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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189970 DATE: July 15, 1981

MATTER OF: Cedar River Watershed Area

DIGEST:

Although prior decision rendered at request of Forest Service holds that easement which grants to Government use of road system within watershed to transport timber from its lands within watershed "or tributary thereto" permits transport of Government timber from outside lands not in immediate proximity to watershed, new information indicates matter is much more complex than it first appeared. However, no clear showing has been made that prior decision was erroneous. Consequently GAO denies request to modify or overrule prior decision.

Mountain Tree Farm and the City of Seattle request that our decision, Cedar River Watershed Area, B-189970, December 16, 1977, 77-2 CPD 473, be reversed or "vacated" on grounds it fails to consider relevant evidence, mistakenly evaluates evidence which was considered and is contrary to law. Mountain Tree Farm is a wholly owned subsidiary of the Scott Paper Company and Weyerhaeuser Company which join in the request but, for convenience, the three companies will be referred to as Mountain Tree Farm.

As pointed out in our initial decision, the Cedar River Watershed area is subject to the Cedar River Watershed Cooperative Agreement (Cooperative Agreement), dated May 28, 1962, entered into by the U.S. Forest Service, Department of Agriculture, the City of Seattle and Mountain Tree Farm for the " * * * coordinated and orderly management of the participating forest properties

Request That Previous Decision Be Modified or Overruled

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within the Cedar River Watershed * * *." Under this agreement, an easement dated May 29, 1962, was granted to the Forest Service in the existing road system previously constructed and maintained by the City and Mountain Tree Farm. This easement was for the purpose of:

> "* * * relocating, realigning, reconstructing, improving, using and maintaining said road system and each of the several parts and segments thereof for all purposes deemed necessary or desirable in connection with the utilization, management, protection and administration of the lands of the United States and the resources thereof within the Cedar River Watershed or tributary thereto, except said purposes shall not encompass, as a matter of right, use of said roads by the public." (Emphasis added.)

The easement required the Forest Service and the purchasers of its timber to bear a share of the maintenance of the portions of the roads used in the same ratio that the timber they hauled bore to the total timber hauled over the same roads. The easement provided for termination at such time as the City acquired all of the lands within the watershed by exchange or otherwise pursuant to its long term objective of protecting the watershed as the source of water for the City. Several other easements were subsequently executed containing substantially the same language.

In return, the Forest Service issued a permit allowing the City and Mountain Tree Farm use of its road system within National Forest Lands in the watershed and paid $512,700 to Mountain Tree Farm and one dollar and "other valuable consideration" to the City as the price for the right to use the existing road system.

Our prior decision was in response to a request from a certifying officer of the Forest Service for an opinion pursuant to 31 U.S.C. § 82d (1976) as to the propriety of proposed payments to Mountain Tree Farm and the City for a "road use rental or toll fee" for hauling by purchasers of Forest Service timber from outside the Cedar River Watershed over roads within the watershed. Although he acknowledged there was nothing in the record specifically

defining the phrase "tributary thereto" as used in the easement, the certifying officer contended the intent of the Forest Service included having access for hauling its timber from outside the watershed over roads within the watershed without payment of any road rental fees or road tolls to the other parties to the agreement. The certifying officer set forth the contentions of the City and Mountain Tree Farm that a tributary relationship between the watershed area and lands outside exists only where such lands are in immediate proximity to the watershed area. Based on the facts presented, we decided that where the watershed roads provided the most feasible means of access to commercial markets for timber resources of the lands outside the watershed, a tributary relationship existed between such lands and the watershed even though such lands were not in immediate proximity to the watershed.

Although the certifying officer attempted to fairly present the positions of the other parties, the record contains no indication that the other parties were asked for their views or that they participated in any manner in the decision making process. When, as was the case here, a certifying officer is in doubt regarding the propriety of a particular payment on a voucher presented for certification the officer may request and receive an advance decision from our Office on any question of law regarding that payment. 31 U.S.C. § 82d, supra. Since such an advance decision is not binding on private parties there is no requirement that they be permitted to submit their views.

