

HOBIN LUMBER CO.

IBLA 81-751

Decided July 29, 1982

Appeal from decision of District Manager, Salem District, Oregon, Bureau of Land Management, denying requests for extension of time on timber sale contracts. OR-080-TS9-119, OR-080-TS9-139, OR-080-TS0-077.

Set aside and remanded.

1. Timber Sales and Disposals

BLM may properly deny a request for an extension of time for a timber sale contract where the purchaser asserts that the delay in cutting and removal was due to market fluctuations. However, where the Secretary has waived the regulations dealing with the term of timber sale contracts and extensions of time, thereby permitting uncompleted contracts to remain in effect past their expiration dates, an affected purchaser will be afforded a grace period on his right to cut and remove timber.

APPEARANCES: Leslie R. Hobin, president, and Gary R. Hobin, secretary- treasurer, Hobin Lumber Company, for appellant; Donald P. Lawton, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURKSI

The Hobin Lumber Company has appealed from a decision of the District Manager, Salem District, Oregon, Bureau of Land Management (BLM), dated April 1, 1981, denying requests for extensions of time for timber sale contracts, OR-080-TS9-119 (Horse Pasture), OR-080-TS9-139 (High Deck Thinning), and OR-080-TS0-077 (Swede Fork).

Appellant's three timber sale contracts were executed on May 24, 1979 (Horse Pasture), November 17, 1980 (Swede Fork), and July 9, 1979 (High Deck

Thinning). Pursuant to the contracts, appellant's right to cut and remove timber expired 36 months after the date of execution in the case of the Horse Pasture and High Deck Thinning contracts and 12 months after the date of execution in the case of the Swede Fork contract. Each of the contracts contains a clause, section 9, which provides for the granting of an extension of time for the right to cut and remove timber under the contract:

If Purchaser shows that delay in cutting and removal was due to causes beyond his control and without his fault or negligence, the Authorized Officer may grant an extension of time, not to exceed one year, upon written request of Purchaser. * * *
Market fluctuations shall not be cause for consideration of contract extensions.

Section 9 of the contract is identical to 43 CFR 5463.2, promulgated in June 1970. See 35 FR 9787 (June 13, 1970).

By letters dated March 2, 1981, prior to the expiration dates of the timber sale contracts, appellant requested an extension of 1 year for the right to cut and remove timber under its contracts "[d]ue to past, present, and dismal future economic outlooks in the lumber and housing industries." As of March 4, 1981, the record indicates that with the exception of a certain amount of road building and associated timber cutting and removal, no work had been done under any of the timber sale contracts.

In his April 1, 1981, decision, the BLM District Manager denied appellant's extension requests because both the terms of the contracts and 43 CFR 5463.2 prohibit the granting of such requests on the basis of "market fluctuations": "Without a Secretarial waiver of the regulations or other administrative contract relief, this office does not have the authority to grant the extensions requested * * *. To the best of our knowledge, no market relief is being proposed for BLM timber sale contract operations."

In its statement of reasons for appeal appellant contends that it has partly performed under the timber sale contracts, spending about \$80,000 to construct and improve roads, and that to refuse an extension would prevent it from recovering its investment. In addition, because there is "no present market" for its timber, owing to a "downturn" in the national economy, refusal to grant an extension would adversely affect appellant and, in turn, its employees, suppliers, and the local community. Appellant states that the absence of a market is beyond its control and without its fault or negligence.

In several cases, we have concluded that "a business depression is no excuse within the 'beyond control' exceptions contained in the exculpatory clause of a contract." Yuba River Lumber Co., Inc., 19 IBLA 65, 66 (1975), and cases cited therein. Accordingly, we have held that neither section 9 of the timber sale contract nor 43 CFR 5463.2 permit BLM to grant an extension

where the delay in cutting and removal under a contract was due to "the poor state of the economy." Id. BLM may properly deny a request for an extension of time in such circumstances. This is the situation here. Moreover, while we recognize that, in certain cases where the purchaser has substantially performed under a contract, granting an extension should be considered, see Timber Access Industries Co., Oregon 14-11-0001(9)-1328 (May 18, 1967), appellant has not demonstrated that it has substantially performed under its contracts. 1/

Nevertheless, information supplied to the Board by the Oregon State Office, BLM, pursuant to our inquiry, indicates that the Secretary has waived the relevant portions of the regulations, particularly 43 CFR 5463.1 which limits the term of timber sale contracts to 36 months or less, thereby permitting certain uncompleted contracts to remain in effect past their expiration dates. 2/ In a memorandum dated November 25, 1981, signed by the Director, BLM, and approved by the Assistant Secretary, Land and Water Resources, BLM afforded a grace period to holders of timber sale contracts scheduled to expire between October 1, 1981, and March 31, 1982, due to the "depressed timber economy" and the threat of imminent contract defaults. The grace period was to end April 1, 1982. The grace period was subsequently extended on March 16, 1982, to June 30, 1982. In Instruction Memorandum No. 82-164, Change 1, dated May 18, 1982, the Director, BLM, announced a further extension of the grace period on "all contracts executed prior to October 1, 1981." The grace period is to end December 31, 1983. We note that all of these actions were taken after the April 1981 BLM decision appealed herein.

All of appellant's timber sale contracts are affected by the Secretarial actions suspending the expiration dates of certain uncompleted contracts. Accordingly, while BLM's decision denying appellant's requests for extensions of time was proper, we conclude that appellant's right to cut and remove timber under its contracts has not expired and has been extended to December 31, 1983.

1/ In its response to appellant's statement of reasons for appeal, the Office of the Solicitor states that as of June 18, 1981, with respect to the Horse Pasture sale, appellant had removed no timber; with respect to the Swede Fork sale, appellant had removed no timber; and, with respect to the High Deck Thinning sale, appellant had removed only 12 percent of the timber. In contrast, the purchaser in Timber Access had removed 75 percent of the timber when it requested an extension.

2/ The Secretary also waived 43 CFR 5463.2 and 43 CFR 5473.1 which requires a written request for an extension prior to the contract expiration date and reappraisal as a condition for extension.

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 set aside and remanded for further action in accordance herewith.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

