POSTON LOGGING,	)	**AGBCA Nos. 99-143-R**
	)	**99-145-R**
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Alan I. Saltman	)	
Saltman & Stevens, PC	)	
Attorneys at Law	)	
1801 K Street, N. W.	)	
Washington, D. C. 20006	)	
	)	
Representing the Government:	)	
	)	
James L. Rosen	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery, 17th Floor	)	
San Francisco, California 94105-4511	)	

RULING ON PARTIES' MOTIONS FOR RECONSIDERATION

March 10, 2000

Before HOURY, POLLACK (presiding), and VERGILIO, Administrative Judges.

Opinion for the Board by Administrative Judge VERGILIO. Separate concurrence by Administrative Judge POLLACK.

VERGILIO, Administrative Judge.

This appeal arose under Contract No. 058302, between the Forest Service (FS), U. S. Department of Agriculture, and Poston Logging, of Sonora, California (Appellant). The contract was for the sale of timber from the Mi-Wok Ranger District of the Stanislaus National Forest in California, and was known as the Fraser Timber Sale. A dispute arose between the parties over whether the contract permitted the removal of certain timber. After the FS interpreted the contract to preclude cutting of the disputed timber, Appellant filed a $319,842 claim for lost profits and certain expenses, which was denied by the Contracting Officer (CO). Appellant filed a timely appeal.

After a hearing and briefing, the Board sustained the appeal and awarded the Appellant $167,911.60. The Board agreed with the contract interpretation of the Appellant, that the contract included the disputed timber. The Government had not exercised its termination rights in accordance with the contract provisions, such that the Government actions constituted a breach entitling the Appellant to damages supported in the record. The Board awarded the Appellant less than the amount it sought. Some of Appellant's figures (for logging and hauling costs) were not supported in the record. Others (for idle equipment costs and unabsorbed overhead) were not shown to have continued after the breach. That is, the record did not demonstrate that the Appellant did not utilize or could not have utilized the equipment or recovered those overhead costs through other work after the Government breached the contract. Poston Logging, AGBCA No. 97-168-1, 99-1 BCA ¶ 30,188.

The Appellant and Government have each filed a motion for reconsideration of the determination.

In its motion (AGBCA 99-143-R), Appellant maintains that the Board erred in calculating recoverable logging and hauling costs, and inappropriately denied recovery for idle equipment and unabsorbed overhead after the Government breach. The Board fashioned relief based upon the arguments and facts presented. The allegations of the Appellant do not demonstrate that reconsideration is appropriate or required. Timber Rock Reforestation, AGBCA No. 97-194-R, 98-1 ¶ 29,360; White Buffalo Construction, Inc., AGBCA No. 95-221-R, 96-1 BCA ¶ 28,050 (reconsideration is not intended to allow a party to reargue its position or provide information or argument which could have been provided while the record was open).

With its motion (AGBCA No. 99-145-R), the Government again attempts to limit its liability based upon its termination rights found in the contract. In support, it offers what it characterizes as "new" evidence -- the affidavit of a wildlife biologist who concludes that the cutting of the disputed timber would have been detrimental.

For the reasons set forth in the cases cited above, the Government has not supported a valid basis for reconsideration. Contrary to the assumptions of the Government, the Board did not limit the termination rights of the Government. During the entire time the record was open, the Government did not properly terminate the underlying contract. Further, the Forest Service Chief never made the findings and determinations required by the contract language to support a termination. Given this record, a retroactive termination to limit damages was not a viable defense.

DECISION

The Board denies the motions for reconsideration.

JOSEPH A. VERGILIO
Administrative Judge

We concur:

EDWARD HOURY	**HOWARD A. POLLACK**
Administrative Judge	**Administrative Judge**

Separate Opinion by Administrative Judge POLLACK.

This separate opinion represents my own additional remarks.

The FS has largely rested its Motion to Reconsider on the basis that the Board committed an alleged error of law when it determined that the FS could not retroactively invoke contract clauses CT8.2(2)(d) and CT9.52, and thereby limit Appellant's recovery to that allowed under such clauses. The FS states, "According to the doctrine of constructive termination, the Government may avoid common law damages for breach of contract by retroactively invoking a liability-limiting termination clause, if a termination according to such clause was available at the time of the breach, but unexercised." The FS asserts that is the case here and relies heavily upon College Point Boat Corp. v. United States, 267 U.S. 12 (1925) and Reservation Ranch v. United States, 39 Fed. Cl. 696 (1997), aff'd, 43 C.C.F. ¶ 77,532 (Fed. Cir. 1999) (nonprecedential).

