



INTERIOR BOARD OF INDIAN APPEALS

Albert J. Firchau v. Metlakatla Indian Community and Commissioner of Indian Affairs

5 IBIA 188 (10/06/1976)

Related Board case:  
13 IBIA 4



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF ALBERT J. FIRCHAU  
v.  
METLAKATLA INDIAN COMMUNITY  
AND  
COMMISSIONER, BUREAU OF INDIAN AFFAIRS

IBIA 75-20-A

Decided October 6, 1976

Appeal from an administrative decision and order of the Acting Deputy Commissioner of Indian Affairs, fixing the stumpage rates for timber cut under contract no. E00C14200696 between the Metlakatla Indian Community, hereinafter referred to as the Seller, and Albert J. Firchau, hereinafter referred to as the Purchaser, entered into on January 7, 1972, and approved March 6, 1972, by the Deputy Commissioner of Indian Affairs.

Affirmed and Modified in Part.

APPEARANCES: Allen Lane Carr, Esq., for appellant; Mason D. Morisset, Esq., for the Metlakatla Indian Community; and John H. Kelly, Esq., Departmental Counsel, for the Bureau of Indian Affairs.

## OPINION BY ADMINISTRATIVE JUDGE SABAGH

This matter comes before the Board of Indian Appeals on appeal from the decision of the Acting Deputy Commissioner, Bureau of Indian Affairs, dated May 1, 1974, establishing stumpage rates for the period commencing June 1, 1974.

Under the contract referred to, supra, the purchaser was to cut and pay for designated timber (an estimated volume of approximately 40,000,000 board feet) on or before December 31, 1975.

The purchaser was to cut and pay for not less than 5 million board feet during calendar year 1972 and not less than 12 million

board feet during each subsequent calendar year. Section 13(b) of said contract authorized a maximum quantity of 16 million board feet to be cut in any one calendar year.

Stumpage rates for the annual periods following the one in which the contract was approved were to be adjusted pursuant to procedures set forth under section 9(b) of the contract. Section 9(e) provides a further basis for review in accordance with section 9(d). These provisions are set forth in Administrative Law Judge Dean F. Ratzman's decision which is hereto attached.

The dispute between the parties involves two species of saw logs - Sitka spruce and Western hemlock. The appellant acknowledged there was no basic dispute in regard to cedar prices.

The original contract (bid) prices were \$34.75 per MBM for Sitka spruce and \$9.00 for Western hemlock. As a result of application of section 9(b) the rates were increased in early 1973 to \$45.49 for Sitka spruce and \$20.74 for Western hemlock. In April 1973, the purchaser requested authorization to exceed the 16 million board feet annual limitation incorporated in the contract. The seller approved the request and a contract modification allowing cutting above the limit was approved by the Secretary of the Interior on May 8, 1973. As a result of this action the purchaser's total cut in 1973 was about 23 million board feet.

On February 8, 1974, the Area Director, Bureau of Indian Affairs, informed the purchaser that rates under section 9(b) for calendar year 1974 were \$88.29 for Western hemlock and \$291.49 for Sitka spruce.

The purchaser had previously on December 4, 1973, asked for a price adjustment for 1974 to be determined under sections 9(e) - 9(d) of the contract. A review of the stumpage rates was ultimately made under 9(d) and the Commissioner's Office, Bureau of Indian Affairs, advised the purchaser on May 1, 1974, that after review of the current stumpage rates under the contract the Bureau found that the economic conditions in the forest products industry subsequent to the time of the bidding warranted the following rates, per MBM, for sawlogs: Sitka spruce \$271.06 and Western hemlock \$52.01. These rates were to become effective May 1, 1974.

The purchaser appealed the decision of the Deputy Commissioner to this Board asserting that his determination concerning stumpage prices for Sitka spruce and Western hemlock were too high and did not take into consideration the actual cost of logging in the area, which costs were \$147.00/M during the 1973 logging season, or that logging costs would increase to approximately \$167.00/M for the 1974 season.

The matter was referred to Administrative Law Judge Dean F. Ratzman for a fact-finding hearing and recommended decision.

Adversary hearings were held in Ketchikan, Alaska, and Seattle, Washington. In addition, the Judge together with representatives of the interested parties and their respective counsel inspected major portions of the Annette Island timber sale area. The hearing record includes a voluminous transcript and numerous exhibits in addition to prehearing and posthearing briefs by the parties.

Findings and a recommended decision were issued by the Judge on June 16, 1976. The essential facts and pertinent provisions of the contract are contained therein.

The Administrative Law Judge found among other things that:

1. Cost plus would not be a reasonable approach to adjustment of prices for the second, third or fourth years of the timber sales contract nor was such suggested by the language of sections 9(d) and 9(e).
2. The Approving Officer established the 1-month period for consultations with the purchaser and seller which is part of the sections 9(e) - 9(d) rate review process.
3. The parties submitted facts and recommendations during the 1-month period.
4. Having complied with (2) and (3) above, the Approving Officer was empowered under the timber contract to "evaluate the data submitted and, on the basis of such material and other available material that a prudent man would consider" establish the new stumpage rates. The phrase "other available material that a prudent man would consider" must be deemed to give wide latitude to the contract administrator.
5. The Approving Officer in a section 9(e) - 9(d) review properly considers the experience of the parties in all prior contract periods during which stumpage rates were not established by competitive bidding.
6. The action taken by the Approving Officer on the rate determination was not arbitrary and capricious, responsibility being to proceed on the basis of economic factors affecting the forest products industry of the region, not those involved in the operation of the purchaser who requested the rate review.

7. The utilization of values for the last quarter was prudent and reasonable and should be accepted.

8. Due to inflation and other post-bidding difficulties the appellant is entitled to a substantial increase over the \$55 - \$60 average production cost for Alaska region sales as reported by the United States Forest Service.

9. An increase of 40 percent brings a \$60 production cost per MBM up to \$84, the amount considered to be equitable under sections 9(e) and 9(d).

We hold that the preponderance of the evidence in the record supports the findings and recommended decision of the Administrative Law Judge. We adopt Judge Ratzman's decision which is hereto attached.

In his decision Judge Ratzman established the following rates per MBM as proper and reasonable under sections 9(e) and 9(d) to become effective as of June 1, 1974:

Sitka spruce \$279.80  
Western hemlock \$60.75.

Appellant contends there was no basis in fact or in law justifying the Administrative Law Judge, or the Interior Board of Indian Appeals determining rates which are higher than those appealed from by the appellant since these entire proceedings involved an appeal by the purchaser from values determined by the Bureau of Indian Affairs, and no cross appeal was made by the Bureau or by the Indian Community.

We find that this contention is without merit.

It has been consistently held that the Secretary of the Interior in the exercise of his authority is not limited in the scope of his review. Nor is the Board of Indian Appeals or the Administrative Law Judge who as authorized representatives of the Secretary are responsible for the full and final disposition of such matters in accordance with law and equity.

