



INTERIOR BOARD OF INDIAN APPEALS

Stock West, Inc. v. Portland Area Director, Bureau of Indian Affairs

18 IBIA 7 (10/05/1989)

Judicial review of this case:

Dismissed, *Stock West Corp. v. Lujan*, No. 90-250-JU, 17 Indian Law Reporter 3153
(D. Ore. Sept. 27, 1990)

Vacated in part, reversed in part, and remanded, 982 F.2d 1389 (9th Cir. 1993)

Related judicial case:

Colville Confederated Tribes of the Colville Reservation v. Stock West, No. CV86-624,
21 Indian Law Reporter 6075 (Colv. Tr. Ct. June 1, 1994)



United States Department of the Interior

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

STOCK WEST, INC.

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-26-A

Decided October 5, 1989

Appeal from a decision denying retroactive approval of a construction management agreement and a management and marketing agreement with the Colville Tribal Enterprise Corporation and the Colville Indian Precision Pine Company.

Dismissed.

1. Bureau of Indian Affairs: Administrative Appeals: Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

APPEARANCES: Peter H. Koehler, Jr., Esq., and Jeanne M. Chamberlain, Esq., Portland, Oregon, for appellant; George T. Skibine, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee; Michael Taylor, Esq., Nespelem, Washington, for the Confederated Tribes of the Colville Reservation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Stock West, Inc., seeks review of a February 21, 1989, decision of the Portland Area Director, Bureau of Indian Affairs (BIA; appellee), concerning denial of retroactive approval of a Construction Management Agreement (CMA) and a Management and Marketing Agreement (MMA; collectively, agreements) between appellant and the Colville Tribal Enterprise Corporation (CTEC) and the Colville Indian Precision Pine Company (CIPP). For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal as being untimely filed.

Background

Appellant met with representatives of the Confederated Tribes of the Colville Reservation (tribes) in late 1983 to discuss the possible construction and operation of a sawmill on the reservation. The discussions resulted in the July 23, 1984, signing of the two agreements at issue

here. In order to implement the agreements, the tribes created CTEC and CIPP. CTEC was established as an entity separate from the tribal Business Council, but part of the tribes. CTEC was responsible for overseeing the construction of the sawmill. CIPP was organized as a wholly owned subsidiary of CTEC to own and operate the sawmill after construction. Both CTEC and CIPP were organized and chartered under tribal law, specifically Article V, section 1(a), of the tribal constitution.

Under the CMA, appellant was to manage and supervise all aspects of the construction of the sawmill. Appellant was to manage the sawmill and market its products for a period of 15 years under the MMA.

Both agreements contained provisions relating to approval by BIA under 25 U.S.C. § 81 (1982). 1/ Appellant and CTEC and CIPP presented the agreements to BIA in 1984 and requested that they be approved under section 81. Based upon a September 28, 1984, opinion by a Departmental Assistant Regional Solicitor, appellee determined that the agreements did not need BIA approval under section 81 and, therefore, declined to approve them. 2/ Each agreement thus carries the notation "Bureau approval not required nor desirable. See 12/7/84 memorandum to Superintendent." The notation is initialed and dated "1/9/85." 3/ Although the record clearly indicates that both the tribes and appellant continued to believe that BIA approval was required, no appeal was taken from appellee's decision.

The parties began performance under the agreements. The sawmill was apparently substantially completed by late 1985, but problems developed between the parties.

1/ Section 81 states in pertinent part:

"No agreement shall be made by any person with any tribe of Indians * * * in consideration of services for said Indians relative to their lands, * * * unless such contract or agreement shall be executed in writing and approved as follows:

* * * * *

"Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

* * * * *

"All contracts or agreements made in violation of this section shall be null and void."

2/ The Sept. 28, 1984, Assistant Regional Solicitor's opinion was based on an interpretation of Inecon Agricorporation v. Tribal Farms, Inc., 656 F.2d. 498 (9th Cir. 1981), in which the circuit court held that a tribal corporation chartered under state law was a distinct legal entity and was not a "tribe of Indians" for purposes of section 81. The Assistant Regional Solicitor reasoned that the CIPP and CTEC were also distinct legal entities separate and apart from the tribes, and that, accordingly, section 81 did not apply.

3/ The referenced Dec. 7, 1984, memorandum was from the Area Office to the Superintendent and stated the opinion that BIA approval was not required under section 81, and that such approval was undesirable as an intrusion into reservation business matters.

By letter dated July 15, 1986, and in accordance with section 7.1 of the CMA and section 14.1 of the MMA, the tribes issued a notice of default to appellant. Appellant responded to this notice by letter dated July 28, 1986, in which it also made a demand that the matter be submitted to arbitration in accordance with section 6 of the CMA and section 12 of the MMA.

On July 30, 1986, the tribes filed suit against appellant in the Colville Tribal Court. Appellant opposed the suit and asked the court to compel arbitration. On April 7, 1987, before the tribal court had ruled, appellant filed suit in Federal district court, asking the district court to compel arbitration in accordance with the agreements and to enjoin the parties from pursuing the matter in tribal court.

