allowed by law would be appropriate for each and every violation charged. The

Forum hereby orders Respondents to pay the following penalties, which are identical to the penalties the Agency sought for the violations that it proved:

Penalties for which A & B and Sulfridge are jointly and severally liable

- a) For two violations of ORS 658.410(1) and 658.417(1), operating as a farm/forest labor contractor without a proper license or indorsement: \$2,000.00 per violation for a total of \$4,000.00.
- b) For two violations of ORS 658.417(3), failure to provide timely certified payroll records: \$2,000.00 per violation for a total of \$4,000.00.
- c) For four violations of ORS 658.440(g), failure to enter written agreements with workers as required by statute: \$1,000.00 per violation for a total of \$4,000.00.

Penalties for which MSC Inc. and Sulfridge are jointly and severally liable

- a) For four violations of ORS 658.417(3), failure to provide timely certified payroll records: \$2,000.00 per violation for a total of \$8,000.00.
- b) For one violation of ORS 658.440(g), failure to enter any written agreement with a worker: \$1000.00.
- c) For fourteen violations of ORS 658.440(g), failure to enter written agreements with workers containing all the required elements: \$250.00 per violation for a total of \$3,500.00

Exceptions

In each of their exceptions, Respondents challenge the magnitude of the proposed penalties, asserting that they should be reduced because Respondents' workers did not lose wages and because Respondent Sulfridge has not had repeated violations during the last two years. The preceding section of this Order addresses both the mitigating and aggravating factors in this case, and adequately explains why a nominal penalty would not be appropriate.

In their first exception, Respondents also argue that because A & B never contracted a farm/forest labor job, and because Sulfridge was licensed for MSC Inc., A & B should not be penalized for acting as a farm labor contractor without a license. This argument misses the point -- because A & B employed forestation/reforestation workers to perform labor for MSC Inc., it was required to be licensed as a farm labor contractor. It simply is irrelevant that MSC Inc. was licensed. Because A & B and MSC Inc. were two different legal entities, each of which performed some activities that qualified it as a farm labor contractor, each was required to be licensed. The exception is denied. Respondents' fourth exception presents a similar argument and is denied for the same reasons.

In their second exception, Respondents argue that the proposed order penalizes both A & B and MSC Inc. for failing to provide CPRs on "Forest Service Rogue River contract #53-04N7-5-26." That is not correct. A & B is being penalized for failing to provide a timely CPR for USFS Contract No. 53-04-N7-5-26, which involved work in the Rogue River National Forest in October 1995. See Factual Findings 10-13, Ultimate Factual Finding 6(c). MSC Inc., on the other hand, is being penalized for failing to provide a timely CPR for a USFS contract involving work near the Rogue River that was performed in March 1997. See Factual Findings 40-43, Ultimate Factual Finding 7(a). The exception is denied.

Respondents' third exception essentially challenges the Commissioner's authority to impose penalties where workers are provided with written contracts, but those contracts do not contain all of the elements required by ORS 658.440 and are entered into by a legal entity (here, MSC Inc.) different from the entity that actually employed the workers (A & B). The exception is denied for the reasons stated in the third paragraph of the Opinion section of this Order.

In their sixth exception, Respondents claim that their written agreements with workers properly identified the "Owner of the Operation" as Sulffridge, because he owned MSC Inc. and A & B. This argument fails to recognize that ORS 658.440(1) requires that workers be told who owns the land on which they perform labor, not merely who owns the company that employs or supplies them. The exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453 and as payment of the civil penalty for their violations of ORS 658.410(1), ORS 658.417(1), ORS 658.417(3), and ORS 658.440(1)(g), the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Mike Sulffridge and A & B Cutters Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Mike Sulffridge and A & B Cutters Inc. comply with the Final Order.

Furthermore, as authorized by ORS 658.453 and as payment of the civil penalty for their violations of ORS 658.417(3) and ORS 658.440(1)(g), the Commissioner of the Bureau of Labor and Industries orders Respondents **Mike Sulffridge and Mike Sulffridge Contracting Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in the amount of TWELVE THOUSAND FIVE HUNDRED DOLLARS (\$12,500.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Mike Sulffridge and Mike Sulffridge Contracting Inc. comply with the Final Order.

¹The letter states that the deadline was August 1, 1996, but it is clear from the context of the letter that the deadline actually fell in 1997.

²The letter states that the deadline was August 1, 1996, but it is clear from the context of the letter that the deadline actually fell in 1997.

³Cary Nash, one of Sulfridge's employees, purchased the remaining shares of A & B.

⁴See former OAR 839-15-400(1), (2)(j). The rule has been renumbered to OAR 839-015-0400, but has not changed substantively since at least 1990.

⁵The Forum has made one exception to this finding, in the case of David Vasquez. See Finding No. 16, *infra*.

⁶The record includes only one contract for Alvarez, dated March 1, 1997, and Sulfridge testified credibly that he rarely entered new agreements with workers when their jobs changed. From those facts, the Forum infers that the March 1997 contract is the first (and perhaps only) contract that Alvarez signed.

⁷Although Vasquez's employment agreement is not in the record, he testified credibly that he signed one that did not specify work locations. Vasquez could not recall whether the contract specified more than one pay rate, and he testified credibly that he was paid at more than one rate while he worked on MSC Inc. contracts. Because no other MSC Inc. employment agreement identified work locations or more than a single pay rate, the Forum infers that Vasquez's contract was similarly deficient.

⁸See footnote appended to paragraph 15, *supra*, for an explanation of why the Forum has inferred that any given contract in the record is the first contract signed by that employee.

⁹Part of the BLM contract number is not legible on the photocopied exhibits, but the last four digits of the contract number are 0514. The Forum infers that the contract referred to in the exhibits is BLM Contract No. P7-0514, listed in the Notice of Intent. (Exhibits X-25, A-22, A-23)

¹⁰At some point, the rule was renumbered from OAR 839-15-310 to OAR 839-015-0310, but section (1) of the rule has not changed substantively.

¹¹Prior to January 9, 1996, the rule was different only in that more terms were capitalized; substantively, the rule has remained the same since 1990.

¹²Even if the agreements with Nash and Powell "counted" towards A & B's compliance with ORS 658.440(1)(g), the Forum would find that A & B committed a total of four violations of that statute. Nash's and Powell's agreements did not state the different wages they would receive for performing different types of work. Nor did the agreements state the names and addresses of the owners of all operations where the workers would be working. By omitting these required elements from the agreements with Nash and Powell, A & B failed to "execute a written agreement with the * * * workers *as required by ORS 658.440(1)(g).*" Exhibit X-24 at 4 (emphasis added); see ORS 658.440(1)(f), (g); OAR 839-015-0360.

¹³Even without this additional deficiency, however, the Forum would find violations of ORS 658.440(1)(g) just for the failure to include the identity of landowners in the written agreements, and would impose the same penalty.