We find no merit to any of the other contentions raised against the findings and decision of Judge Ratzman.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR

4.1(2), the decision of the Commissioner of Indian Affairs is AFFIRMED and MODIFIED in accordance with the adopted findings and decision of Judge Ratzman, dated June 16, 1976, and the appeal is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

\_\_\_\_\_  
//original signed  
Mitchell J. Sabagh  
Administrative Judge

We concur:

\_\_\_\_\_  
//original signed  
Alexander H. Wilson  
Administrative Judge

\_\_\_\_\_  
//original signed  
Wm. Philip Horton  
Board Member

Attachment



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
HEARINGS DIVISION  
ROOM W-2426, 2800 COTTAGE WAY  
SACRAMENTO, CALIFORNIA 95825

June 16, 1976

ADMINISTRATIVE APPEAL OF :  
ALBERT J. FIRCHAU :  
UNDER CONTRACT NO. : IBIA 75-20-A  
E00C14200696 :  
(METLAKATLA INDIAN COMMUNITY) :

## FINDINGS AND RECOMMENDED DECISION

This contract dispute was referred for a hearing and recommended decision by an order of the Interior Board of Indian Appeals dated April 22, 1975. Hearing sessions were held in Ketchikan, Alaska and Seattle, Washington. Accompanied by representatives of the parties, and the attorneys who participated in the hearing, the undersigned Administrative Law Judge inspected major portions of the Annette Island timber sale area on August 26, 1975. The final item included in the case record was a brief submitted on May 26, 1976.

The Metlakatla Indian Community, a group residing on Annette Island in southeastern Alaska, entered into a timber sale agreement as of January 7, 1972, with Mr. Albert J. Firchau. Under the agreement, which was approved by the Deputy Commissioner of Indian Affairs, the purchaser was to cut and pay for designated timber (an estimated volume of approximately 40,000,000 board feet) on or before December 31, 1975.

Under the contract the purchaser (Firchau) was to cut and pay for not less than five million board feet during calendar year 1972, and not less than twelve million board feet during each subsequent calendar year. Section 13(b) of the contract stated that a volume of sixteen million board feet was the maximum quantity to be cut in any one calendar year. It follows that the parties contemplated originally that timber harvesting would take place over a three calendar year period if the maximum volumes were cut, or over a four calendar year period if Mr. Firchau decided to cut the minimum annual volumes allowed by the cutting schedule.

The dispute between the parties over prices involves two species of sawlogs -- Sitka spruce and western hemlock. The appellant's post-hearing brief acknowledges (page 7) that there is no basic dispute in regard to

cedar prices because the volumes involved are insignificant. Section 7 of the contract states that the estimated total volumes of spruce and hemlock designated for cutting are 8,690,000 and 29,376,000 board feet, respectively.

The disagreement between the seller and purchaser is concerned principally with the following rate adjustment provisions:

"9. Stumpage Rates.

\* \* \* \* \*

(b) Annual Determination of Stumpage Rates. For the annual periods following the one in which this contract is approved, stumpage rates shall be adjusted by the procedures set forth as follows:

In order to determine the stumpage rates to be paid for the timber cut under this contract, it is agreed that the Bureau of Indian Affairs has calculated, for each species, the average log grade percentages cut to August 31, 1970, on Annette Island weighted with the estimated log grade percentages of the Annette Bay Logging Unit. Average log grade percentages so derived are as follows:

<u>Species</u>	<u>Grade</u>	<u>Average Grade Percent</u>
* * *	* * *	
Western hemlock	Peeler & Select	1.20
	No. 1	7.20
	No. 2	52.30
	No. 3	39.30
* * *	* * *	
Sitka spruce	Peeler & Select	8.40
	No. 1	13.30
	No. 2	58.10
	No. 3	20.20

It is further agreed the Bureau of Indian Affairs has calculated, for each species, from information published by the Industrial Forestry Association, the average prices paid by grade for logs sold on the Puget Sound Export Log Market during the months of April, May and June of 1971.

These values have been weighted with the selling values obtained from Region 10 U.S.F.S. Handbook 2425, Region 10, Amendment No. 17 dated December 1970. The following weighted average log prices for the months of April, May and June 1971 have been determined by application of these average log prices paid to the weighted average grade percent as set forth above.

<u>Species</u>	<u>Weighted Average Price per MBM</u>					
	*	*	*	*	*	*
Western hemlock				88.23		
	*	*	*	*	*	*
Sitka spruce				125.94		

The Approving Officer shall obtain from the Portland Area Office the annual average prices of export logs on the Puget Sound Market, which shall be the arithmetic average of the quarterly prices calculated from the published reports of the Industrial Forestry Association and the Approving Officer shall obtain from the U.S. Forest Service, Region 10, through its published reports or otherwise the average sale prices of Alaska logs, for each annual period during the life of this contract or any extension thereof, and shall calculate the average log price for each species on the same basis of the log grade percentages as those used in determining the weighted average log prices stipulated above.

To determine the rates which are to become effective for each annual period, the Approving Officer shall compare the weighted average log prices computed above with the corresponding weighted average log for the annual period just

passed, and shall increase or decrease the stumpage rate by 75 percent of the difference between these average log prices. The resulting stumpage rates shall be those paid for the timber actually scaled the succeeding annual period, except that in no case will the stumpage rates be reduced to less than rates shown in (c) below.

\* \* \* \* \*

(d) Adjustment of Stumpage Rates in the Event the U.S. Forest Service or Industrial Forestry Association log market information is not available. If the U.S. Forest Service or the Industrial Forestry Association log market information becomes unavailable for use in the procedure described in Section 9(b), the Approving Officer shall review the stumpage rates. If, as a result of such review, it appears equitable to consider changing the stumpage rates, the Approving Officer shall establish a 1-month period for consultations with the Seller and the Purchaser, either separately or collectively as circumstances and convenience permit. During the consultation period the parties may submit any appropriate facts or recommendations they may desire. As soon as practicable after the close of the consultations the Approving Officer shall evaluate the data submitted and, on the basis of such material and other available material that a prudent man would consider, either determine new stumpage rates or that no change should be made. The Approving Officer shall announce his decision and the basis upon which it is determined. In the event the decision provides for changed stumpage rates they shall become effective one month after the date of the announcement.

It is agreed that any consideration of changes in the stumpage rates in accordance with this section must be based on changes subsequent to the bidding time in production costs, forest product prices, or other economic factors affecting the forest products industry of the region in which the timber is located or be justified by the necessity for making equitable adjustments to meet situations

which were not recognized or anticipated at the time the timber was sold. It is understood that a decision at any time by the Approving Officer, either to change or not to change stumpage rates in accordance with this section, shall not affect his authority in any subsequent adjustment studies to consider any pertinent changes that have occurred since the timber was sold.

It is understood that the annual stumpage adjustments requirements of Section 9(b) shall have no application if revised stumpage rates are determined according to the procedure in this section and that the revised stumpage rates may be made effective without reference to annual periods. It is further understood that stumpage rates determined in accordance with this section shall not be changed more often than once in each calendar year.

(e) Further basis for review of stumpage rates. It is further understood that if the annual determination of stumpage rates described in Section 9(b) does not provide an acceptable basis for stumpage rate determinations, the Approving Officer may on his own motion or upon submission in writing by the Seller or the Purchaser of evidence satisfactory to the Approving Officer, review the stumpage rate, and proceed in accordance with the provisions of Section 9(d); provided that no review shall be initiated prior to the first stumpage rate determination under Section 9(b)."

