

Appeal from a decision of the Ely (Nevada) District Office of the Bureau of Land Management, denying appellant's request for a partial refund of the purchase price paid under a contract for cash sale of vegetative resources, NV-040-VG6-2.

Affirmed.

1. Administrative Procedure: Substantial Evidence--Materials Act--
Rules of Practice: Evidence--Timber Sales and Disposals

A party seeking a partial refund of the purchase price under the risk of loss provision of a contract for the cash sale of vegetative resources pursuant to the Materials Act of July 31, 1947, must present substantial evidence of the quantity of resources lost which otherwise would have been harvested.

APPEARANCES: Alma D. LeBaron, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This appeal is brought by Alma D. LeBaron, Jr., from a September 30, 1976, letter (decision) of the Ely, Nevada, District Office of the Bureau of Land Management (BLM). That decision rejected appellant's claim for a refund of 25 percent of the purchase price paid by him under 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 requested 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.

This is the second time that this case has been before us. The prior appeal was brought from a decision of the BLM holding recovery was barred by the provision of the sale contract containing an express disclaimer of warranty as to the quantity or quality of vegetative resources sold under the contract. 1/ It appears from the record that competitors bid by declaring the number of pounds they would pick rather than the price per pound and thus the contract poundage is a purely conjectural figure established by the contractor for which the government should bear no responsibility. We held in our prior decision, Alma LeBaron, Jr., 25 IBLA 164 (1976), that the disclaimer of warranty as to quantity did not automatically preclude appellant from recovery of part of the purchase price under the risk of loss provision of the contract. 2/ This was based on appellant's allegation of a loss of a substantial part of the product he contracted to purchase due to an unusual intervention by birds which devoured the pine nuts subsequent to contracting and before severance. Accordingly, the case was remanded for the BLM to consider whether appellant's loss was the result of negligence on his part (which would preclude recovery) and to provide appellant an opportunity to prove the amount of resources lost which otherwise would have been harvested.

The BLM provided appellant with an opportunity to submit further evidence on remand. Appellant did not provide evidence of the quantity of nuts destroyed which otherwise would have been harvested, although he reasserted that the bird damage was severe and unusual. Appellant contends that his action in waiting for the cones to open before severing and harvesting the pine nuts is common practice normally followed by commercial pine nut harvesters.

The BLM concluded in its decision on remand that the prudent man would have severed and gathered the cones prior to their opening rather than waiting for the cones to open to harvest the pine nuts. The BLM further concluded that the loss of nuts to wildlife is foreseeable when gathering is delayed until after the cones open. Finally, the BLM decision below noted that a loss of 25 percent of

1/ "Sec. 12. Disclaimer of Warranty. * * * Any warranty as to the quantity or quality of the vegetative resources sold hereunder is expressly disclaimed by Government."

2/ "Sec. 7. Passage of Title and Risk of Loss. Title to the vegetative resource [sic] 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.)

the number of pounds identified by appellant in his bid for the sale contract would require the presence of a bird population much larger than that actually observed at the time. The BLM held that because appellant had been negligent in his harvesting operation by waiting for the cones to open before gathering and because the appellant had not submitted evidence of the extent of the loss caused by the birds, his claim for a refund must be rejected.

Appellant in his statement of reasons for appeal essentially reiterates that he followed the common practice of commercial pine nut harvesters in waiting for the cones to open prior to harvesting.

[1] We find the failure of the appellant to produce evidence of the quantity of pine nuts lost to birds which otherwise would have been harvested to be dispositive of this appeal. An applicant asserting a claim to benefits pursuant to an Act of Congress has the burden of presenting sufficient evidence of his entitlement to such benefits. Jeanne Pierresteguy, 23 IBLA 358, 362 (1976); Gas Producing Enterprises, Inc., 15 IBLA 266, 268 (1974); Faydrex, Inc., 14 IBLA 195, 198 (1974); Tibor W. Fejer, 11 IBLA 166, 167 (1973). Appellant has not done this as he provides no basis for his estimate of a 25 percent loss of pine nuts. Thus, there is no basis upon which the requested relief can be granted.

Although the record is inconclusive as to whether appellant was negligent in failing to harvest the pine nuts prior to the time that the cones opened, there is little doubt as to the foreseeability of loss from birds or other predators resulting from allowing the cones to open prior to gathering. In view of this foreseeable loss, we have some doubt as to whether the prudent harvester of pine nuts would delay gathering of the cones until after they have opened. However, we find it unnecessary to decide this question in view of the lack of evidence as to the extent of any pine nut loss.

Therefore, 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 affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge

