

FRERES LUMBER CO., INC.

IBLA 86-431

Decided December 8, 1987

Appeal from a decision of the Oregon State Office, Bureau of Land Management, denying request for inclusion of timber sale contract in buy-out. OR 5470.

Affirmed.

1. Timber Sales and Disposals

In calculating the entitlement of a purchaser to a buy-out of BLM and Forest Service timber sale contracts under 43 CFR 5475.2-2(a), BLM may aggregate the total remaining volume of BLM contracts as of Jan. 1, 1982, as determined by BLM, and the total remaining volume of Forest Service contracts as of Jan. 1, 1982, as determined by the Forest Service in accordance with its regulations, in order to derive the total remaining volume of uncut timber under both types of contracts.

APPEARANCES: Alan I. Saltman, Esq., and Ruth G. Tiger, Esq., Washington, D.C., for appellant; Roger W. Nesbit, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Freres Lumber Co., Inc., (Freres) has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated January 21, 1986, denying appellant's request for inclusion of the Doris Road timber sale contract (Contract No. 0057) in a "buy-out" of appellant's existing BLM timber sale contracts.

On September 9, 1985, appellant filed with BLM an application for the buy-out of 65,292.6 thousand board feet (MBF) of timber, specifically designating two BLM timber sale contracts, Thomas Creek (Contract No. 0019) and Lone Spring (Contract No. 0064), for buy-out. ¹/ Appellant filed the application pursuant to section 2 of the Federal Timber Contract Payment Modification Act (FTCPMA), 16 U.S.C. § 618 (Supp. II 1984), and the Department's

¹/ On Sept. 9, 1985, appellant also filed with the Forest Service an application for the buy-out of 65,292.6 MBF of timber. In that application,

implementing regulations, 43 CFR Subpart 5475, in response to an "application package" sent to appellant by BLM containing a cover letter, application forms (Enclosure 1), and a list of seven qualifying BLM contracts (Enclosure 2). The list indicated with respect to each contract the "Unhailed Volume" as of January 1, 1982. BLM listed the total volume of those contracts as 29,310 MBF.

In its BLM application, appellant calculated its "volume entitlement" for purposes of a buy-out at 60,298 MBF, based on 55 percent of the total volume (109,633 MBF) of all defaulted "qualifying federal [timber sale] contracts," both BLM and Forest Service 2/ (Enclosure 1-2). The application stated that the volume entitlement could be exceeded by the volume of the smallest contract requested for buy-out "[i]f you cannot otherwise obtain your percentage volume eligible for buy-out and provided that you do not exceed 200 million board feet of buy-out" (Enclosure 1-4). The volume of the smallest BLM contract requested for buy-out at the time appellant filed its application was 5,370 MBF (Thomas Creek). Appellant's total entitlement was, thus, 65,668 MBF. As stated above, its buy-out volume request was 65,292.6 MBF.

By letter dated October 15, 1985, the Forest Service's Regional Forester, Pacific Northwest Region, notified appellant that its volume entitlement had been recalculated to be 56,849 MBF (55 percent of 103,362 MBF), due to a revision in the volume of remaining timber as of January 1, 1982, with respect to two of the Forest Service timber sale contracts, Echo (Contract No. 061505) and South Camp (Contract No. 038141). 3/ The Forest Service did not revise the volume of remaining timber with respect to any of the other timber sale contracts. The Regional Forester noted that, as a result of the revision, appellant had requested 8,444 MBF over its volume entitlement. Thus, he stated: "We dropped the Bull Horn Timber Sale since it was the smallest sale [5,322 MBF] to be bought out." Id. at 1.

In a letter dated October 25, 1985, BLM notified appellant of BLM's estimated determination of appellant's buy-out charge for BLM contracts. In making its calculations, BLM utilized the qualifying volume figure provided

fn. 1 (continued)

appellant reported in "Table I - Qualifying Contracts" the seven BLM timber sale contracts and 13 Forest Service timber sale contracts that it considered to be qualifying and, with respect to each contract, "Estimated Net Merchantable Sawtimber Volume as of 1/1/82." Of those 20 contracts, appellant sought the buy-out of two BLM contracts (Thomas Creek and Lone Spring) and six Forest Service contracts. Taken together, appellant's Forest Service and BLM applications sought the buy-out of 65,292.6 MBF. 2/ In accordance with the instructions on the application, appellant was to calculate "total volume (1/1/82 remaining volume) of all qualifying federal contracts which are not in default" (Enclosure 1-2). Appellant determined that the "1/1/82 remaining volume" was 29,310 MBF under seven BLM timber sale contracts and 80,323 MBF under 13 Forest Service timber sale contracts. 3/ Neither of those contracts was requested for buy-out by appellant.

by the Forest Service (74,052 MBF) for Forest Service contracts and its own figure of 29,310 MBF for BLM contracts for a total qualifying volume of 103,362 MBF.