The original contract (bid) prices were \$34.75 per MBM for Sitka spruce and \$9.00 for western hemlock. As the result of the application of Section 9(b) the rates were increased in early 1973 to \$45.49 for Sitka spruce and \$20.74 for western hemlock. These rates apparently were favorable from the standpoint of the purchaser since in April, 1973 he requested authorization to exceed the 16 million board feet annual limitation incorporated in the contract. The Community approved his request and a contract modification allowing cutting above the limit was approved by the Secretary of the Interior on May 8, 1973. As the result of this action, Mr. Firchau's "total cut in 1973 was about 23 million, where formerly it would [have been] limited to 16 million."  
Tr. 31.

On December 4, 1973, Mr. Firchau wrote to the B.I.A. Area Office asking that the price adjustment for 1974 be determined under Section 9(e) of the contract rather than 9(b). On December 14, the Area Director requested financial statements, log sales data and other information from the contractor. On February 8, 1974, the Area Director informed Mr. Firchau by letter that rates under Section 9(b) for calendar year 1974 were \$88.29 for western hemlock and \$291.49 for Sitka spruce. The letter also stated:

“. . . we are collecting and reviewing logging costs and log grade selling value to prepare a stumpage review under contract Section 9(e). We have requested that the Approving Officer establish the one month period for consultations with the seller and purchaser according to Section 9(d). Our request has not been authorized to date. However, we are hopeful that new rates will be approved, if justified, to become effective April 1, 1974."

The February 8, 1974 letter also advised the purchaser that his request to have rates fixed under a stumpage review retroactive to January 1, 1974 could "be accomplished only through a contract modification."

The B.I.A. Commissioner notified Mr. Firchau by telegram on February 12 that a review of contract stumpage rates would be made under Section 9(d), and established a one month consultation period which commenced on February 12, 1974. A letter dated March 5, 1974 from the Area Director to Mr. Firchau referred to meetings held in February and March, and forwarded "a copy of the final report of stumpage rate review prepared by our forestry staff."

On May 1, 1974, the B.I.A. Commissioner's Office sent the following message to the purchaser by telegram:

"After reviewing current stumpage rates under the Annette Bay Timber Sale Contract . . . and consultations with your representatives and the sellers, we find that the trend of economic conditions in the forest products industry subsequent to the time of bidding warrants the following rates, per MBM, for sawlogs: Sitka spruce \$271.06; western hemlock \$52.01 . . . . The above stumpage rates shall become effective one month after the date of this message."

The Area Director provided additional information on the effective date of the new rates in a letter to Mr. Firchau dated May 6, 1974. The May 6 letter advised that the higher 1974 rates which had been established under Section 9(b) would apply to timber scaled during the January 1, 1974 - May 31, 1974 period; however, it transmitted an "Addendum - Supplemental Agreement" which provided that the revised (lower) rates determined under 9(e) "will be effective May 1, 1974 rather than June 1, 1974" as the result of a waiver of the one month waiting period specified in the contract. The "Addendum - Supplemental Agreement" was never accepted by the purchaser.

The contractor's appeal, dated May 17, 1974, asserts that the Commissioner's May 1, 1974 determination specified stumpage prices for Sitka spruce and western hemlock which are too high. It alleges that the Commissioner's findings did not take into account the actual costs of logging in the [contract] area, that the B.I.A. did not deal in good faith because it considered only "arbitrary high prices in existence for three or four months in 1973" without taking into account much lower prices obtainable in 1974, and indicated that the contractor had "approximately \$3,000,000 worth of equipment [standing] idle at an interest cost of approximately \$25,000 per month."

The contractor offered to pay \$25 per thousand for western hemlock and \$75 per thousand for Sitka spruce. Notice of Appeal dated May 17, 1974 and letter to Mayor Guthrie of the Metlakatla Indian Community dated August 2, 1974.

Mr. Albert J. Firchau, the appellant, testified in support of his contention that the stumpage prices established in 1974 were "arbitrarily set way too high." Tr. 137. He has 35 years in the timber industry, and has bought timber, built roads and sold logs for the last 15 years. He has purchased large volumes of timber under many contracts with the U. S. Forest Service, and under agreements with states and private parties. He is president and sole owner of the company (Transcontinental) that held contracts to perform road building and logging on the Annette Bay Unit. Those contracts were executed with "Wasser and Winters on the first bunch of logs and with Indian Head Trading Company in 1973." Tr. 138. Wasser and Winter exchanged timber rights in 640 acres of land in the State of Washington to Mr. Firchau in a transaction which was made primarily for tax purposes. The trade involved approximately five million board feet of Annette Bay stumpage. Tr. 233 - 237.

Mr. Firchau purchased the Annette Bay timber personally, after making his own inspection. He also supervised the road building required for performance of the contract. Tr. 141.

The appellant has sold logs to Japanese concerns since "the first of the '50's," and has negotiated 30 to 50 contracts covering such sales. Tr. 143. The Firchau - Indian Head transaction covered stumpage acquired for a Japanese concern represented by Indian Head. Mr. Firchau testified that the market started falling off after the first five or six months of 1973, and that it was necessary to make a number of concessions to the Japanese clients of Indian Head in order to avoid a situation in which the Japanese "walked away" from the contract. Tr. 214. The Indian Head agreement was entered into on February 20, 1973. A copy of the agreement, Exhibit V, was added to the case record after the appellant made it available in accordance with a request made by the counsel for the Metlakatla Community. Tr. 190. The Japanese accepted approximately fifteen million board feet (logged by Transcontinental) under that agreement prior to its expiration date in the fall of 1973. At the time of the Seattle hearing, October 20, 1975, Indian Head, on behalf of the Japanese purchasers, had a \$204,000 claim pending against Mr. Firchau. Tr. 144. The claim relates to the quality of some of the delivered logs.

At the end of 1973 Mr Firchau had about six million board feet of logs. They were carried over into 1974, and there was a small amount of production in early 1974, to "square up" some corners. Tr. 145. Five million of the six carried over from 1973 were sold to a pulp mill, and in the summer of 1975 Indian Head accepted an additional volume of spruce and hemlock for the export market.

Mr. Firchau contends the export market was good during part of 1973, that it changed later in that year, and was "wiped out" in 1974. Tr. 146. Commenting upon the prices established by the B.I.A. for spruce and hemlock and his counter proposal he stated:

“. . . we realized that we had a sale to finish and actually had I given this amount [\$75 for spruce and \$25 for hemlock] . . . I had no sale for it at that time . . . the way the logging was and the prices . . . we couldn't afford to even have logged it if somebody had given it to us last year; or, this year is even worse. I mean because the price of machinery and all that's gone up. . . ." Tr. 147.

Prices received by the appellant in 1975 for export logs were: spruce, \$390; hemlock, \$240. The 1973 prices for logs sold domestically were in the \$90 - \$135 range. The appellant received prices higher than \$135 for logs sold to a pulp mill in 1974. Tr. 147 - 149. He asserted that if he paid the 1974 prices established by the B.I.A. for spruce

and hemlock he would have lost money "finishing up the contract." Tr. 152. He did not, either in his testimony or in records submitted in this proceeding, go into the question of his profit or loss on his 1972 sales, his 1973 sales, or on the entire contract volume of 40,000,000 feet.