In view, however, of Mountain Tree Farm's contention that our conclusion that the "parties to the easement and reciprocal permits intended that the watershed road system could be utilized for the marketing of their timber regardless of whether the timber was cut from lands within or outside the watershed area" was not based on a consideration of the entire record and history of the Cooperative Agreement, we have now solicited the views of all the major parties: Mountain Tree Farm, the Forest Service and the City of Seattle. All the parties have submitted extensive documented briefs and all were represented at a conference held at this Office.

Both Mountain Tree Farm and the City maintain that the term "tributary thereto" is ambiguous on its face and therefore its definition must be in accord with the entire Cooperative Agreement and the intent of all the parties as

manifested by the interpretation of the parties placed on that term contemporaneously with the formation of the agreement and by the administration of the agreement over the years. In support of their position that consideration of these factors shows the disputed term was intended to encompass only minor volumes of timber closely adjacent to the watershed or specifically committed to that area at the time the 1962 Cooperative Agreement was signed, Mountain Tree Farm and the City have provided extensive arguments and documentation reaching back to an agreement between the City and private owners of timber in 1945. In addition to providing documentation which Mountain Tree Farm and the City argue shows that the Forest Service developed its view that it is entitled to haul significant outside timber over watershed roads several years after the 1962 Cooperative Agreement was signed and even then had serious doubts about the validity of that position, they also argue that the Cedar River Watershed Cooperative Protection Agreement executed by the City and the Forest Service also in 1962 under which the agency agreed to pay the City a fee for all timber hauled over City watershed roads for "fire protection" was actually an agreement for a toll for road use and contained clearly defined limits of the timber to be included in the Cooperative Agreement and in fact constituted the "other valuable consideration" cited in that agreement.

Mountain Tree Farm and the City conclude that since their positions and the extensive documentation supporting them were not before our Office when the 1977 decision was issued, that decision was wrong. Those parties believe that in view of the complexity of the matter and the need to resolve factual disputes, our Office is not the proper forum to decide this case. It is their view that this matter would be best settled by negotiation between the City, Mountain Tree Farm and the Forest Service or failing that, by a definitive resolution in court.

Although not disputing the fact that most of the documentation currently submitted by Mountain Tree Farm and the City was not before our Office when our prior decision was issued, the Forest Service maintains that this material should not alter our view of the matter. The agency disputes the other parties' conclusions and argues that the history of the Cooperative Agreement and its administration supports its view that the language of the easements and the Cooperative

Agreement and the intent of the Forest Service show that the agency has the right to haul timber from outside the watershed agreement area over the easement roads within the agreement area without paying tolls. The Forest Service seems to argue that the limit to the area from which it is entitled to haul timber over watershed roads is not fixed but is based upon economics of log hauling and road maintenance costs. The Forest Service states that it must have free access to these roads for hauling outside timber in order to save $3,300,000 in transportation costs and that it will ask the United States Department of Justice to take the matter to court if the other parties fail to follow our prior decision.

Although the documents and arguments now before us indicate that the dispute is much more complex and far reaching than the 1977 record indicated, it is not clear from the current record, which contains several factual disputes, that the Forest Service's position is without merit. Consequently, we cannot conclude that it has been shown that our 1977 decision was erroneous. Therefore, we will not overrule our prior decision. Rather, we think this matter is appropriate for treatment similar to that afforded doubtful claims, which, because of the doubt involved, we deny and instead leave the parties to pursue whatever remedy may be available in the courts, where sworn testimony, cross-examination and other fact-finding procedures are available. See Reiter-Compton Trucks, B-184924, September 1, 1976, 76-2 CPD 210; James J. Longwell v. United States, 17 Ct. Cl. 288 (1881); John H. Charles v. United States, 19 Ct. Cl. 316 (1884). The parties may, of course, attempt to resolve the matter through negotiation instead of immediately resorting to litigation. Should the parties do so, and should the Forest Service conclude that our 1977 decision does not reflect the actual intention and understanding of the parties at the time the agreement was entered into, it should at that time formally document its position and request us to overrule or modify the decision.

Milton J. Socolar

Acting Comptroller General
of the United States