On November 7, 1985, appellant filed a request with BLM, pursuant to 43 CFR 5475.1(b), for inclusion of the Doris Road BLM timber sale contract (4,039 MBF) in the BLM buy-out due to the deletion of the Bull Horn Forest Service contract. Appellant stated that with the inclusion of the Doris Road contract its total buy-out request was 64,009 MBF. Appellant asserted that its volume entitlement was 60,298 MBF (55 percent of 109,633 MBF), plus the smallest contract requested for buy-out, which was then the Doris Road contract (4,039 MBF). Appellant noted that its total buy-out request was less than its total entitlement of 64,337 MBF.

In its January 1986 decision, BLM denied appellant's request for inclusion of the Doris Road timber sale contract in the BLM buy-out, stating:

After consulting with the Forest Service, we find that Freres Lumber Company's total buy-out volume in the amount of 59,971 MBF [65,293 MBF - 5,322 MBF (Bull Horn Volume)] now exceeds its volume entitlement of 56,849 MBF [103,362 MBF x 0.55]. Therefore, we find that the Doris Road Sale is not eligible for buy-out even though the Forest Service Bull Horn Sale has been deleted from your application.

Along with its January 1986 decision, BLM sent appellant a buy-out agreement with respect to the Thomas Creek and Lone Spring timber sale contracts for review and signature by appellant. Appellant executed the buy-out agreement on February 17, 1986, and returned the agreement to BLM, stating in a cover letter that execution of the agreement was "without prejudice" to appellant's position that it was also entitled to buy-out the Doris Road timber sale contract.

In its statement of reasons for appeal (SOR), appellant contends that BLM's denial of its request for inclusion of the Doris Road timber sale contract in the BLM buy-out was based on a calculation of appellant's volume entitlement which is at variance with the applicable Departmental regulation, 43 CFR 5475.2-2(a), which provides:

A purchaser holding qualifying contracts with more than 27.3 million board feet of net merchantable timber shall be entitled to buy out up to 55 per centum of such timber volume up to a maximum of 200 million board feet. The total remaining volume on Bureau and Forest Service timber sale contracts as of January 1, 1982, as set forth in the appropriate agency's qualified timber sale contracts, shall be used to establish buy-out entitlement. [Emphasis added.]

Appellant argues that, under the regulation, BLM is required to calculate volume entitlement using the "total remaining volume as set forth in the BLM's and Forest Service's timber sale contracts as of January 1, 1982,

without adjustment" (SOR at 3). Appellant states that this "total remaining volume" was 109,633 MBF. Appellant contends that BLM, rather than relying on an assessment of "total remaining volume" under 43 CFR 5475.2-2(a), improperly relied on a Forest Service assessment of such volume under 36 CFR 223.175. Appellant states that the Forest Service regulation, in contrast to the BLM regulation, permits an "adjustment" of original sale volumes in the calculation of "total remaining volume" for purposes of a Forest Service buy-out of timber sale contracts 4/ (SOR at 3). The resulting "total remaining volume" under this Forest Service assessment, appellant notes, was 103,362 MBF. Appellant concludes that using the correct volume entitlement (55 percent of 109,633 MBF), plus the smallest contract requested for buy-out, appellant is entitled to inclusion of the Doris Road timber sale contract in the BLM buy-out.

BLM responded to appellant's statement of reasons, contending that BLM justifiably relied on the Forest Service's assessment of appellant's "total remaining volume" under appellant's Forest Service timber sale contracts and that BLM was not required to make its own independent determination of that volume. BLM argues that to require BLM to second-guess the Forest Service's assessment of "total remaining volume" might result in conflicting determinations of volume entitlement and, thus, conflicting allowable buy-outs under FTCPMA, as between BLM and the Forest Service. By contrast, reliance by each agency on the other agency's determination of volume entitlement under that agency's contracts, BLM asserts, precludes such "conflicting results" (Answer at 5).