From the standpoint of available equipment and personnel the timber that had not been cut at the beginning of 1974 could have been logged during that year. Tr. 155. Operation into another year might have been necessary to "get all the corners, and clean up." Tr. 162. Mr. Firchau estimates that the remaining (uncut) timber on the contract consists of four to five million board feet of export and four million board feet in the downgrade or sawlog category. Tr. 158, 185. His decision not to cut the remaining timber was partially based on his conclusion that it should be saved until the export market would accept it. Tr. 159.

In his discussion of increased prices for logging equipment, Mr. Firchau noted that 1974 Caterpillar equipment cost 30 to 35% more than similar equipment in 1973. He described the result of that price increase as follows:

“. . . with the sales I had down here, I had approximately \$2 million worth of Caterpillar equipment that I bought which I turned around and sold and I made quite a bit of money in just reselling new Caterpillar equipment I had ordered the year before, to do all these jobs." Tr. 163.

On October 9, 1973, the appellant purchased stumpage from private lands adjoining Dickman Bay on Prince Wales Island, approximately 30 miles west of Annette Island. Tr. 165; Exhibit 1. According to Mr. Firchau there is a volume of between four and five million board feet on the sale area. He considers the quality and species to be very comparable to Annette Island. For hemlock the stumpage prices were export, \$29.00, domestic, \$15.00, and pulp, \$1.00; for spruce they were export, \$45.00, domestic, \$15.00, and pulp, \$1.00. Page 1, Exhibit 1. Mr. Firchau believes that he could log the Dickman Bay timber "at much less cost" than the timber which he purchased from Metlakatla Community, because of favorable terrain and access conditions. Tr. 165. The Dickman Bay sale was made to Firchau after the seller's representative had negotiated with other prospective purchasers in an effort to obtain "the total amount of money he could possibly get." Tr. 227.

Mr. Firchau said he did not bid on the Chenango Mountain sale in 1975 because he considered the prices to be too high. In his view the purchaser of that Metlakatla stumpage can make a profit only if the log market changes "considerably from what it is now." Tr. 168. Further information on the Chenango Mountain sale is set forth on page 15, infra.

Mr. Firchau asserted that in 1974 export logs could not have been sold at any price because of excessively high inventories. He acknowledged that export logs were delivered under existing contracts. Sales under new contracts or on the open market were the ones that were difficult to negotiate. Tr. 211, 213. Because logs deteriorate and are attacked by insects when they are in storage, stockpiling an unsold inventory for more than two years can result in a substantial reduction in value. Tr. 168 - 170.

Transcontinental (or Firchau) had removed logging equipment from Annette Island between the summer of 1975 and October, 1975, and sold "quite a lot of it." Tr. 226. In the latter month one loader and skidder and two operable log trucks remained on the sale area. Tr. 187.

Some of the logs delivered by Transcontinental to Indian Head were "thrown back" to Firchau because Indian Head or its Japanese clients did not consider them to be acceptable export logs. When those logs were sold later to Ketchikan Pulp, the latter concern paid \$60 per thousand to Transcontinental for logging, and Mr. Firchau received the balance. Tr. 181. The appellant referred several times in his testimony to reluctance by Indian Head to accept logs under the 1973 agreement (Exhibit V) and "renegotiation" under that agreement. However, a fully detailed statement relating to the completion of that contract is not incorporated in the case record. He had known since 1953 that Japanese purchasers of export logs take the position that if conditions change the contract changes, and will "walk off" from a contract when market conditions weaken. Tr. 214.

In describing the efforts of the Firchau organization to sell logs in 1974, the appellant said:

“[prospective purchasers] maybe wanted to go in and pick out a few logs . . . of these we were selling over to the mill, and I can assure you that Mr. Wallace spent that whole year up there trying to merchandise -- trying to get rid of these logs, putting them in and selling them to the best place he could . . . if an exporter had given us a better price than the pulp mill, we'd have sold them to them. We were always looking for the best price. \* \* \* \*” Tr. 208.

The Bureau requested selling value data and a certified financial statement from Firchau in a letter dated December 14, 1973. Exhibit U. On June 18, 1974, the Bureau's Acting Area Director wrote to Mr. Firchau, repeating the request for a financial statement, and observing:

"The past audit of your records by our accountants was extremely difficult for all involved, because the sales reported were for only a portion of the period covered by the cost. This year's sales should also include as a separate item, the sale of logs which were not reported last year. The only sales information in your previous statement was for sales to Wasser and Winters company for the first 5,028,890 board feet from the Annette Bay Logging Unit."

When he was asked about his company's failure to furnish a certified statement, Mr. Firchau responded:

"Well, in getting into a certified -- and this is what they keep harping on all the time, and particularly Mr. Meeker . . . and this sort of arrangement we had here is virtually impossible. I tried to have Price-Waterhouse make me out one, but they said, 'It's impossible with all the ramifications, for us to certify a statement for you, I mean, without spending an awful, awful lot of money, and we don't think we can do it timely anyway.'" Tr. 245.

Upon cross-examination Mr. Firchau stressed that his principal objection to the Bureau's rate review is directed to the amount per thousand allowed for logging costs and road building. Tr. 251. He asserts that the \$60 per thousand agreed upon between Indian Head and Transcontinental for the cutting and yarding out of timber in 1973 resulted in a loss to Transcontinental. Tr. 252 - 254. When he was asked to generalize on the sales subsequent to 1973 of equipment which had been used on Annette Island he indicated that such sales had been made into a "bad climate of logging" and he could not recall making any money on such sales. He mentioned a D-9 Caterpillar which was purchased at the beginning of 1973 and sold at the end of one year's use for \$96,000. Most of the logging trucks have been sold. He mentioned sales for around \$40,500 each of trucks purchased by his firm in 1973. Tr. 255. In taking back a large slack line yarder from a subcontractor Mr. Firchau had allowed a credit of \$225,000 for that piece of equipment in settling accounts. That yarder was for sale in Seattle at the time of the October, 1975 hearing. Mr. Firchau said that for a "quick sale" he might have to accept a price as low as \$150,000 for it. Tr. 257.

Mr. Firchau's proposal for logging the remaining 20 - 25% of the stumpage at Annette Bay is as follows:

"Well . . . if one could stave off the logging for a while because of the market situation, you're trying to sell logs when there really isn't any market and not a demand. So I suppose . . . the main thing that should be done is [an arrangement to] let the timber set for 2 or 3 years if possible -- maybe go in and build the roads in anticipation of the market getting better . . . ." Tr. 352.

He suggested that the Metlakatla Community should take its base stumpage price first, and the profit be split after deduction of logging costs. As an example, he suggested base stumpage of \$9 on hemlock, with an additional return to the Community of \$25 if a \$50 profit on the sale of logs was realized. Tr. 353.

Mr. Warren Wood, a forest industry consultant, testified that he reported to Mr. Firchau in May, 1974 and in July, 1974 on what was happening in the world marketplace. Mr. Wood has a degree in forestry, has worked in that field for more than 35 years, and has been a consultant for approximately 10 years. Tr. 118 - 120. He furnishes professional advice in planning, wood utilization technology and market studies. He has worked in other countries in the last few years, but other than reviewing the prospects for marketing the Annette Bay stumpage has not had assignments in Alaska in recent years. Tr. 126.