For purposes of this opinion, I will refer to clause CT8.2(d) as the environmental clause and to the standard FAR termination for convenience clause as the T/C clause. It must be said at the outset, that the contract in issue contained no T/C clause, nor was one required by regulations.

THE ATTEMPTED RETROACTIVE USE OF THE ENVIRONMENTAL CLAUSE IN THIS CASE IS NOT SUPPORTED BY COLLEGE POINT AND ITS PROGENY

The FS has contended that it was entitled to retroactively terminate Appellant under clause 8.2(2)(d). Clause 8.2 provides:

> CT8.2 - Termination. (12/89) The Chief, Forest Service, by written notice, may terminate this contract, in whole or part, (1) to comply with a court order regardless of whether the sale is named in the order, upon a determination that the order would be applicable to conditions existing on the sale, or (2) upon a determination that the continuation of all or part of this contract would:
>
> (a) cause serious environmental degradation or resource damage;

(b) be significantly inconsistent with land management plans adopted or revised in accordance with Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended;

(c) cause serious damage to cultural resources pursuant to CT6.24;

(d) jeopardize the continued existence of Federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester.

Compensation for termination under this provision shall be calculated pursuant to CT9.5, except: compensation for termination under (1) shall be pursuant to 9.51, when included in this contract and compensation under 2(d) shall be calculated pursuant to CT 9.52 when included in this contract.

Clauses 9.5 and 9.52, cited in the above clause, each limit the compensation a contractor can recover under a termination. The clauses differ in that clause 9.5, the recovery clause, which is not triggered by 8.2(2)(d) but instead is used under subparagraphs (a) through (c), is more generous in the compensation allowed.

It is agreed by the parties that the California spotted owl is not a federally endangered or threatened species. Therefore, to exercise termination under clause 8.2(2)(d), the clause requires that the termination has to be made under the second portion of the clause and requires that the termination be made by the Chief, Forest Service. It conditions the Chief's action upon the Chief determining that the continuation of all or part of this contract would cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester. These conditions were not met at the time of the breach, nor during the briefing period, nor even today. There has been no determination by the Chief to terminate nor has the Chief either actually or constructively concluded that continuation of the contract would cause an unacceptable impact on a sensitive species. The evidence submitted by the FS through Mr. Beck's[1] February 1999 affidavit (information first filed with the FS motion), is solely the conclusion of Mr. Beck and cannot be constructively attributed to the Chief of the FS.

This timber sale was awarded in January 1996. As of March 1996, the parties were disputing whether the contract included or did not include the larger blue-marked trees. The matter was treated as a contract interpretation dispute at that time and continued to be treated in that manner through the hearing stage of proceedings. The legal defense of termination was first raised during briefing and was raised because the FS believed that the Court of Federal Claims' decision in Reservation

[1] Mr. Beck is a retired biologist with the Stanislaus National Forest and testified at the initial hearing as to State of California's guidelines regarding the California spotted owl. As part of the submission of its Motion for Reconsideration, the FS attached an affidavit by Mr. Beck, where he discussed the potential impact of having proceeded with the sale with the large trees and further concluded that the sale would have an adverse impact.

Ranch v. United States gave the FS the right to retroactively invoke the environmental termination clause, even though termination and cancellation had not been in issue in this case up to that point.

Essentially, the FS asks the Board to expand the body of case law so as to allow the FS to retroactively use its environmental termination clause to limit the FS liability in what is otherwise a contract interpretation case. The FS, relying on College Point and Reservation Ranch wants us, in this case, to give its environmental termination clause the same status and application as the courts have created for retroactive application of the T/C clause. What the FS asks is well beyond the scope of College Point and the cases which have relied upon it. Further, the dispute in this case presents an entirely different situation than what was before the court in Reservation Ranch. I know of no case which has applied the retroactive termination doctrine to a conditional non-fault termination, such as that which we have here.

College Point sets out the legal basis for the use of retroactive termination for convenience. In College Point, the Navy had ordered blasting mats just prior to the end of World War I. Within weeks of the order, the armistice ending the war was signed. The Navy thereupon contacted College Point and informed it that the mats would probably not be needed and suggested to College Point that College Point stop operations and asked it to submit a proposal for cancellation of the contract. The parties were unable to fully settle matters, and thereafter, College Point brought suit. It contended that the United States was under the ordinary liability of one who, having contracted for goods to be manufactured, without cause gives notice that it will not accept delivery; and that the United States was liable for the prospective profits.

In its analysis, the court pointed out that at the time the suit was filed, there had yet to be a cancellation of the contract. In fact, during negotiations the Navy actions were inconsistent with an intention to exercise a right of cancellation. The court stated in regards to the Navy, "As its efforts to procure consent to cancel proved futile, stopping the work was an anticipatory breach." The court continued that the contract did not contain a clause authorizing cancellation other than for default by the plaintiff, and there was no such default. The court, however, then pointed out that, "The United States actually did have an unconditional right to cancellation." The court pointed out that the right was by virtue of the Act under which the contract was made, where the Supreme Court in its earlier decision, Russell Motor Car Co. v. United States, 261 U.S. 514 (1921) had held that the right to cancel became, by implication, one of the terms of the contract. Neither the Navy nor the contractor, however, knew at the time of the cancellation in College Point that the Navy had such a right. With that backdrop, the court posed the question of whether the measure of damages recoverable for the breach would be the same as it would have been if the Government had not possessed the right of cancellation.

The Court, through Justice Brandeis, set out the applicable law as follows:

> A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination,

> recission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later. An unconditional right to cancel can be availed for the purpose of terminating a contract, even after suit is brought, unless some intervening change in the position of the other party renders that course inequitable.

267 U.S. at 15-16. (emphasis supplied)

The Court continued that the right to cancel was not lost by mere delay in exercising it; among other reasons, because the statute also conferred upon the Government the power to suspend the contract.

The current state of the law, relying on College Point is that in virtually all instances, courts or boards will constructively allow the Government to invoke the T/C clause to retroactively justify the Government actions, avoid breach, and limit liability, if the contract includes a T/C clause and the CO could have invoked the clause instead of terminating, rescinding, or repudiating the contract on some other invalid basis. John Reiner & Co. v. United States, 325 F.2d 438, 443-444 (Ct. Cl. 1963), G. C. Casebolt Co. v. United States, 190 Ct. Cl. 783, 421 F. 2d 710, 712 (1970). To qualify for retroactive application, the justification for using the clause had to exist at the time of the Government action. The justification had to be available and invokable at the time, but not used. College Point. Implicit in that requirement is that any prerequisites or conditions to the use of the clause had to be satisfied and in place at the time. Put another way, the right to cancel had to be unconditional. Such requirement was not met in this case.

The common thread in the T/C cases, relying on College Point, is that the clause (or statute) being invoked retroactively was a clause which allowed the Government to unconditionally terminate or cancel the contract. A review of the cases shows that where invoked, there were essentially no preconditions on the use of the clause (generally a T/C), other than the determination by the decision maker that the termination was in the best interest of the Government. There was no precondition or need on the part of the Government to establish qualifying facts or conditions before the clause could be used. But for a decision based on bad faith, parties, in signing a contract with a T/C clause, agree that the Government has a carte blanche right (but for few limitations) to end a contract and limit the financial liability of the Government through use of the T/C clause, should the Government so choose. That is different than the environmental clause in issue here.

Given that broad unconditional grant in the T/C clause allowing termination without cause (and a similar broad grant in the statute involved in College Point), courts have made the determination that they would allow the Government to retroactively invoke the T/C clause, even where the Government failed to utilize the clause because of ignorance or some other cause. As pointed out in College Point, the law had long allowed a party to defend an action of breach by establishing that the other party had also breached. The courts have chosen to extend that doctrine, in the case of Government contracts, to also allow the Government to transform an otherwise non-permitted cancellation action to one for convenience, when the Government had protected itself by including in its contract an unconditional termination for convenience clause.

Nothing in College Point, nor in the cases that have followed, have applied the doctrine of retroactive termination to a situation such as the one here. The doctrine has not been expanded or applied to cover situations where one must first make certain findings as preconditions before using the clause. Nor has the doctrine been applied, as is the case here, when at the time of the attempted retroactive cancellation, the conditions (a determination by the Chief) needed for such cancellation were not met. A necessary element to allowing a retroactive termination is that the justification for terminating existed and was in place at the time the court retroactively applied the termination right. In the case of the broadly worded T/C clause, justification (but for bad faith) is a given. Thus, ending a contract on a T/C is always available where the clause is in place and as such, the retroactive application of the T/C clause meets the criteria set out in College Point.

The environmental termination clause, which the FS attempts to equate with the T/C clause, presents a very different situation from the T/C clause. Here the contracting parties only agreed that the FS could use the environmental termination clause if certain conditions existed and if the termination was decided by the Chief, FS. Those were not immaterial requirements. Neither was met.

The FS takes the position that at all material times, it had justification to invoke the clause and that it is not necessary that the Chief acted on the clause. The justification to invoke the clause, as presented by the FS, is the facts and conclusions compiled by Mr. Beck in his affidavit. The FS in essence argues that the Board can constructively determine from Mr. Beck's affidavit, that the Chief would have terminated at the time rather than allow breach.

First, the FS minimizes the importance of the fact that the primary use of the environmental clause is not as a defense to limit compensation. Rather, the clause is a vehicle to be used under certain environmental conditions and can only be used upon a finding of one of a number of delineated situations. Second, what the FS calls in this case, its "existing justification," the findings of Mr. Beck, was not compiled until almost 3 years after the dispute arose and 2 years after the point that we identified as breach. The fact that Mr. Beck's analysis purports to address conditions in January 1997 (the time of breach) does not change the fact that his analysis is dated February 1999. Even then, I must point out that Mr. Beck is not the Chief, FS, nor do I find any evidence that he stands in that official's shoes. I do not know why the regulation requires termination under the clause to be determined by the Chief, rather than the CO. I must, however, assume that there is a reason for putting the discretion at the Chief level and will not find that to be immaterial. Here there has been no evidence that the Chief would have invoked the environmental clause.

Moreover, as the Appellant points out in its Reply to the FS Motion, even were we to conclude that we could make the determination that the Chief, FS, would have invoked the clause, we would still be faced with several variables. Each would materially change the outcome and bring about a different result from that asked for by the FS. As Appellant points out, the record is devoid of any evidence to show that the Chief would invoke clause 8.2 (d) rather than 8.2 (a) or (b). Section "(a)" deals with findings of environmental degradation or resource damage, while "(b)" deals with inconsistency with a land management plan. Should the determination to invoke the termination

clause turn on either of those alternatives, then the compensation formula changes dramatically (even if the termination was justified).

When all is said and done, in order for the Board to allow the FS to invoke the environmental clause in this case, I must accept the FS's post hoc analysis from Mr. Beck. I must conclude that notwithstanding creation of the analysis in February 1999, the same analysis would have been made in 1996/1997, and would have come to the same conclusions, had the FS realized that it had improperly interpreted the contract. Finally, to find for the FS, I must also conclude, without any evidence of contact with the Chief, FS, that had the dispute in issue been presented to the Chief, FS, he would have invoked the termination clause, would have deleted from the contract all of the large trees, and would have chosen to act under clause 2(d), which just happens to allow the most restrictions on dollar recovery. I do not believe that the courts, in creating the law of retroactive termination, intended it to be applied in a case requiring so much speculation and uncertainty.

Finally, the expansion of the retroactive application to a situation such as this opens potential integrity problems. To allow the FS to make its analysis and determination as to the existence or lack thereof, of an adverse impact on a sensitive species, at a point after the Board has rendered an adverse decision which will cost the FS money, inherently raises questions as to the motivation and accuracy of the adverse impact finding. It calls into question whether the determination of adverse impact was truly environmentally driven or dollar driven. I in no manner suggest that Mr. Beck or the FS have allowed the dollar impact to affect their determination in this case. I believe they have acted in good faith. Nevertheless, any environmental analysis made after the initial decision was made, does open a window to at least an appearance of potential impropriety in use of the clause.

THE USE OF THE CLAUSE CANNOT BE JUSTIFIED UNDER THE ALTERNATIVE TERMINATION FOR DEFAULT CASES

Among the cases cited by the FS as justifying its use of the environmental clause in this appeal, is the case of Pots Unlimited, Ltd., 600 F.2d 790 (Ct. Cl. 1979). Pots is an alternative basis of default case and has nothing to do with a non-fault based retroactive termination. Pots goes to the use by the Government of retroactive termination for default or retroactive justification of termination for default, where the Government had that remedy available but failed to exercise the power to terminate. As is the case with the body of law involving retroactive T/C, the doctrine of alternative basis for termination also finds its early support in College Point.