[1] Section 2(a)(1) of FTCPMA, 16 U.S.C. § 618(a)(1) (Supp. II 1984), authorizes the Secretaries of the Interior and Agriculture to permit purchasers of qualifying timber sale contracts bid prior to January 1, 1982, and held as of June 1, 1984, to return a specified volume of such contracts to the Government upon payment of a buy-out charge. For a purchaser holding more than 27.3 million board feet of net merchantable sawtimber as of January 1, 1982, in qualifying contracts, section 2(a)(2)(B) of FTCPMA provides that the purchaser is entitled to buy-out "up to 55 per centum of such timber volume up to a maximum of two hundred million board feet." 16 U.S.C. § 618(a)(2)(B) (Supp. II 1984). In addition, section 2(a)(2)(D) of FTCPMA

4/ Appellant states that the difference in the applicable Forest Service and BLM regulations regarding volume entitlement is "not improper" (SOR at 3). In so saying, appellant points to an oral decision by the district court in North Side v. Block, No. 83-490 BU (D. Or. Sept. 13, 1985), in which the court stated, as quoted in appellant's SOR at page 3, that FTCPMA leaves "room for the adoption of one type of regulation by the Forest Service and another by the BLM because of their different methods and different history and different conditions." Appellant notes that this fact has been recognized by the Forest Service. See 50 FR 26660 (June 27, 1985); see also 49 FR 47512 (Dec. 5, 1984) (preamble to proposed BLM regulations). Thus, appellant concludes that there is "no legal basis for [BLM] to defer to the Forest Service's rules where the BLM rules validly differ and require a different result" (SOR at 4).

provides that the percentage limitation "may be exceeded by a volume amount not to exceed the volume of the smallest volume contract bought out by the purchaser if the purchaser could not otherwise attain his percentage * * * entitlement." 16 U.S.C. § 618(a)(2)(D) (Supp. II 1984). Finally, section 2(a)(6)(B) of FTCPMA provides for the promulgation of implementing regulations by the two Secretaries. 16 U.S.C. § 618(a)(6)(B) (Supp. II 1984).

Under section 2(a)(2)(B) of FTCPMA, the volume of timber which a purchaser is entitled to buy-out is described merely as 55 percent of the volume held "as of January 1, 1982, in qualifying contracts." 16 U.S.C. § 618(a)(2)(B) (Supp. II 1984). The legislative history of FTCPMA provides the following explanation:

The initial calculation which must be made is the volume of qualifying timber from which the purchaser's buy-out entitlement is calculated. The volume of timber is that volume remaining as of January 1, 1982 in contracts which qualify * * *.

If, for example, a contract for 5 million board feet of timber as estimated and stated by the agency were purchased in 1980, 1 million board feet were harvested during 1981, and the contract is currently held, the volume to be counted as qualifying would be 4 million board feet.

S. Rep. No. 596, 98th Cong., 2d Sess. 7-8, reprinted in 1984 U.S. Code Cong. & Ad. News 3796, 3800.

In implementing section 2(a)(2)(B) of FTCPMA, BLM essentially provided that the buy-out entitlement would be 55 percent of the "total remaining volume on Bureau and Forest Service timber sale contracts as of January 1, 1982." 43 CFR 5475.2-2(a). However, this regulation also included the language that "total remaining volume" would be "as set forth in the appropriate agency's qualified timber sale contracts." Id.

The comparable Forest Service regulation regarding volume entitlement provides that volume entitlement is to be calculated "based on the remaining net merchantable sawtimber volume, as of January 1, 1982," in qualifying Forest Service and BLM timber sale contracts. 36 CFR 223.173(a). This is, in essence, the "total remaining volume" referred to in 43 CFR 5475.2-2(a). However, from this point on, Forest Service regulations are clearly more explicit than 43 CFR 5475.2-2(a) in spelling out the method for calculating total remaining volume. The regulation at 36 CFR 223.175 provides two approaches to calculating the "remaining net merchantable sawtimber volume," depending on how much of that volume has been removed as of January 1, 1982. With respect to contracts where less than one-half of the advertised volume has been removed, 36 CFR 223.175(b) provides that the remaining volume "will be calculated by subtracting the net merchantable sawtimber volume removed as of the specified date from the advertised volume." With respect to contracts where one-half or more of the advertised volume has been removed, 36 CFR

223.175(c) provides that "the contracting officer will estimate the remaining net merchantable sawtimber volume." 5/

Appellant greatly emphasizes that the Forest Service regulations allow the adjustment of the estimated remaining net merchantable saw timber for the purposes of the buy-out of Forest Service timber sale contracts, but that BLM regulations allow no such adjustment. Counsel for BLM explains the difference on the basis of the variation in contracting procedures between the agencies:

Inasmuch as the Forest Service uses a scale sale form of contract, Forest Service contract administration does not need to keep track of the proportion of volume being harvested from the sale area. Payment is based on the scale of the timber as it is removed. Thus, no reliable record was readily available to the Forest Service of the remaining volume at any one time on its contracts. Therefore, in administering the buy-out program the Forest Service relied on the purchasers to report the remaining volumes, subject to verification and adjustment by the Forest Service. The BLM, on the other hand, because of the terms of payment in its lump sum form of contract does keep track of the proportion of the timber harvested from the sale area and for any point in time has records of the remaining volume on its contracts.

(Answer at 4).

In a supplemental brief appellant vigorously disagrees with BLM's claim that the Forest Service had no reliable records available. It states:

This is simply untrue. Since Forest Service sales are scaled (the timber removed is measured by the Forest Service and payment is based on the actual volume measured), the Forest Service has reliable records of the actual volume of timber that is removed from its sales. Thus, by subtracting the actual volume removed from the sale, as shown on the Forest Service's scaling records and as reflected in its timber sale statements of account (TSSAs), from the advertised volumes set forth in section A2 of the Forest Service's contracts, the volume remaining as set forth in the Forest Service's contracts is readily determinable. 3/

3/ There is no dispute as to the volume of timber which Freres removed from the Echo and South Camp sales prior to January 1, 1982. Nor is there any dispute concerning the timber volumes set forth in § A2 of the contracts. See supra note 2. [6/]

5/ The estimate derived by the contracting officer may, according to 36 CFR 223.175(c), be challenged by a purchaser by relying on a separate estimate derived by an "independent qualified party." However, that latter estimate is subject to "verification and agreement by the contracting officer." 36 CFR 223.175(c).

6/ At note 2 of its supplemental Brief at 4 appellant states that "[i]t is not disputed that as of January 1, 1982, Freres had cut and removed 5,536 MBF

Supplemental Brief at 5.

In any case, appellant's principal argument, best expressed in its supplemental brief, is that BLM, in accepting the Forest Service's calculation of total remaining volume under Forest Service contracts, where the Forest Service "adjusted" appellant's volume entitlement, rather than simply subtracting the volume cut from the advertised volume, violated 43 CFR 5475.2 and also ignored the intent of FTCPMA. It is appellant's contention that BLM was bound by 43 CFR 5475.2-2, as a duly promulgated regulation, to rely solely on the method of subtracting volumes cut from the advertised volumes. Appellant asserts that the purpose of FTCPMA is remedial, and as such, it should be liberally construed in favor of federal timber purchasers. BLM's interpretation, appellant claims, does not do so.

Appellant's argument, however, does not focus on the critical language of the regulation. That language is "total remaining volume." Clearly, the volume estimates in the timber contracts in question, all of which were bid prior to January 1, 1982, would not accurately reflect the remaining volume of timber on January 1, 1982, if any timber cutting had taken place prior to that date. ^{7/} "Total remaining volume" is a variable which is dependent on the volume of timber cut prior to January 1, 1982, on each of the individual sale areas. Review of the rulemaking leading to the promulgation of 43 CFR 5475.2-2(a) sheds no light on the rationale for the inclusion of the "as set forth" language contained in the regulation. The only reasonable interpretation which we can give for the inclusion of the "as set forth" language is that the Department intended that the advertised volumes set forth in each agency's contracts would be the starting point for calculating total remaining volume. However, neither the Act nor the regulation provided that BLM was required to make its own independent determination of total remaining volume under Forest Service contracts or that a particular method was to be used to get from advertised volumes to total remaining volume. We also note that the legislative history of FTCPMA, cited by appellant, merely provides that total remaining volume "normally is the volume estimated and stated by the agency when the contract originally was sold, less any volume cut, removed and paid for." S. Rep. No. 596, 98th Cong., 2d Sess. 10, reprinted

fn. 6 (continued)

from Echo and 7,987 MBF from South Camp. The advertised volumes for these two sales, which were never modified, were 10,900 MBF and 13,300 MBF, respectively. * * * Simple arithmetic demonstrates that there was 5,364 MBF remaining on Echo (10,900 MBF - 5,536 MBF = 5,364 MBF) and 5,313 MBF remaining on South Camp (13,300 MBF - 7,987 MBF = 5,313 MBF) on January 1, 1982 as set forth in the contracts." There is no evidence, however, that Freres challenged the downward adjustment by the Forest Service of the remaining volumes for the Echo and South Camp sales from 5,364 MBF to 1,208 MBF and from 5,313 MBF to 3,198 MBF, respectively.

^{7/} The qualifying BLM and Forest Service timber sale contracts used to calculate appellant's buy-out entitlement were bid between Sept. 28, 1976 and Dec. 18, 1981. See appellant's Forest Service Application for Contract Buy Out, "Table I - Qualifying Contracts."

in 1984 U.S. Code Cong. & Ad. News 3796, 3803 (Emphasis added). This statement does not preclude the use of other methods. The statute itself adopts no particular method of calculating total remaining volume. Accordingly, we conclude that BLM could justifiably rely on the Forest Service's calculation of total remaining volume under Forest Service contracts without violating either BLM regulations or FTCFMA.

BLM's procedure of adopting the "total remaining volume" figures provided by the Forest Service was clearly proper. 8/ There is no evidence that the Forest Service's method of calculating those figures conflicted with the requirements of FTCFMA. BLM's procedure is consistent with the intent of Congress that buy-out entitlements were "to be considered as applying to timber contracts with both agencies as a whole." S. Rep. No. 596, 98th Cong., 2d Sess. 9, reprinted in 1984 U.S. Code Cong. & Ad. News 3796, 3802. Thus, the Forest Service and BLM each determined the remaining volumes of timber on their own contracts, and each agency agreed to use those figures in establishing the total qualifying volume. This interpretation precluded conflicting results which would be the logical extension of the approach urged by appellant, which appellant admits. Supplemental Brief at 8.

Appellant's attempt to seek solace from the intent of FTCFMA is unfounded. That Act constituted a Congressional waiver of certain contractual rights of the United States. While it might be characterized as a remedial statute, there is no evidence that BLM's approach in this case has frustrated the intent of the Act. 9/ Moreover, BLM's construction of the regulation which is at the center of appellant's argument comports with the legislative history of the Act and with common sense.

Therefore, we conclude that BLM was justified in incorporating the Forest Service's determination of "total remaining volume" under Forest Service contracts (74,052 MBF) with BLM's determination of that volume under BLM contracts (29,310 MBF), thereby resulting in a "total remaining volume" under both types of contracts of 103,362 MBF. Based on that "total remaining volume," the resulting volume entitlement under 43 CFR 5475.2-2(a) was 56,849 MBF (55 percent of 103,362 MBF). With the inclusion of the Doris Road timber sale contract in the BLM buy-out, appellant's total buy-out request would, as appellant states, total 64,009 MBF. Given this, the correct volume entitlement (56,849 MBF) would be exceeded by a volume amount (7,160 MBF)

8/ In fact, according to BLM, reliance was the accepted practice in carrying out the buy-out program. At page 1 of an Aug. 19, 1986, affidavit appended to BLM's answer, Ken Mak, a BLM employee involved with processing buy-out applications, states that "one of the standard procedures was to request from the Forest Service its determination of remaining volumes on Forest Service contracts and to likewise inform the Forest Service of BLM's determination of remaining volumes on BLM contracts."

9/ BLM argues in its response to appellant's supplemental brief that, in fact, while the Act may be remedial it is not that type of remedial statute which courts typically have found entitled to a liberal construction, citing 3 Sutherland Statutory Construction § 60.02 (4th ed. 1974).

which exceeds the volume of the smallest volume contract (4,039 MBF) requested for buyout by the purchaser, in violation of section 2(a)(2)(D) of FTCPMA. Thus, we conclude that BLM properly denied appellant's request to include the Doris Road timber sale contract (Contract No. 0057) in the buy-out of existing BLM timber sale contracts.

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 affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

John H. Kelly, Administrative Judge