Mr. Wood stated that when he was in Japan on other work in April, 1974, he "reviewed inventory levels" and "what the outcome was expected to be." Tr. 127. In early 1973 the Japanese log importers had agreed to a quota system applicable to logs from the United States. Mr. Wood has concluded that Japanese concerns placed very large orders for logs in order to establish preferred positions within the quota system. Tr. 135. The limits of the quota were to be established "from what the various companies did" during an 18 month period. Tr. 131. The appellant's consultant testified that this resulted in great increases in inventories of imported logs in Japan -- varying in August, 1974 from "over 300% of normal in the Southern Islands, to over 1,000% of normal on the North Islands." Tr. 128, 132. He based this statement on an August, 1974, report of the Japanese Government which "related only to the current situation in terms of what would be normal for that particular period." Tr. 132.

According to Mr. Wood the heavy Japanese purchases came at a time when the American housing market was "setting something of a record." The resulting seller's market fell off very rapidly in 1974. Sales that

were being reported in March through July, 1974 "had been contracted for at an earlier date, for the most part." There is a time lag between the time contracts are written and the product actually is delivered. Tr. 130.

The appellant's consultant did not furnish details as to prices obtained on the export market for logs from the Annette Bay sale. However, in discussing differences between the export and the domestic market he alluded to prices paid for logs going to Japan:

" . . . if they were paying \$280 a thousand for the same grade and species of log in 1971 or 1972, that they're now paying 271 or 2 or \$3 for; but in 1973 and part of 1974, they paid \$600 for the same grade and species; and I say the 600 is high, but if I, as a private mill operator, can buy Forest Service timber that is not exportable in the Willamette National Forest and can get that log delivered to my mill for \$120 -- because it is not exportable, then the \$270 is much higher than the 120 or 150 or whatever it might be. So the Japanese figure is relatively always higher than our own domestic market." Tr. 134.

The quota system established for Japanese exports was discontinued in the summer of 1975. Tr. 130.

Roger Sylvester, the Juneau Area Forester for the Bureau of Indian Affairs, testified at a hearing session on August 26, 1975, in support of the stumpage rate adjustment which is the subject of this appeal. Mr. Sylvester has a college degree in forestry and at the time of the hearing had more than 20 years experience in timber sales and the administration of timber contracts. He administered the Firchau contract and was familiar with the steps which were taken after Mr. Firchau's request for a review under Section 9(e) was approved. Tr. 8. He was dissatisfied with the information provided by the contractor in 1974, indicating that it was "not the kind that we specify." Tr. 9. Instead of a certified statement showing a total picture of selling values, costs, and profit and loss, Firchau submitted "a more or less cost statement with some sales made in 1972." Tr. 9.

Mr. Sylvester stated that action taken under Section 9(e) (which refers back to Section 9(d)) is not based solely on information provided by the contractor even when it is complete. It is necessary to consider selling values and costs which reflect the experience of the industry -- very low selling values or unusually high production costs reported by one

logging contractor would not be controlling. Also, "what happened in 1973 is the basis for adjustment in 1974." Tr. 10. At the time the rate review was made Mr. Firchau had not demonstrated that he sold logs in 1973 at prices that were different from those obtained by the B.I.A. from the Industrial Forestry Association and other sources. Tr. 15.

Mr. Sylvester described the most significant changes that were made as the result of the rate review. Instead of using the production cost average for Alaska logging operations obtained from the Forest Service, \$55 - \$60 per thousand, the rate review allows \$92.74 per thousand (the contractor asserts that his actual logging costs during the 1973 season were \$147 per thousand). Because the price trend for stumpage was downward in 1973, the IFA index prices for export logs and Forest Service selling values for local use logs reported for the fourth quarter of 1973 were utilized in the B.I.A. calculations, rather than the averages for the entire year, which are used when a determination is prepared under Section 9(b). Tr. 13. Justification existed for using the actual grade recovery, which was better than that anticipated in the contract, and for taking into account the introduction of a special mill log grade, which was added to the grading system after the original appraisal. These developments increased the total amount realized by the contractor for Annette Bay Logs. However, the Section 9(e) rate review did not reflect the fact that he received these benefits. Tr. 17.

Mr. Firchau proposed a logging and hauling equipment depreciation allowance of more than \$70. According to Mr. Sylvester the Forest Service depreciation allowance for the same items on Alaskan logging operations during the same period was "around \$4 to \$5." Tr. 15. The B.I.A. depreciation calculations, summarized on page 16 of Exhibit O, allowed \$19.88.

As the result of the review the average rate for timber remaining on the Annette Bay contract was reduced from \$134.55 to \$103.06. Tr. 16. Mr. Sylvester estimates that a volume of 10,660,000 board feet remains to be cut (the contractor does not agree with this estimate). Using Mr. Sylvester's estimate, as the result of the rate review the appellant would have paid approximately \$335,000 less for the remaining stumpage than he would have paid under the original 1974 (Section 9(b)) adjustment. The rates offered by Mr. Firchau would require an additional reduction of more than \$710,000 in the amount payable to Metlakatla Community. The totals given above are based on the assumption that percentages of species and grade distributions will correspond to those for the timber which has been severed under the contract. Tr. 44.

Although he left a great deal of logging equipment and other facilities on Annette Island during 1974 and at least into the fall of 1975, Mr. Firchau has not logged the timber which is the subject of the disputed

rate review. Mr. Sylvester testified that Mr. Firchau "could have gone ahead and finished his contract while we are arguing rates. This has happened in our sales." Tr. 20.

No calculation of Firchau production costs was made in the spring of 1973, when approval was given to increase the 1973 cut from 16 million to 23 million. Tr. 32. Selling values "went quite high" during the period of performance of the requested additional logging. Tr. 49. Mr. Sylvester expressed the view that there was "no indication that the market would be like it was," but the B.I.A. "probably should have made a stumpage readjustment in the middle of the year [1973]." Tr. 78.

As an example of stumpage prices obtainable in the summer of 1975, the B.I.A. introduced the Chenango Mountain Logging Unit sale contract (Exhibit T). That contract provides for the sale of approximately seven million board feet of timber on Annette Island. The sale area is "on the other side of the mountain" closer to Metlakatla "by about three miles." Tr. 34. An existing road can be utilized, which limits the necessity for building new access roads to "something like two miles of main haul road and maybe two miles of spur road." Tr. 35. The bid was accepted on June 23, 1975. The purchaser, Johnson-Byers, had contracted for timber in other areas of Alaska, and "they pay their bills." Tr. 35.

The Chenango Mountain sale has 30% Sitka spruce compared to 23% on the Firchau sale; in other respects Mr. Sylvester considers the sales to be similar. He stated:

"The amount of road left to be built by Mr. Firchau to get to his timber and the amount of road to be built to this one, this steepness, is similar. The volume per acre may be a little higher in this sale, but I am not positive of that. Generally, it's the same type of logging." Tr. 36.

