

ALMA LeBARON, JR.

IBLA 76-408 Decided June 14, 1976

Appeal from a decision of the Ely (Nevada) District Office of the Bureau of Land Management (BLM) denying appellant's request for a partial refund of the purchase price paid under a contract for cash sale of vegetative resources.

Set aside and remanded.

1. Materials Act--Timber Sales and Disposals

Where a contract for the sale of vegetative resources (pine nuts) contains a disclaimer of warranty by the vendor (government) as to the quantity of resources sold, the parties are deemed to have contracted on the assumption that there was doubt as to the quantity, and the risk with respect to such factor must be considered to have been assumed by the purchaser as one of the elements of the bargain. Thus, the fact that the quantity of the resource available for harvesting turned out to be less than was expected at the time of contracting is not a basis for a claim to a refund.

2. Materials Act--Timber Sales and Disposals

Where appellant alleges a loss of vegetative resources (pine nuts) which he purchased occurring subsequent to the time of contracting and prior to severance, due to severe and unusual damage

by birds, and the contract of sale provides that the risk of loss shall remain in the government and not pass to purchaser until such vegetative resources have been severed or extracted, appellant's claim for a refund is governed by the risk of loss provision rather than a disclaimer of warranty as to quantity contained in a separate part of the contract.

APPEARANCES: Alma LeBaron, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This appeal is brought from a November 24, 1975, decision of the Ely (Nevada) District Office of the Bureau of Land Management (BLM) denying appellant's request for a refund of 25 percent of the purchase price paid by him pursuant to a contract (NV-040-VG6-2) for the cash sale of vegetative resources (pine nuts). Such contracts are authorized by the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (1970). Appellant requests a refund on the ground that his harvest of pine nuts was substantially less than expected due to a severe and unusual invasion of birds which ate many of the nuts before they could be harvested.

The BLM held that the government had expressly disclaimed any warranty as to the quantity or quality of the vegetative resources sold under the contract (Sec. 12 of the contract). The BLM further found that animal damage or loss is not encompassed within the provision of the contract to the effect that title to the vegetative resources remains in the government until severance and that risk of loss rests with the party holding title. No authority was cited by the BLM for this latter holding. The BLM stated that the risk of animal damage should have been taken into consideration when appellant prepared his bid.

Appellant asserts in his statement of reasons on appeal that Sec. 7 of the contract provides that title to the vegetative resources remains in the government until severance and that the risk of loss shall be borne by the party holding title. It is further contended by the appellant that the bird damage suffered was severe and unusual and constitutes just cause for a refund, as would the occurrence of an unseasonable snow or fire.

The issue raised by this appeal is whether the express disclaimer by the government of any warranty as to the quantity of vegetative resources sold under the contract precludes appellant from obtaining a refund of part of the purchase price where unusual damage from birds eating the product sold is alleged to preclude a full harvest of the product.

[1] The law developed regarding timber sales under the same statute clearly holds that where the contract of sale contains a specific disclaimer of warranty by the vendor (government) as to the quantity of timber sold, the parties are deemed to have contracted on the assumption that there was doubt as to the quantity. The risk with regard to such factor must be considered to have been assumed by the purchaser as one of the elements of the bargain. Lloyd L. Clark, 17 IBLA 201 (1974); John D. Huffman, 7 IBLA 190 (1972). Although published cases regarding sale of other vegetative resources are scarce, the presence of a similar disclaimer of warranty as to quantity in contracts for sale of such resources compels us to draw the same legal conclusion. Thus, appellant cannot base a claim for refund on the mere fact that the quantity of pine nuts available for harvesting turned out to be less than was expected at the time of entering into the contract.

However, the sale contract (Form 5450-1, September 1966) makes the following provision for allocation of the risk of loss between buyer and seller:

Sec. 7. Passage of Title and Risk of Loss. Title to the vegetative resource sold under this contract remain in Government and shall not pass to Purchaser until such vegetative resources have been severed or extracted. Risk of loss shall be borne by the party holding title, except that nothing herein shall be construed to relieve either party from liability for any breach of contract or any wrongful or negligent act.

(Emphasis in original.)

[2] In this case, appellant has alleged a loss, apparently prior to severance, of a substantial part of the product which he contracted to purchase due to an unusual intervention by birds which devoured the pine nuts before they were harvested. The cases in which a disclaimer of warranty as to quantity has been held to preclude a refund are those in which the purchaser has removed all of the available resources and the amount harvested has turned out to

be less than the amount thought to be available at the time of contracting. Lloyd L. Clark, supra; American Pozzolan Corp., 17 IBLA 105, 109 (1974). These cases can be distinguished from the present situation where, subsequent to contracting, a portion of the product which could otherwise be harvested is destroyed as a consequence of the unusual intervention of birds. Under the latter circumstances, the risk of loss provision of appellant's contract is invoked to determine liability for the loss. See Forest Management, Inc., A-31045 (February 6, 1970). 1/ Construing the contract otherwise would render the risk of loss provision of the contract nugatory. 2/

However, this conclusion itself does not establish that appellant is entitled to a refund. An important exception to the risk of loss provision in Sec. 7 of the contract (quoted above) exists where the loss arises from the negligence of a party to the contract. In such a case, the liability for the loss shall be borne by the negligent party. There are some indications in the case file that appellant may have waited an unusual length of time before commencing harvesting operations, that he may have elected to gamble on waiting for the pine cones to open before harvesting, and that the loss might have been avoided by prompt harvesting.

Negligence is ordinarily defined as the failure to exercise the standard of care which a reasonably prudent man would exercise in like circumstances where there is a foreseeable risk of harm to someone and a corresponding duty, which failure is the proximate cause of the loss suffered. 65 C.J.S. Negligence §§ 1, 2, 4, 103, and 104 (1966).

1/ This is consistent with the general rule that under a contract for the sale of crops, which party bears the risk of accidental loss or destruction of the crop, occurring after the contract is made, depends upon whether title has passed; the risk of loss generally follows the title. 87 ALR 2d Crops § 9 (1963). It has been held that a contract for the sale of crops itself did not have the effect of passing title to a fruit crop to the purchaser, and, therefore, the grower had to bear the loss or damage to the crop caused by frost while the fruit was still on the grower's trees. Hartley v. Lapidus & Holub Co., 216 F. 92 (8th Cir. 1914). 2/ We are mindful of the judicial doctrine of contra proferentum to the effect that where a contract is susceptible of two possible meanings, that which is least favorable to the party drafting the contract will be adopted. The Superior Oil Company, 12 IBLA 212, 224 (1973); 3 A. CORBIN, CONTRACTS, § 559 (1960). However, the contract terms in this case are not so ambiguous as to require resort to that doctrine.

Questions to be considered include whether there was a risk of harm or loss from improperly conducted harvesting operations (waiting too long) such as to impose a duty upon appellant. If there is a duty, then the question of whether appellant's conduct deviated substantially from the norm among commercial pine nut harvesters in the area is important. If appellant's conduct is found to have breached the reasonably prudent man standard, then the issue becomes one of proximate cause. If there was such a breach, was it the efficient cause of the pine nut loss? Was a loss resulting from appellant's conduct foreseeable? Was the incurred loss the natural and probable consequence of appellant's actions?

If these questions are answered in the affirmative, then appellant's claim must be rejected. If, on the other hand, appellant was not negligent and is entitled to a refund, then it appears that additional evidence will be necessary to establish the extent of the loss. Proof will be required as to the amount of resources lost which otherwise could have been harvested. The record does not clearly reflect either the quantity of pine nuts actually harvested or the quantity destroyed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further action consistent herewith.

Poindexter Lewis

Administrative Judge

Anne

We concur:

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge

