



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED IN PART FOR LACK OF JURISDICTION;  
MOTIONS FOR SUMMARY RELIEF DENIED: April 21, 2010

CBCA 1779

NORTH WIND, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Margaret B. Hinman of North Wind, Inc., Idaho Falls, ID, counsel for Appellant.

Heather R. Hinton-Taylor, Office of the General Counsel, Department of Agriculture, Ogden, UT, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **BORWICK**.<sup>1</sup>

**DANIELS**, Board Judge.

The Department of Agriculture's Forest Service contracted with North Wind, Inc. for reconstruction of the Little Mill Campground and North Mill Day Use Area in the Uinta National Forest, Utah. In performing this contract, North Wind used more fill material from outside the site (called "select borrow") than specified in the contract or, the contractor says,

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<sup>1</sup> The appellant has elected the accelerated procedure, as permitted by 41 U.S.C. § 607(f) (2006) and Board Rule 53(a)(1) (48 CFR 6101.53(a)(1) (2009)). The decision is consequently being rendered by two judges, rather than a standard panel of three. Rule 53(b).

than it could reasonably have expected to use. North Wind seeks reimbursement for the cost of the additional material.

The Forest Service has filed a motion to dismiss part of the case for lack of jurisdiction and another motion to summarily deny the entire appeal. The motion to dismiss is granted, since the matter in question -- compensation for an alleged constructive change to the project design -- has never been presented to the contracting officer. The motion for summary relief, which addresses the original claim, is denied. Although we find the contractor's theories of the case to be confusingly intertwined, we are confident that facts on which this motion hinges are in dispute.

North Wind has asked us, in its own motion for summary relief in part, to conclude that it is entitled to some recovery (though it acknowledges that determination of the amount must come later). As with the Forest Service's motion for summary relief, we cannot grant the motion because factual disputes stand in the way.

#### Background

The parties have submitted voluminous proposed statements of uncontested facts. We include here the facts which are indeed uncontested.

The Forest Service awarded this contract on July 13, 2007, in the amount of \$1,764,994.94. Appeal File, Exhibit 1 at 307. The contract required North Wind, among other activities, to construct sub-grade for roads, parking lots, spurs, trails, and camp pads using suitable material from on-site sources, designated borrow sources, and commercial sources. After the sub-grade of the road was completed, the contractor was to place road base before putting concrete or asphalt on that base. Respondent's Statement of Uncontested Facts (RSUF) ¶ 11.

The contract incorporated by reference Federal Acquisition Regulation (FAR) clause 52.236-2, "Differing Site Conditions (Apr 1984)." Appeal File, Exhibit 1 at 21. This clause provides, in part:

- (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

48 CFR 52.236-2 (2007).

A pre-construction conference was held on July 13, 2007. During this conference, the Forest Service's contracting officer (CO) discussed, among other things, the contract's Differing Site Conditions clause. She explained that if North Wind thought that it encountered a differing site condition, it should immediately notify her before disturbing the site so that an investigation could be conducted. RSUF ¶ 7.

The contract included a schedule of pay items. The schedule identifies a specific pay item that is associated with a type of work. Each pay item identifies how the work will be measured for payment. Among the items are entries for select borrow. RSUF ¶ 10; Appeal File, Exhibit 1 at 6-10.

The contract incorporated designed quantities of select borrow that was needed to construct the sub-grade of the road by bringing the road and other elements up to the required sub-grade. North Wind was to obtain 1795 cubic yards (CY) of material from excavation activities, 142 CY from milled asphalt in abandoned parts of the site, and 275 CY from the demolition of an existing bridge. The contract anticipated that the contractor would bring to the site 1110 CY of material (plus another 440 CY for bridge construction) from a commercial source. The contract also provided that 2092 CY of road base would need to be imported for construction of the road and trail. RSUF ¶ 12.

The contract includes this provision for determining final payment for designed quantities:

DESIGNED QUANTITIES (DQ) - These quantities denote the final number or units to be paid for under the terms of the contract. They are based upon the original design data available prior to advertising the project. Original design data include the preliminary survey information, design assumptions, calculations, drawings, and the presentation in the contract. Changes in the number of units shown in the Schedule of Items may be authorized under any of the following conditions:

- a. As a result of changes in the work authorized by the CO.
- b. As a result of the CO determining that errors exist in the original design that cause a pay item quantity to change by 15 percent or more.
- c. As a result of the Contractor submitting to the CO a written request showing evidence of errors in the original design that cause a pay item quantity to change by 15 percent or more. The evidence must be verifiable and consist of calculations, drawings, or other data that show how the designed quantity is believed to be in error.

Appeal File, Exhibit 1 at 53.

North Wind began work under the contract on August 6, 2007. RSUF ¶ 9. The contractor engaged in clearing and grubbing activities -- removing trees, brush, shrubs, stumps, roots, and other vegetative material and debris -- from August 27 to September 27. *Id.* ¶ 14; *see also* Appellant's Statement of Uncontested Facts (ASUF) ¶ 7. It roughly graded the road between bridge 1 and bridge 2, as well as the road and parking area for group camping. RSUF ¶ 15; *see also* ASUF ¶ 9.

By October 1, North Wind estimated that it had removed 593 CY of material from the road cut between sites 10 and 11. RSUF ¶ 16. The contractor had 252.44 tons of road base delivered to the site. *Id.* ¶ 17. Between October 19 and November 17, 1030 CY (2042 tons) of fill were delivered to the site. *Id.* ¶ 20.

Between October 23 and November 14, North Wind poured the concrete for all the campsite pads (of which there were forty-two) except those for sites 12-17 and 28. RSUF ¶ 21; *see also id.* ¶ 23; ASUF ¶ 10.

North Wind started bridge work on November 20, and the contracting officer's representative (COR) limited winter activity on the site to bridge construction until project mobilization for the next construction season started on May 13, 2008. ASUF ¶ 11; RSUF ¶ 22. Between November 20, 2007, and March 28, 2008, 500 CY (985.82 tons) of road base material were delivered to the site for backfill relating to the bridge structures. RSUF ¶ 26.

On November 29, 2007, North Wind's construction project manager notified the CO that the contractor had already used more than 1110 CY of select borrow and informed her that more would be needed to complete the job. He wrote, "Many areas, most notably the group campground loop area, had to be over excavated through existing organic material to reach a suitable foundation to build concrete and asphalt structures. That over-excavation of unsuitable material resulted in a need for more backfill to reach subgrade." He also alerted the CO that "the road section approach off State Highway 92 onto Bridge 1 is

estimated to require an additional 700-1000 CY (compacted) fill, which has not been hauled in yet.” Appeal File, Exhibit 5 at 416.

After March 28, 2008, no additional select borrow was delivered to the site. RSUF ¶ 27; *see also* ASUF ¶ 28. From June 2 to June 16, however, North Wind imported 101 CY (198.6 tons) of road base material for bridge backfill. RSUF ¶ 27.

On May 8, work resumed on all items. RSUF ¶ 28. That same day, North Wind’s construction project manager told the CO, with reference to his November 29, 2007, letter, “We still need to bring in more select borrow for the approach coming into the group loop area (500-600 cy) and together with the over run depicted on the attached spreadsheet (500 cy) equals approximately 1100 cy required overall.” Appeal File, Exhibit 5 at 428.

After a review of the layout by the COR, North Wind constructed a gabion basket wall<sup>2</sup> from May 19 to June 5. RSUF ¶¶ 29, 32; ASUF ¶ 13. The wall was built at a different location from the one originally planned. According to North Wind:

It was estimated that 700 to 1000 CY of fill were used to complete the gabion wall construction with fill on the downhill side. This had to come from either suitable material excavated on site (road or bridge construction) or from the commercial source (select borrow). Obviously, this was not anticipated during the bidding process since the design indicated the fill for the downhill side would come from the uphill side.

ASUF ¶ 21.

On May 29, North Wind’s construction project manager and the Forest Service’s COR met to discuss a modification to the contract for additional select borrow. The COR explained that the contractor needed to submit evidence to demonstrate that an error in the design existed and that additional borrow was necessary to meet the design elements of the project. RSUF ¶ 30; *see also* ASUF ¶¶ 12, 31.

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<sup>2</sup> “Gabions . . . are cages, cylinders, or boxes filled with soil or sand that are used in civil engineering, road building, and military applications. . . . In civil engineering a gabion wall[] is a retaining wall made of rectangular containers (baskets) fabricated of heavily galvanized wire, which are filled with stone and stacked on one another, usually in tiers that step back with the slope rather than vertically.” <<<http://en.wikipedia.org/wiki/Gabion>>> (last visited Apr. 20, 2010).

On June 4, North Wind began taking fill material from the obliterated bridge site. The contractor took approximately sixty CY of fill from this site. RSUF ¶ 31.

On June 16, North Wind and the COR discussed the positioning of the walk-in sites, the paving schedule, and road grading methods. ASUF ¶ 12; Appeal File, Exhibit 6 at 1230-32. Construction of the walk-in sites and remaining camp site pads began on June 25 and was completed on July 7. ASUF ¶ 12. Excavation for the road in the main campground area began in early June. Road preparation continued into mid- to late-July, and asphalt was laid through July 29. ASUF ¶ 16; Government's Reply Brief in Support of Its Motion for Summary Relief (Government's Reply) ¶ 7.

North Wind notes that the design included elevations for only the centerline of the main roads, and that the edge of road elevations were derived by calculating the specified slope from the centerline elevation. The spurs into the individual camp units were also sloped off the centerline elevations of the main roads. ASUF ¶ 23. Additionally, the design specified maximum slopes for spurs coming off the main road. *Id.* ¶ 24. Further, the contractor was required to set the corners of the concrete pads connected to the spurs, but the elevations for the pads were not included on the drawings. North Wind used a 1% grade from the centerline grade of the spur (per design requirements), and field adjusted spurs and pads as needed to avoid trees or boulders. *Id.* ¶ 25.

On July 31, North Wind sent a letter to the CO requesting a modification to the contract in the amount of \$59,850 to compensate the contractor for an additional 1995 CY of select borrow. The number of CY was 895 more than previously claimed. North Wind gave three reasons for its belief that the design of the project was flawed, resulting in the need for additional borrow: to meet the specification that camp pads be built to a plus or minus 1% grade from the road grade, additional fill was necessary; the base course under the pads overran by approximately 300 CY; and "unsuitable duff or topsoil materials" had to be excavated to reach a suitable sub base. Appeal File, Exhibit 5 at 457-59; RSUF ¶ 33. The COR did not believe that this information demonstrated a design flaw. RSUF ¶ 34; Appeal File, Exhibit 7 at 1468.

On August 26, North Wind sent another letter to the CO requesting a contract modification to provide additional compensation. Included in this request was \$81,480 for an overrun of 2716 CY of select borrow and \$995 for "gabion wall adjustment @toilet." The contractor stated, "We can provide all the weight scale tickets. However, we understand we will need to show how original design was wrong requiring the additional select borrow. A topog[raphic] survey of final alignment will be performed." Appeal File, Exhibit 5 at 476-78. The COR responded on September 3, agreeing to modify the contract to pay the

contractor \$15,000 for an additional 500 CY of select borrow that was placed in the group area and \$995 for the additional work associated with the gabion basket wall. *Id.*

On September 16, North Wind told the CO that it agreed “that we need to provide more proof for this over run.” Appeal File, Exhibit 5 at 483-84.

On September 20, the parties agreed to contract modification 5. This modification, which was bilateral in nature, included compensation for “changes necessitated by [items including] required gabion stabilization due to inadequate room to construct as designed.” The modification also included compensation for 500 CY of additional fill for the group area loop. RSUF ¶ 38; ASUF ¶ 22; Appeal File, Exhibit 3 at 349-55. Later, however, the Forest Service determined that the road had been overbuilt by 1400 CY and the compensation for the 500 CY of borrow in the group area was reversed by contract modification 6, which was also bilateral, dated July 21, 2009. RSUF ¶ 38 n.5; ASUF ¶ 22; Appeal File, Exhibit 3 at 356.

North Wind demobilized its crews on September 26. According to the Forest Service, the contractor completed various punch list items, and thereby the entire project, by November 24. ASUF ¶ 17; Government’s Reply ¶ 8.

On December 8, North Wind reported to the CO that it had “finally completed all tasks on the Little Mill Campground.” The contractor brought to her attention “the final outstanding issues,” the largest of which was a request to be paid \$56,580 for bringing an additional 1886 CY of select borrow to the site. North Wind said that “it appears much of the overrun has to do with the clearing and grubbing of large[] trees and substantial amounts of brush, boulder blasting and removal, and concrete demolition.” RSUF ¶ 39; Appeal File, Exhibit 5 at 488-96.

The COR reviewed North Wind’s request in detail, and on January 29, 2009, he recommended to the CO a denial of the request for payment of \$56,580 for additional select borrow. He believed “that the as-built surface is over-built to the point that a significant amount of material, 1412 compacted cubic yards, was wasted in fill. This is where the excess select borrow that North Wind hauled in was placed.” Appeal File, Exhibit 5 at 497-503. The CO accepted the recommendation and so informed the contractor. *Id.* at 504.

On April 6, North Wind asked the CO for compensation in the amount of \$88,020 for additional select borrow and \$6000 for additional job overhead. Appeal File, Exhibit 5 at 511-17.

On May 6, the COR gave the CO his views on this request. The COR stated that the matter of additional fill material was first brought to his attention in November 2007. He opined that the contractor “did not provide quantitative justification utilizing sound and practical engineering principles to support [its] request for a change.” He also asserted that “North Wind has admitted that they overbuilt the road and spurs and has not disputed the amount of overbuild, 1400 compacted cubic yards.” Appeal File, Exhibit 5 at 568-76. The CO denied the request on May 15, stating, “Your company has not delivered any quantifiable information that we can use to evaluate whether or not you are entitled to additional compensation.” *Id.* at 577-79.

On July 17, the parties agreed to a contract modification which provided for a final contract payment to North Wind, with the understanding that the contractor reserved the right to submit a claim for select borrow and job overhead in the amount of \$95,910. RSUF ¶ 45; Appeal File, Exhibits 3 at 356, 4 at 396.

Such a claim was transmitted to the CO on August 4, 2009. Appeal File, Exhibit 11. It “includes payment for 2997 CY of fill at \$30/CY plus \$6000 of related overhead expenses.” *Id.* at 1637. In the claim, North Wind noted that “[t]he solicitation indicated that 1110 cubic yards of fill would need to be placed for the sub grade of the road and the individual site and group areas.” *Id.* at 1631. Under the heading “Basis for Claim,” the contractor stated:

During project implementation, [North Wind] encountered conditions requiring use of additional amounts of fill to meet specifications.

Based on vehicle weight tickets (the required measurement in Specification 312010 1.3 B<sup>3</sup>), [North Wind] imported 6862 CY of fill. After deductions for

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<sup>3</sup> Within section 312010 of the contract, “Select Borrow,” paragraph 1.3, “Method of Measurement,” reads as follows:

- A. Government Borrow Site - Select borrow to be measured shall be the number of cubic yards of material, measured on site (Tibble Fork Borrow Site) after gradation is met and prior to hauling to project site.
- B. Commercial Source - Select borrow to be measured shall be the number of cubic yards of material compacted in place. The Contractor shall provide a copy of the vehicle weight tickets to the Contracting Officer.

(continued...)

amounts used for base course under concrete slabs (223 CY), base course for paving (2092 CY), and bridge backfill (440 CY), 4,107 CY of fill, or 2997 CY over the Solicitation quantity, was used under pay item 312010.

A review of other measurements and estimates, including the as-built elevations, supports the amount of extra fill of 4,107 CY required based upon the weigh scale tickets. In general, less fill was available from on-site sources than estimated in the drawings, and site preparation activities generated more needs for fill than specified in the drawings.

*Id.* at 1634.

The claim further explained:

This contract provides for equitable adjustments in the event of differing site conditions. Notice of the differing site conditions requiring use of additional fill was provided to the [Forest Service] in a timely manner on 11-29-07 . . . . These differing site conditions include instances where material was determined to be unsuitable material for cut and had to be replaced with fill and adjustments to ‘site fit’ constructions around trees or other natural features.

Other changes in quantities were required to complete the work indicated on the drawings in compliance with the specifications. . . . The fill needed to assure smooth links between construction elements was required to meet the specifications for road slopes and lengths and to achieve the final constructed site foot print specified in the drawings.

Appeal File, Exhibit 11 at 1637.

The CO denied the claim by decision dated October 7, 2009. RSUF ¶ 47. The decision addressed both the allegation of a differing site condition and the allegation of a

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<sup>3</sup> (...continued)

C. The measurement will not include material excavated and used for purposes other than as directed in the Drawings or by the Contracting Officer.

Appeal File, Exhibit 1 at 184.

variation in designed quantity. With regard to the alleged differing site condition, the CO asserted that “[b]ecause [North Wind] failed to notify the Contracting Officer prior to completing the work . . . the Government did not have the opportunity to investigate prior to the disturbance of the site(s).” With regard to the alleged variation in quantity, the decision said that “[North Wind] has not submitted any verifiable evidence to demonstrate that the design quantities in the contract were inaccurate and additional fill was required in order to complete the contract to specifications.” Additionally, “Overbuilding by [North Wind] and lack of material taken from excavation sources accounts for the increase in fill required and contributed to the conditions that [North Wind] now alleges they encountered.” Appeal File, Exhibit 12.

North Wind appealed the CO’s decision on October 30, 2009.

In its complaint, North Wind requested that the Board direct the Forest Service to pay it “the amount of \$95,910 for additional fill required due to differing site conditions. This amount includes payment for 2,997 CY of fill at \$30/CY plus \$6,000 of related overhead expenses.” Complaint at 8. Further, “[o]n the alternative theory of recovery for the additional fill required due to changes in the gabion basket wall design, North Wind requests the amount of \$30,000 for 1,000 additional cubic yards of fill plus associated overhead expense of \$2,000.” *Id.*

## Discussion

### Motion to dismiss

The Forest Service moves us to dismiss the portion of North Wind’s complaint which requests \$32,000 for additional fill allegedly required due to changes in the gabion basket wall design. According to the agency, this request is a claim which was never presented to the contracting officer, and because the Board may consider only claims which were so presented, we have no jurisdiction to consider this one. *See Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987).

Whether a matter placed before a board of contract appeals is a new claim or part of the claim which was presented to the contracting officer “turns on whether the matter raised before the Board differs from the essential nature or the basic operative facts of the original claim.” *Stroh Corp. v. General Services Administration*, GSBCA 11029, 96-1 BCA ¶ 28,265, at 141,130 (quoting *Trepte Construction Co.*, ASBCA 38555, 90-1 BCA ¶ 22,595, at 113,385); *see also Clark Concrete Contractors, Inc. v. General Services Administration*, GSBCA 14340, 99-1 BCA ¶ 30,280, at 149,771; *Hawkins & Powers Aviation, Inc. v. United States*, 46 Fed. Cl. 238, 243 (2000).

North Wind's response to the motion makes plain that the \$32,000 in question constitutes a new claim. The \$95,910 claim that was presented to the contracting officer is predicated on two theories -- site conditions differed from those reasonably anticipated and the amount of fill required to complete the job was greater than the designed quantity. The gravamen of both theories is that in constructing the project as specified, the contractor had to provide more fill than the amount on which its price was reasonably calculated. The \$32,000 claim is predicated on a theory of constructive change -- by redesigning the work in the area of the gabion basket wall, the Forest Service caused North Wind to provide more fill than it would have under the original plan. To evaluate this claim, the contracting officer would have to review assertions as to a change in the project design, rather than assertions as to the project as designed. These are different operative facts from those he had to examine in evaluating the larger claim. This matter consequently has not been presented to the contracting officer, and without a decision on it, we do not have jurisdiction to consider it. The motion to dismiss is granted. *See Wheeler Logging, Inc. v. Department of Agriculture*, CBCA 97, 08-2 BCA ¶ 33,984.

