ROESLER INDUSTRIAL DISTRIBUTING CO., INC.,	**AGBCA No. 97-139-1**
Appellant	
Representing the Appellant:	
Alan I. Saltman Ruth G. Tiger Saltman & Stevens, P.C. 1801 K Street, N. W. Washington, D. C. 20006	
Representing the Government:	
Jim Kauble Office of the General Counsel U. S. Department of Agriculture 1734 Federal Building 1220 S. W. Third Avenue Portland, Oregon 97204-2825	

DECISION OF THE BOARD OF CONTRACT APPEALS

December 23, 1999

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges

Opinion for the Board by Administrative Judge POLLACK.

This appeal arises out of Contract No. 075902, Sawyer Timber Sale, between the Forest Service (FS), U. S. Department of Agriculture, Mt. Baker-Snoqualmie National Forest, Washington, and Roesler Industrial Distributing Co., Inc., of Startup, Washington (Appellant).

Appellant claimed entitlement to $1,454,283 due to what it characterizes as the "wrongful deletion" by the Contracting Officer(CO) of Units 1 and 2 of the sale and for damages it claims it suffered because of "improper suspension" of operations for 360 days during years 1991, 1992, 1993 and 1994.

There were four harvest units in this sale. Early on, the FS suspended Appellant's operations in Units 1 and 2 because of the discovery of spotted owls within the harvest area. Thereafter, the FS deleted Units 1 and 2. The FS also suspended work at Units 3 and 4 and thereafter, made changes

to the work in those two units. The actions as to Units 3 and 4 related to the listing of the marbled murrelet as a threatened species under the Endangered Species Act of 1992. While the FS ultimately lifted the suspension on Units 3 and 4, it changed the method of cutting from clear-cut to partial cut.

On December 11, 1996, the CO issued a final decision on Appellant's claim. The decision was timely appealed and docketed by the Board on March 12, 1997. The parties then exchanged pleadings and began to engage in discovery.

By letter of August 11, 1997, in response to a letter from the Board regarding setting a hearing schedule, the Appellant advised the Board of its intention to file a Motion for Summary Judgment as to the dispute over Units 1 and 2 (Count I of Appellant's Complaint). In addition, counsel for Appellant advised the Board that the issues in the other three counts of Appellant's Complaint (which all concerned issues regarding the propriety of the FS suspension of the Sawyer contract following the listing of the marbled murrelet), were subjects of extensive discovery in Scott Timber Co. v. United States, Nos. 94-784C, 96-204C (COFC), which Appellant identified as a case involving 14 timber sale contracts, which were similarly suspended by the Government following the listing of the marbled murrelet. Appellant went on to explain that the predominant issues raised in Counts 2 through 4 of Appellant's Complaint in the Board appeal were also the subject of the cross-motions for summary judgment in Scott and that the motions in Scott had already been argued and were awaiting decision. Noting that resolution of the issues by the Court of Federal Claims would considerably narrow the litigation in the instant appeal, the Appellant requested that as a cost savings measure, the Board hold Counts II through IV in abeyance pending the decision in Scott.

The Board granted Appellant's request as to Counts II through IV and the parties then proceeded with discovery in Count I. As of November 1997, the court had not issued a decision in Scott and the parties advised that discovery in Count I was continuing.

On March 12, 1998, the Court of Federal Claims issued its decision in Scott and on March 26, 1998, the Government asked for reconsideration of portions of the court's ruling. Because of that motion, the parties again requested that the matter remain in abeyance, pending the court's ruling on reconsideration. The Board again agreed, and the parties were directed to keep the Board advised as to the status of the Scott Timber matter.

As of February 1999, there had still been no decision on the motion for reconsideration. In a letter of February 23, 1999, responding to a Board inquiry, the Board was advised that the parties were still awaiting a decision. Another telephone conference was held on March 3, 1999, to discuss moving forward with Count I. At that time, Appellant then raised the contention that Count I could be affected by an appeal on Reservation Ranch, 39 Fed. Cl. 696 (1997) which was presently before the Court of Appeals for the Federal Circuit. The Board expressed some doubt as to the applicability of Reservation Ranch, to Count I; however, the Board requested Appellant to set forth its position in writing. Appellant followed with a letter in which it explained how a decision could affect Count I as to both entitlement and damages and again asked that the matter be held in abeyance in order to relieve Appellant of the additional expense of proceeding with a hearing on Count I.

On June 3, 1999, the Court of Federal Claims issued its decision on the Motion for Reconsideration in Scott, ruling in favor of the Government. The Board then contacted the parties for another conference. In that conference of August 19, 1999, Appellant advised that it intended to appeal the Scott decision and again asked that the matter remain in abeyance, pending a decision by the Court of Appeals for the Federal Circuit. As to Count I, the Appellant again asked for matters to be held until the decision was rendered in Reservation Ranch. Appellant indicated that it was hoping that the Court of Appeals' decision in that case would either overturn the lower court decision or at least clarify certain matters. The Board and parties then discussed the request. Given the uncertainty as to when the Court of Appeals would render its decisions on either matter, the Board determined that a dismissal without prejudice under Rule 30 would be the most appropriate action. Counsel for both parties agreed, and Appellant thereafter confirmed its agreement by letter of that same date.

On September 9, 1999, in an unpublished order, the Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims decision in Reservation Ranch, 39 Fed. Cl. 696 (1997). On November 16, 1999, the Board held a telephone conference with the parties regarding the status of Count I, given the Reservation Ranch decision. Counsel for Appellant continued to request that Count I be dismissed without prejudice, along with the other counts. Counsel noted that the unpublished decision of the Court of Appeals gave little or no guidance as to certain issues involving the disputed contract clauses and that there were at least two other cases, closer to decision, which counsel hoped would clarify the issues and might render further action on Count I moot. Counsel for the FS agreed with her representations and concurred in dismissing Count I along with Counts II, III, and IV.

Under this Board's Rule 30, the Board may in its discretion dismiss an appeal without prejudice, where a matter is in a suspense status and the Board is unable to proceed with disposition for reasons outside the Board's control. In this case, the Board does not consider it prudent to proceed until resolution of the pending appeals in Scott and the other cases cited by Appellant.

DECISION

Under this Board's Rule 30, the dismissal is without prejudice to the restoration of the appeal when the cause for the suspension has been removed. Notwithstanding the above, unless either party or the Board acts within 3 years to reinstate this appeal, the dismissal shall be deemed with prejudice for all counts.

_____
HOWARD A. POLLACK
Administrative Judge

Concurring:

_____ _____
EDWARD HOURY **ANNE W. WESTBROOK**
Administrative Judge Administrative Judge

Issued at Washington, D. C.