



INTERIOR BOARD OF INDIAN APPEALS

Stone Trucking v. Portland Area Director, Bureau of Indian Affairs

19 IBIA 312 (04/18/1991)

Related Board case:
22 IBIA 52



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

STONE TRUCKING

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-88-A

Decided April 18, 1991

Appeal from the denial of an application for an Indian Business Development grant to expand an existing business.

Vacated and remanded.

1. Indians: Financial Matters: Financial Assistance

Under 25 CFR 286.17(a), if review of an application for a grant under the Indian Business Development Program by the Bureau of Indian Affairs suggests that the applicant may be able to obtain financing through other sources, the Bureau is required to ask the applicant to submit letters from two customary lenders in the area that are making loans for similar purposes, before it disapproves the grant application on the grounds that such financing should be available.

2. Indians: Financial Matters: Financial Assistance

Under 25 CFR 286.17(g)(5), an application for a second grant for an Indian enterprise that has previously received a grant under the Indian Business Development Program must show that the additional grant will increase the enterprise's net profits, increase Indian employment, or both.

APPEARANCES: Lou Stone, pro se; Wilford G. Bowker, Acting Portland Area Director, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Stone Trucking seeks review of a March 23, 1990, decision of the Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), denying an application for a grant under the Indian Business Development Program (IBDP) to expand an existing business. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this matter to the Area Director for further consideration.

Background

Appellant's owner and co-manager, Lou Stone, is an enrolled member of the Colville Confederated Tribes. In January 1988, appellant submitted an application for an IBDP grant, in the approximate amount of \$100,000, to begin a timber and wood products hauling business located on the Colville Reservation. It appears that appellant intended to provide services to logging operations both on the Colville Reservation and in the immediate vicinity. ^{1/}

Appellant's grant application was reviewed by the Washington, D.C., BIA office. In an undated letter, the Area Director informed appellant that its application had been approved in the amount of \$50,000, subject to two conditions not relevant here. The decision letter stated that "[t]he Superintendent also recommended that the operation should be scaled down and expansion of the enterprise be considered dependent upon the market and growth of the market." Appellant objected to this determination in a June 2, 1989, letter to the Assistant Secretary - Indian Affairs, but did not file an appeal with the Board. Appellant accepted IBDP grant number GTP03900689, in the amount of \$50,000, on July 7, 1989.

On March 5, 1990, appellant requested an additional \$50,000 grant to "expand" its existing IBDP grant to the level of the initial request. Appellant apparently resubmitted the application package submitted for the initial grant, with updated information. Appellant indicated that it expected its operations to affect the Colville, Spokane, and perhaps the Yakima Reservations, as well as the State of Washington. In an accompanying explanatory letter, appellant stated:

While most Indian truckers expect to conduct business solely within the boundaries of their respective reservations, this proposal continues to expect to follow the original opportunity to operate outside the boundaries of the Colville Indian Reservation. To date, I have hauled for the export market, vis a vis Colville Indian Precision Pine and for the Spokane Indian Reservation. The market considered for this proposal includes both reservations, the export market of which Colville Indian Precision Pine participates and has designated me for the hauling, and Washington State as I have secured an Intrastate Permit * * * from the Washington Utilities and Transportation Commission. This permit continues to provide [appellant] with further advantages over competitor peers for hauling services.

By letter dated March 23, 1990, the Area Director informed appellant that:

^{1/} The administrative record contains partial information related to BIA's analysis of appellant's initial grant application. Most of the information relating to the initial grant is taken from documents submitted by appellant on appeal.

We have reviewed your application for a second [IBDP] grant request to expand your trucking business. The purpose of the IBDP grant program is to provide equity capital to Indians and Indian tribes to stimulate and increase Indian entrepreneurship and employment. We provided this opportunity with the IBDP grant in fiscal year 1989 of \$50,000.

According to your financial statement you have equity of \$67,643.96, which should provide you with the sufficient leverage in the future to expand your business. In addition, your application does not generate any new jobs. We therefore are unable to approve your IBDP grant request.

The Board received appellant's notice of appeal from this decision on May 2, 1990. Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

The Board has previously held that decisions concerning whether or not to approve a particular request for financing under the Indian Financing Act are committed to the discretion of BIA. In reviewing those decisions, the Board will not substitute its judgment for that of BIA, but will ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. See Reed v. Minneapolis Area Director, 19 IBIA 249, 252 (1991), and cases cited therein.

Because appellant had received a prior IBDP grant for this enterprise, its second application fell under 25 CFR 286.17(g) and (h), which provide:

(g) Ordinarily, not more than one grant will be made for a project. Nevertheless, in certain circumstances a second grant may be made to the same applicant for * * * expansion of the original project. An addition grant will not be approved for an economic enterprise previously funded * * * except for expanding a successful enterprise, provided the total of grants made shall not exceed \$50,000. [2/] Information to be submitted with the application will include at a minimum the following:

(1) Use made of the prior grant. Where practical, evidence of such use shall be furnished.

(2) Evidence of competent management.

2/ The ceiling for a grant to an individual was increased from \$50,000 to \$100,000 in the Indian Financing Act Amendments of 1984, P.L. 98-449, § 9, 98 Stat. 1725. See 25 U.S.C. § 1522(a) (1988). Regulations implementing this change were promulgated at 55 FR 36272 (Sept. 5, 1990). There is no dispute in this case that appellant could request IBDP grants totaling \$100,000.

(3) Maintenance of adequate accounting records.