#### Motions for summary relief

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

North Wind maintains that it reasonably anticipated constructing the project with far less fill material (or select borrow) than it had to use in the actual construction. While it conflates the theories of differing site conditions and variations from designed quantities, the contractor's point is a simple one: It expected, relying on a walk-through of the site and the information the Forest Service provided in the contract, to be required to incorporate a certain amount of fill in the project. Because the contract stated that the agency would compensate the contractor for additional fill which might be needed, and additional fill was indeed needed, the agency must pay for that extra material.

The Forest Service's motion for summary relief focuses on the differing site condition theory enunciated by North Wind. The agency maintains, citing *Schnip Building Co. v. United States*, 645 F.2d 950 (Ct. Cl. 1981), that the contractor failed to provide notice of a differing site condition in accordance with the pertinent contract clause, and that the agency was consequently prejudiced in its ability to evaluate the claim because construction was complete at the time of notice. The argument is not persuasive. While North Wind may not have used the words "differing site condition" until making its claim in August 2009, the

contractor notified the agency as early as November 2007 that it had to engage in more excavation and provide more fill than had been expected. At this point, some construction had been performed, but much remained to be done. Had so much been performed that the agency's ability to investigate the veracity of the contractor's assertions was prejudiced? The parties disagree on this point. The answer is not apparent at this preliminary stage of the proceedings. It will have to depend on the tribunal's review of the facts -- as occurred in the *Schnip* case cited by the Forest Service.

More important than the use of the term "differing site condition" is the key matter, whether the contractor reasonably used more fill material than the designed quantities specified in the contract. Here the factual disputes are pronounced. As North Wind points out, the Board has held:

Once the Government provides an estimated quantity through a vehicle such as . . . the DQ [designed quantities] clause, a contractor is entitled to rely on the stated quantity. This is because by including such clauses, the Government agrees to pay the contractor for any overrun (here with the DQ, having to first meet a threshold, if a design error).

*Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118, 07-1 BCA ¶ 33,556, at 166,209. But because of the hot disagreements between the parties, we do not know several facts that are necessary to determine the extent, if any, of the contractor's need for additional fill.

We will have to answer several relevant questions raised by the agency, as well as others:

-- How much additional fill (if any) beyond the designed quantities is North Wind contending that it required to complete its work under the contract? The amount claimed seems to have increased over time.

-- Has North Wind supplied evidence demonstrating that an error or errors existed in the original design, and that the error or errors were responsible for the contractor's having to import extra fill to meet the design elements of the project? At various times, contractor personnel acknowledged that they would have to provide such evidence and that they had not yet done so.

-- Did North Wind over-excavate the project by about 1400 cubic yards (or some other amount)? Did it create excessive voids in removing boulders, organic material, and tree root systems?

-- Are the contractor's measurements of additional fill accurate? North Wind measured the material by weight, but the designed quantities are expressed in volume. Has the contractor properly translated quantities from tons to cubic yards?

-- Has the contractor used the appropriate contract prices for compensating for various kinds of fill? The contract includes different prices for different types of select borrow.

The presiding judge will have to schedule further proceedings so that the parties can place before the Board the information on which the answers to these questions and others will turn. Without that information, both parties' motions for summary relief must be denied.

#### Decision

The Forest Service's motion to dismiss for lack of jurisdiction North Wind's claim for \$32,000 is granted. That portion of the case is **DISMISSED FOR LACK OF JURISDICTION**. The Forest Service's **MOTION FOR SUMMARY RELIEF IS DENIED**. North Wind's **MOTION FOR SUMMARY RELIEF IN PART IS DENIED**.

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STEPHEN M. DANIELS  
Board Judge

I concur:

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ANTHONY S. BORWICK  
Board Judge