The prices paid by Johnson-Byers for the Chenango Mountain stumpage were \$147.60 per thousand for Sitka spruce and \$68.10 for western hemlock and other species. Page 4, Exhibit T. In cost development calculations prepared for that sale the B.I.A. Forest Officer determined a total logging cost for 1975 of \$98.73. This was carried over into minimum appraised stumpage rates which were identical to the prices bid by Johnson-Byers. Page 26, Exhibit T. A professional forester had cruised the Chenango Mountain sale before Johnson-Byers made its bid. By the fall of 1975 the company had submitted its advance deposit and moved equipment into the sale area. Tr. 258, 260.

Mr. Sylvester considers the adjusted rates which are the subject of this appeal to be fair and equitable to Firchau and to the Metlakatla Community over the duration of the contract. Tr. 40. He indicated that determinations relating to rate adjustments take into account the profit and cost structure over the entire life of the contract. Tr. 46. Mr. Sylvester attested to the correctness of the Forest Service figures on logging costs in Alaska (based on purchaser's records for 300 to 500 million board feet cut in one year), and stated that the value of equipment used in the logging industry had "held up very well" in the period between 1972 and August 26, 1975. Tr. 46.

Mr. Sylvester was questioned by the counsel for Metlakatla concerning selling values reported by the Industrial Forestry Association for various quarters in 1973. He gave as examples for spruce #2, export selling values of \$471.51 first quarter, \$375.05 second quarter and \$393.00 fourth quarter. Tr. 52.

Cross-examination of Mr. Sylvester regarding depreciation of approximately \$3,000,000 worth of equipment included the following inquiries and answers:

"Q. Now why did you take a two year life . . .

"A. Because he removed with this equipment in one year 23 million. The sale is 40 million. Therefore, he could in theory remove 46 million in two years.

\* \* \* \* \*

"Q. Well, now how much did he take out in 1972?

A. Approximately 4,800,000.

\* \* \* \* \*

Q. . . . you said you'd never seen 23 million taken out on Annette before [the reference is to production in 1973], and so you would say that was a rather substantial accomplishment . . . ?

A. Let's say we had never seen that much equipment there before either.

\* \* \* \* \*

Q. Well, there's no dispute between the two as to what equipment he had?

A. Not at the peak season. We don't say this equipment was there the whole period. Some of it didn't arrive until March of 1973."

Mr. Sylvester also made the following statements relating to equipment assigned to the contract:

"Well, the whole theory on two years was that the job could be completed in two with that amount of machinery. Whether he could have used half the machinery in theory and done it in four years, he wanted to lay off a year, he could have moved his machinery somewhere else. That would be his option. If he wanted to let it set there and depreciate for a year in anticipation that the selling values, say, would skyrocket again, leaving him an opportunity for another larger profit, he could do that. That would be his risk.

JUDGE RATZMAN: Well, in your view, with 11 million board feet remainder, what would have been the reasonable value of equipment to have left on the job, taking into account there was 1974 and 1975 as a period left under the contract for logging?

A. I would say half, if all the machinery can log 23 [million] in half, it should be able to log 11." Tr. 66, 67.

Mr. Sylvester contended that after 1973 there was too much equipment for the sale, and that Firchau "wouldn't need all that machinery to handle, say, 12." Tr. 68. He conceded that a constant or continuing need existed for some types of equipment, such as a boom boat. He also pointed out that the appellant has completed approximately nine miles of the 13 miles of logging road required for accomplishment of the contract. Tr. 330 - 332.

Mr. Sylvester took the position consistently that dramatic changes in selling values in one year are caught up with by adjustments made in the following year, indicating that use of 1973 selling values in the

Section 9(e) adjustment was proper and part of a contractual system under which the Metlakatla Community could offset the appellant's gains in 1973 with gains to the Community in 1974. Tr. 66, 71, 80, 81. He expressed his view on the rights of the Metlakatla Community as follows:

“. . . our trust responsibility is the only concern we have, that in the fact that we did not receive maybe adequate compensation in 1973, we anticipate to make it up on the balance, which is the way that contract is written with a one-year lag; and if we could back up and have quarterly adjustments, then we could probably say that we had come out on a trust responsibility -- all right, he had paid the proper rate at the proper time, but when you have a year lag in the contract, its not quite fair to our clients to say 'When the market's good, he can have it; and when the market's bad, we'll take it.' That would be our main objection, to just saying 'Well, so you can't sell it, you can go now.'" Tr. 334.

Mr. Victor Meeker, a forester in the Portland Area Office of the B.I.A., made a technical review of the disputed rate revision. Tr. 97. He has a Masters degree in forest management, and has worked for the B.I.A. for 25 years. Tr. 103. He described 9(b) adjustments as automatic, with calculations based on a formula set out in the contract. He testified that when a 9(e) adjustment is made, "the bargain made by the purchaser at the time of contracting" is considered. Tr. 98. In his view it is up to the purchaser to make profit on a timber sale contract by working efficiently and taking advantage of the market. Tr. 99. He would not use 9(e) to compensate a contractor because a market was good in one year and suddenly turned very bad -- he considers that to be the purchaser's risk. Tr. 100. A profit and risk factor is included in a B.I.A. timber sale appraisal, but, Mr. Meeker testified, the timber sale contract utilized by that agency does not guarantee a profit. Tr. 104. Over an eight year period he worked on many other similar rate reviews, and in the course of such assignments had obtained and made use of log sale information.

Mr. Meeker follows the log export market on a weekly basis. Tr. 313. The log sale volumes for export as reported by the Department of Commerce are as follows:

1971 : 2 billion board feet  
1972 : 2.8 billion board feet  
1973 : 2.8 billion board feet  
1974 : 2.3 billion board feet

At the hearing session held on October 21, 1975, Mr. Meeker stated that 1975 export shipments probably would "approximate the 1974 figures." He considers this to be a "tremendous volume for log export." He testified also that the trend of new sales transactions had been much the same as the figures listed for actual shipments. Tr. 314.

Mr Meeker described the B.I.A. request for Firchau financial statements and other records called for under the contract "as a continuing request made from Mr. Firchau for well over a year." The requests were made verbally and in writing.

General guidelines for the depreciation of logging equipment cover expected periods of life running from six to eight years. Mr. Meeker considered Annette Island operations, particularly the road building activity, to be hard operations. However, the B.I.A. foresters would not accept the appellant's assertion that all of the equipment was worn out in two years. On the subject of depreciation and the period to be utilized, he stated:

"[Firchau] demonstrated that [the entire unit could be logged in less than two years] by logging 23 million in 1973 with that equipment, and all that equipment was not there all that time. In applying a depreciation schedule, there are two parties to be concerned -- the stumpage owner and the purchaser; and it would be eminently unfair for the stumpage owner to take the depreciation of that equipment that had a life that would proceed beyond the time they're logging their stumpage.

\* \* \* \* \*

The U. S. Forest Service of Region X Alaska, in their guidelines state that depreciation schedules will be only straight lines -- straight line depreciation only will be allowed. Their standard guide is 8 years." Tr. 317.

Mr. Meeker agreed with the B.I.A. auditors that interest on capital investments is properly carried within the profit and risk allowance. Tr. 319. He confirmed that in the stumpage rate revision the log prices of the fourth quarter of 1973 "were used as the latest data available on log prices." Tr. 325. He pointed out that the fourth quarter prices were the lowest for any quarter in 1973. When the appellant's counsel asked him why he used any of those prices, Mr. Meeker responded:

"What other prices would you use?" Tr. 326.