Pots involved a cancellation of a contract, suit for breach and the Government defending and winning on the basis that Pots had breached the contract. The Pots contract provided for termination by the Government "in case of default on the part of Pots to observe the conditions of this Agreement." After entering into the contract, problems arose that caused the Government to be concerned over several matters involving Pots'continuation on the contract. This led the Government to terminate the agreement. It appeared the termination was not done pursuant to a particular contract clause, but it was clear that at the time the Government terminated the contract, it had not been done for default. Pots then filed a petition in court alleging wrongful termination and

seeking damages. The Government raised as a defense, that Pots breached first by wrongfully selling pottery wheels on park property, which was a violation of the contract. The court found that the Government allegation as to the wrongful sale was correct and, on that basis, the court ruled in favor of the Government and upheld the termination. It did not appear that the Government was aware of the wrongful sales at the time of the termination, however, the court pointed out that "it is settled law that a party can justify a termination if there existed at the time an adequate cause, even if then unknown."

As is evident from its facts, Pots presents a very different set of circumstances then Poston. It and the other default cases are not applicable to this appeal. In Pots, all the court is doing is saying that it will not allow a contractor to benefit from an improper or imprudent Government cancellation, when the contractor, itself, has breached the contract. This appears to be a fair result and more important follows long held legal principles. There is no similar situation here. Poston did not breach, did not act wrongfully, nor did it take any action which can be used to excuse the Government from having to perform.

RESERVATION RANCH DOES NOT APPLY TO THIS FACT SITUATION

The FS relies heavily on Reservation Ranch. As we stated in our underlying decision, the issue in Reservation Ranch has nothing to do with retroactive use of the termination clause. Rather, in that case, the Chief, FS, canceled the contract under clause 8.2(2)(d) on the basis that operations would threaten the continued existence of a Federally listed threatened species. There is no question that the Chief in Reservation Ranch believed that there was an environmental problem and had decided to end the contract for that reason. In Reservation Ranch, the plaintiff challenged the FS decision and among other arguments, charged that there was not adequate evidence to support the Chief's jeopardy determination as to endangered species and thus the Chief's determination was not justified. In large measure, the plaintiff relied on determinations in a Fish and Wildlife (FWL) study (favorable to plaintiff's position), which the plaintiff said challenged the conclusion that there was the necessary environmental danger caused by continuation of the contract. In addressing that argument the court stated, in dicta, that even if the record was inadequate to support the Chief's determination (and it did not find that the record was inadequate), the adverse affect finding in the FS biological evaluation (prepared prior to the FWL recommendation) and prior to the Chief's decision, presented an independent adequate ground for cancellation under the alternative tier of 8.2(2)(d), which allowed for termination where the continuation of the contract would have an adverse impact on a sensitive species. While not addressed by the court, it should be noted that having an adverse impact on a sensitive species is a lesser and more easily reached standard or condition, than finding the threatened continued existence of a Federally listed threatened species (the basis of the Chief's determination in Reservation).

The Poston situation is significantly different from Reservation Ranch. Here, there was no decision by the Chief to invoke the clause. Here, there was no existing study, which would have justified the Chief's conclusion. Here the FS had not done a permitted act for the wrong reason.

EVEN WHERE THE RIGHT TO TERMINATE EXISTS, THE RIGHT CANNOT GO ON INDEFINITELY AND MUST BE EXERCISED WITHIN A REASONABLE TIME FRAME

If I accept the FS position in this appeal, I would be accepting the proposition that but for the formal close out of the contract, the Government retains the unfettered right to reach back and retroactively invoke a clause, even though use of that clause was not contemplated at the time by the parties. I do not believe that the right to retroactively use a clause, particularly the environmental termination clause, is without time limitation and in deciding when the Government can reach back there must be a rule of reason. Therefore, while I again stress that the conditional nature of the environmental termination clause clearly distinguishes it from the T/C clause, even were there to be some parallel, under the facts and timing of this case, the FS attempt to use the environmental clause and provide a justification came too late.[2]

_____

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D. C.
March 10, 2000.

---

[2] Retroactive application of the T/C clause is not without limits. In Maxima Corp. v. United States, 847 F. 2d 1549, 1553 (Fed. Cir. 1988), the court upheld the principle of retroactive termination, however, it refused to allow retroactive application because the contract was already considered closed.