(4) That the operation is profitable as evidenced by operating statements and balance sheets prepared from the accounting records.

(5) That expansion will increase the net profit and/or increase Indian employment.

(h) An application for a second grant will not be approved if the applicant: (1) has not complied with the reporting requirements in connection with the first grant, or (2) has not followed the plan of operation, if any, developed for the management and operation of the economic enterprise, or (3) did not follow and use the management and technical assistance furnished, or (4) is in violation of one or more provisions of the loan agreement entered into between the applicant and the lender who furnished the loan portion of the financing in connection with the first grant.

The Area Director's decision letter sets forth two reasons for not approving appellant's grant application. ^{3/} The letter first states that

^{3/} The first paragraph of the Area Director's decision letter could be read to suggest that appellant was not eligible, or was not being given full consideration, for a grant because of its prior receipt of a grant. Because the regulations in 25 CFR 286.17(g) and (h) specifically provide for receipt of additional grants, the Board declines to read the Area Director's letter as suggesting anything to the contrary.

In addition, the Area Director's brief on appeal states that "appellant did not provide the required commitment for matching dollars for the grant match of 75/25 percent as required by the Assistant Secretary - Indian Affairs policy memo dated December 8, 1989." This memorandum, which was attached to the Area Director's brief, states at page 5: "[IBDP g]rants may be made only to applicants who are able to obtain at least 75 percent of the financing for an economic enterprise from sources other than their own. Other sources do not include direct or guaranteed loans from the Bureau." This statement is contrary to the regulatory requirement set forth at that time in 25 CFR 286.17(b) (1988), which stated: "A grant may be made only to an applicant who is able to obtain at least 60 percent of the necessary financing from other sources." The 75-percent requirement was incorporated into 25 CFR 286.17(b) on Mar. 25, 1991. See 56 FR 12436 (Mar. 25, 1991).

There are two problems with this argument which result in the Board's refusal to consider it. First, the Assistant Secretary's policy memorandum was not published as a rule in accordance with the Administrative Procedure Act, 5 U.S.C. § 553 (1988), and the Area Director has not otherwise shown that the memorandum could be used to determine appellant's rights. 5 U.S.C. § 552(a)(2) (1988) provides:

the application was not being approved because appellant's financial position "should provide [it] with sufficient leverage in the future to expand" its business. For the first time in his answer brief, the Area Director indicates that this statement was based upon 25 CFR 286.17(a), which provides in part that "a grant may be made only when in the opinion of the Commissioner the applicant is unable to obtain adequate financing from other sources." The statement suggests that the Area Director believes appellant should be able to obtain financing from other sources.

[1] Section 286.17(a) continues, however:

If the information in an application indicates that it may be possible for the applicant to obtain financing without a grant, the Commissioner will require the applicant to furnish letters from two customary lenders in the area, if available, who are making loans for similar purposes, showing whether or not they will make a loan to the applicant for the total financing needed without a grant.

There is no indication in the administrative record, the Area Director's decision, or the filings on appeal that the Area Director asked appellant to furnish the two required letters before disapproving the application. Because the Area Director failed to require this information, his decision on this issue is not supported by the administrative record.

The second reason given for disapproval was that the application did not generate any new jobs. Again for the first time in his brief, the Area Director referenced 25 CFR 286.8(a) (2) in support of this decision. Section 286.8(a) provides in its entirety:

The following priority will be used in selecting economic enterprises for grant funding:

(a) First priority. First priority will be given to economic enterprises located on a reservation that will:

(1) Utilize Indian resources, both natural and human.

fn. 3 (continued)

"A * * * statement of policy * * * that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof."

See, e.g., Pueblo of Laguna v. Assistant Secretary for Indian Affairs, 12 IBIA 90, 95, 90 I.D. 521, 530 (1983).

Second, this reason for denial was not addressed in the decision letter, but was raised for the first time on appeal. The Board will not consider a reason for a BIA decision that was not set forth in the original decision. Price v. Portland Area Director, 18 IBIA 272, 280 (1990).

(2) Create the highest ratio of Indian jobs to the total amount of dollars to be invested, including market value of materials and equipment contributed to the project.

(3) Create the highest ratio of income to a tribe or its members in relation to the total amount of dollars to be invested, including market value of materials or equipment contributed to the project.

(4) Generate the most non-Bureau financing. [Emphasis in original.]

[2] 25 CFR 286.17(g)(5), which specifically addresses second grants for the same project, provides that applications for such grants must show that the grant will increase Indian employment, or increase the enterprise's net profit, or both. The Area Director has apparently read only 25 CFR 286.8(a)(2) into section 286.17(g) in determining that new jobs must be created. This reading of section 286.8(a) ignores both that section's remaining three factors (one of which, like section 286.17(g)(5), requires consideration of increased profits, while another addresses the utilization of human and natural Indian-resources) and the fact that this section merely sets forth general factors to be considered when BIA exercises its discretion in establishing priorities for grants. 4/ Section 286.8(a)(2) does not require that an application for a second grant can be approved only if it creates new jobs. Accordingly, the fact that appellant's application did not show that it would create new jobs was not sufficient in and of itself to disapprove the application.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 23, 1990, decision of the Portland Area Director is vacated and this matter is remanded to him for further consideration.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

4/ Although it is possible that the Area Director is now contending that appellant's application could have been funded, but that other applications were deemed of higher priority, this is not the statement that was made in the decision letter. See note 3, supra.