He observed that they were the latest export market log transaction prices available at the time the review was made.

Mr. Donald H. Dirr is a retired auditor who worked six years for the U. S. General Accounting Office and eighteen years for the Bureau of Indian Affairs. In January, 1974, he and another B.I.A. auditor, Dean Stuck, went to obtain information from the appellant. The information requested at that time "was the detailed logging costs that he [Firchau] had in his logging operations on Annette Island and . . . access to the invoices covering the sales from the Annette Island." They requested sales information and received some copies of invoices of log sales to Ketchikan Pulp. Tr. 269. Those invoices covered one-fourth to one-fifth of total sales at that time. Information on the other sales was not provided. I.R.S. tax statements also were requested. Tr. 271.

Mr. Stuck has an accounting degree, is a certified public accountant, and had eight years accounting experience prior to obtaining a position with the B.I.A. Tr. 273. He spent about two days in the appellant's office in an effort to review costs (the costs were those of Transcontinental, the logging firm). Tr. 110. He checked the cost of equipment, but not interest rates, because such rates are not costs which are used in developing stumpage rates. Tr. 111. The costs that he collected were for the year ending May 31, 1973. He did not conduct a complete audit, but traced some costs through the general ledger to invoices. Tr. 113, 284. The cost information collected by Mr. Stuck was furnished to the B.I.A. foresters.

Mr. Firchau did not furnish invoices covering the Indian Head sale to the auditors. His explanation for withholding those invoices was that the Indian Head sale was in dispute and they would not be meaningful.

Mr. Stuck asked for depreciation schedules, which would have been part of the income tax return, but never received them. Tr. 287, 289. The Firchau cost statement, which includes \$167 per thousand for depreciation, covers a period ending in February, 1973. Mr. Stuck's cost figures were calculated for a period ending in May, 1973. Tr. 290.

Mr. Stuck explained the accounting fundamentals and procedures under which he made relatively small additions to and deductions from costs claimed by the appellant. In addition, he explained that his computation of depreciation, based upon equipment life of four years, produced depreciation of \$83 per thousand rather than \$92 per thousand utilized by the foresters. Tr. 302. Because the residual value of equipment should be recognized he decided that Mr. Firchau's method of calculation was improper.

## ANALYSIS AND CONCLUSIONS

The contractor obtained, under the Annette Island timber sale agreement, the right to cut timber and dispose of logs over a period of three or four years. The prices to be paid during the first year were established by his bid. Government agencies, particularly those in the military departments, have utilized cost plus fixed fee and other types of cost plus contracts for many years. Federal regulations relating to the allowable types of cost plus contracts provide details in many areas, including cost principles, limitation of costs, overhead rates, and cost records. A keystone of the system which governs Federal civilian and military contracting is that cost plus a percentage of cost contracts are prohibited. This dispute involves a sale of property by a Federal agency acting in a fiduciary capacity. To construe Sections 9(d) and 9(e) in a manner that calls for primary consideration to be given to the purchaser's production costs, and the success or failure of the purchaser in disposing of the stumpage would lead directly to the evils of cost plus a percentage of cost contracting. This would not be a reasonable approach to adjustment of prices for the second, third or fourth years. Also, it is not suggested by the language of Sections 9(d) and 9(e).

A Section 9(e) adjustment of stumpage rates is initiated in a given year after the annual 9(b) determination for that year has been made and it has been found that the 9(b) determination "does not provide an acceptable basis for stumpage rate determinations." The agreement authorizes a 9(e) adjustment (it states that the Authorized Officer "may" review the rates) at a time when the parties know both the original average log prices and the corresponding prices for the annual period just passed (derived from Industrial Forestry Association and U.S. Forest Service reports or otherwise). Once the decision to carry out a Sec. 9(e) review has been made, the review process established in Sec. 9(d) is followed. The appellant's post-hearing brief suggests that at this point the market values determined to be proper under Sec. 9(b) should no longer be taken into consideration. It asserts that under the last paragraph of Sec 9(d) "the yearly price considerations which are required to be utilized under Section 9(b) simply are not appropriate." That paragraph states that "the annual stumpage adjustment requirements of Section 9(b) shall have no application if the 9(d) procedure is followed" and that "the revised stumpage rates may be effective without reference to annual periods." Its purpose obviously is to eliminate the time schedule which is set forth in Section 9(b) (tied to the first period ending December 3, 1972, established by Section 9(a)) and to permit the Approving Officer to ignore annual periods in setting effective dates for revised rates. It is true that a Section 9(d) review would serve no purpose if it was made on exactly the same basis Section 9(b) review. However, when the general language of the first two paragraphs of Section 9(d) is taken into account, plus the total design of the contract, the integrant of average prices received for logs during one or more quarters of the preceding year (in this case 1973) cannot be excluded.

I find that the Approving Officer established the one month period for consultations with the purchaser and seller which is part of the Section 9(e)/9(d) rate review process. The parties submitted facts and recommendations during that period. At that point the Approving Officer was empowered under the timber contract to "evaluate the data submitted and, on the basis of such material and other available material that a prudent man would consider" establish the new stumpage rates. The phrase "other available material that a prudent man would consider" must be deemed to give wide latitude to the contract administrator.

The heart of Section 9(d) consists of the guides provided for revisions made under that section. Any consideration of changes in stumpage rates must be based on:

“. . . changes subsequent to the bidding time in production costs, forest product prices, or other economic factors affecting the forest products industry of the region in which the timber is located . . . .”

As an alternative Section 9(d) provides that any such consideration of changes must "be justified by the necessity for making equitable adjustments to meet situations which were not recognized or anticipated at the time the timber was sold."

Several significant features of the Sec. 9(e)/9(d) rate determination process should be taken into account:

1. The evaluation of the data submitted by the parties and other available data is to be made as soon as practicable after the consultation period is closed.
2. Post-bidding or post-sale changes and justification are the ones to be considered. Thus, conditions which have not changed, such as steepness of terrain or the need to construct roads in rocky locations, are not grounds for a revision favorable to the purchaser -- in most instances he is able to inspect and evaluate them prior to bidding.
3. Section 9(e) states that the Section 9(e)/9(d) rate determination process shall not be utilized "prior to the first stumpage rate determination under Section 9(b)." Therefore it comes into play after (i) an initial period when operations under the contract have been carried out under rates established on the basis of a competitive bid, and (ii) a later period (or periods) of such operations where the applicable rates are pegged to average log prices for an earlier period as reported by designated organizations. This may be the

most practical system for handling multi-year timber contracts. However, it is obvious that it would allow one party to the contract to gain an improper and unwarranted advantage over the other in the absence of authority in the Approving Officer to exercise broad powers to equalize the overall results of earlier Section 9(b), 9(d), or 9(e)/9(d) determinations. A party who does not wish to invoke the extensive discretionary authority of the Approving Officer under the Section 9(e)/9(d) procedure has the option of accepting the Section 9(b) determination made for a given year.

I do not accept the "new ballgame" approach (page 10, Brief of Appellant), and find that the Approving Officer in a Section 9(e)/9(d) review properly considers the experience of the parties in all prior contract periods during which stumpage rates were not established by competitive bidding. There is testimony by a B.I.A. forester in the case record that other timber concerns have accepted increases of six to eight times the original stumpage rates under the B.I.A. contract language covering periodic stumpage rate redeterminations. What other purchasers may have done is of less importance than whether the Approving Officer's powers to redetermine rates are delineated within narrow or wide limits. I conclude that the contract does not provide for the narrow limits and subjective method of calculation urged by the appellant.

The appellant asserts that action taken by the Approving Officer on the rate determination was arbitrary and capricious. I find that it is Mr. Firchau, not the Approving Officer, who stands in that position. He has never submitted the requested depreciation schedules and certified financial statement, and did not disclose the prices paid under the Indian Head contract until the hearing. Under that contract prices for the three best grades of export spruce were in the range between \$740 and \$1040 per thousand; for the three best grades of export hemlock they were between \$350 and \$390. The reported sale prices for the five million board feet traded to Wasser and Winters in 1973 are suspect -- they are only a fraction of what Indian Head agreed to pay for the same species and grades in the same year. Since dollars were not involved, the parties to the trade had wide latitude to set values on the property traded. It may have been advantageous to both sides to report very low values. The other selling values furnished by the appellant in the winter of 1974 were for stumpage that was not in the export classification and was sold to Alaska concerns, or were related to 1972 and 1973 sales in the State of Washington, unassociated with the Annette Bay sale.

With good cause the B.I.A. auditors and the Approving Officer did not move far into the labyrinth of Mr. Firchau's dealings with Transcontinental, actions taken to obtain tax advantages, sales of used and unused logging equipment, and financing arrangements for purchases of equipment. Their responsibility was to proceed on the basis of economic factors affecting the forest products industry of the region, not those involved in the operation of the purchaser who requested the rate review. His experience relating to costs, prices and other economic factors would have been entitled to more consideration if he had been willing to tell the whole story.

Section 9(e)/9(d) Revisions  
Which Resulted in Lower Rates

The change in rates effected under the 1974 Section 9(e)/9(d) adjustment reduced the amount payable by the contractor by more than \$300,000. Under Section 9(b) the selling values to be used in a rate review are those reported for the entire immediately preceding year. Because the contract administrators found that selling values did slide during 1973, they utilized the values for the last quarter of that year. This action was favorable to the purchaser and related to a "change subsequent to the bidding time." I conclude that utilization of values for the last quarter was prudent and reasonable and should be accepted.

The purchaser's costs incorporated in the B.I.A. audit report were used in the Section 9(e)/9(d) rate review. This departs from the concept that an increase or reduction must be based on changes subsequent to bidding time or other economic factors affecting the forest products industry. Because Mr. Firchau may have placed more equipment on the job than was necessary, may have operated inefficiently, or may have increased costs through his complex arrangements with subsidiaries, subcontractors and independent contractors, we are faced with the undesirable features of cost plus a percentage of cost contracting. I find that due to inflation and other post-bidding difficulties the appellant is entitled to a substantial increase over the \$55 - \$60 average production cost for Alaska region sales as reported by the United States Forest Service. An increase of 40% brings a \$60 production cost per MBM up to \$84, the amount which I find to be equitable under Sections 9(e) and 9(d).

I conclude that the action taken by the B.I.A. auditors in establishing residual values for equipment and calculating depreciation followed accepted accounting practices. The appellant did not submit credible evidence in support of his assertion that increases should be made in the depreciation, development and salvage figures.

Another step taken in the Section 9(e)/9(d) review that was beneficial to the appellant was ignoring the fact that Firchau's actual grade recovery was better than the initially estimated recovery. A "special mill" log was introduced which allowed the purchaser to increase the selling values

of certain logs. It would seem that the Metlakatla Community rather than Mr. Firchau should have the benefit of the improvement in grade recovery. The case record does not provide information as to a specific stumpage rate increase that can be tied to the improved grade recovery. Therefore, I will not go beyond pointing out that the improvement and new "special mill" category operated to the appellant's advantage.

### Legal Considerations

The counsel for the Metlakatla Community refers in his Post-Trial Memorandum submitted on May 26, 1976, to the trust relationship between the United States Government and an Indian tribe, citing a number of cases. The Community's counsel asserts that this relationship requires the B.I.A. "to adjust those rates in accordance with the best interests of the Metlakatla Indian Community and to exercise its discretion under the terms of the contract giving the benefit of any doubts to the Tribe and not to the purchaser." I conclude that the outcome of this appeal if the contract administrators had no predisposition would be the same as if the B.I.A. assumed an overriding primary trust duty toward the Community. I have looked to the standards established in Section 9(d), and have tried to ascertain, from an objective standpoint, whether the Approving Officer made the Section 9(e)/9(d) rate determination in a prudent and reasonable manner.

From all indications Mr. Firchau had an exceptional year profit-wise in 1973, and in 1974 decided to dig in his heels and refuse to arrange for the cutting and disposal of the remaining eight or ten million board feet. Perhaps he concluded that losses sustained in litigating would be less than those resulting from completion of the contract. Since he left equipment on the sale area he may have hoped that export market delivery volumes would move back up to the 2.8 billion board feet totals recorded both in 1972 and 1973. Apparently he did not enter into contracts that gave him a share of the 2.3 billion board feet market (delivered volume) of 1974 -- Mr. Meeker described this as a tremendous volume. The Approving Officer's rate review took place in the early months of 1974, for the purpose of establishing rates that were to be in effect during the last eight or nine months of that year. Mr. Wood's description of a seller's market that fell off very rapidly in 1974, and his reference to sales reported in March through July, 1974 which had been contracted for at an earlier date only emphasize that Mr. Firchau did not make firm arrangements for disposal of all of the Annette Island stumpage when export prices were at their peak. Inability to operate at a profit due to a business downturn has not been treated as a condition beyond the control of a timber purchaser seeking an extension of time under its contract. Yuba River Lumber Co., Inc., IBLA 75-187, 19 IBLA 65 (1975). Similarly, a slide in stumpage prices will not warrant abandonment of the basic plan of the Firchau - Metlakatla contract -- that stumpage rates for the current operating period are fixed primarily on the basis of average prices

paid in the immediately preceding period. A party who realizes great gains during several periods under rates established by this plan cannot quit the contract because the elements to be considered have turned to his disadvantage. The purpose of the Section 9(e)/9(d) procedure is to introduce a measure of equity into the rate revision process, not to guarantee a profit from each year's operations.

RULING ON THE ISSUE IN THIS APPEAL

The reliance placed by the Approving Officer on the purchaser's production costs was too great. The excessive production cost allowance resulted in rates that are inequitable from the Community's standpoint. I establish the following rates per MBM as proper and reasonable under Section 9(e) and 9(d):

Sitka spruce	\$279.80
Western hemlock	\$ 60.75

They are effective as of June 1, 1974, the date established in the notice to the appellant from the Acting Deputy Commissioner of Indian Affairs (May 1, 1974). Otherwise the Approving Officer followed the procedures set out in Sections 9(e) and 9(d) of the contract in a just and acceptable manner. For the reasons set forth above the appeal of Mr. Albert J. Firchau is denied.

\_\_\_\_\_  
//original signed  
Dean F. Ratzman  
Administrative Law Judge