By letter dated June 16, 1987, before decisions had been rendered by either the tribal or district court, appellant requested appellee to approve the agreements retroactively, citing the arguments raised in tribal court by CTEC and CIPP that the arbitration clauses of the agreements were not enforceable because the agreements themselves were void for lack of BIA approval. Appellant cited United States ex rel. Buxbom v. Naegele Outdoor Advertising Company of California, Inc., 739 F.2d 473 (9th Cir. 1984), for the proposition that BIA had authority to approve an Indian contract retroactively. Appellee denied retroactive approval in a letter dated July 21, 1987. Appellee stated his continued belief that the agreements did not require BIA approval and noted that the only apparent reason for appellant's request for retroactive approval was to assist it in the tribal court litigation. Appellant did not appeal this decision.

On August 4, 1987, the district court granted the tribes' motion to dismiss appellant's suit. Although it found it had diversity jurisdiction under 28 U.S.C. § 1332 (1982), the district court held that it should abstain from exercising its jurisdiction under the doctrine of comity. Stock West, Inc. v. Confederated Tribes of the Colville Reservation, No. C-87-242-RJM (E.D. Wash. Aug. 4, 1987); aff'd, 873 F.2d 1221 (9th Cir. 1989).

Shortly thereafter, on August 14, 1987, the tribal court ruled that it had jurisdiction over the suit filed by CTEC and CIPP. Confederated Tribes of the Colville Reservation v. Stock West, 14 Indian L. Rep. 6025 (Colville Tribal Ct. 1987). After additional proceedings concerning appellant's demand for arbitration, the tribal court ruled on May 2, 1988, that the tribes' claim that the agreements were void because they were not approved by BIA was a matter for the court, rather than an arbitration panel, to resolve. Citing case law decided after the issuance of the Assistant Regional Solicitor's memorandum upon which appellee had relied, the tribal court concluded that BIA approval of the agreements was required by section 81, and that the agreements were void because they had not been approved. Confederated Tribes of the Colville Reservation v. Stock West, 15 Indian L. Rep. 6019 (Colville Tribal Ct. 1988). It appears that although further proceedings have been held in the tribal court, no trial date has been set.

Appellant again requested appellee to approve the agreements retroactively in a letter dated December 9, 1988. Appellant noted that even though appellee had previously stated that the agreements did not need his approval, the tribal court had held them void because they were not approved. Appellant argued that BIA had been involved in this project since before its inception. As proof, appellant stated that a BIA employee served on the task force that developed the project; BIA approved "to the extent required" several other agreements arising out of or related to the project; and BIA directly participated in the financing of the project, through a grant to the tribes and a guaranty for a bank loan. Against the background of this involvement, appellant contended that BIA had the authority to approve the agreements retroactively, retroactive approval would be consistent with BIA's position throughout the development of the project, BIA's initial determination that section 81 approval was not needed was erroneous, and retroactive approval would be in the interest of all Indians because it would promote faith in Indian contracts.

By letter dated February 21, 1989, appellee again declined to approve the agreements, this time on the grounds that the matter was in litigation and the tribal corporations had not requested approval. It is from this second denial of retroactive approval that appellant has taken the present appeal.

The Board received appellant's notice of appeal on March 27, 1989. Pursuant to the Board's notice of docketing, briefs were filed by appellant, appellee, and the tribes.

Discussion and Conclusions

On appeal, appellant raises essentially the same arguments as were presented to appellee in the second request for retroactive approval of the agreements.

Appellee and the tribes both argue as a threshold matter, however, that this appeal should be dismissed because it was not timely filed. They contend that appellant's 1988 request for retroactive approval is nothing more than an attempt to circumvent the fact that it failed to appeal appellee's 1985 decision not to approve the agreements. Thus appellee and the tribes contend that the Board lacks jurisdiction to hear this appeal because the 1985 decision became final when it was not timely appealed.

Although not raised by the parties, a similar issue exists with respect to appellee's July 21, 1987, denial of appellant's June 16, 1987, request for retroactive approval of the agreements. This decision was also not appealed. ^{4/}

Under BIA appeals regulations in effect in both 1985 and 1987, a person adversely affected by a decision of a BIA Area Director had 30 days from

^{4/} It does not appear from the copies of this correspondence in the administrative record furnished to the Board that distribution was made to any other interested party.

receipt of the decision to file a notice of appeal with the Commissioner of Indian Affairs or other BIA official exercising the administrative review authority of the Commissioner. 25 CFR 2.10 (1988). If no timely notice of appeal was filed, the decision became final 60 days after the person's receipt of it. 25 CFR 2.18 (1988). See Cahoon v. Portland Area Director, 17 IBIA 187 (1989), and cases cited therein.

The record shows that appellant believed in 1984 and at all times since then that BIA approval of these agreements was necessary for them to be effective. BIA, on the advice of counsel, disagreed with appellant, and specifically denied appellant's requests to approve or retroactively approve the agreements on three separate occasions. Appellant appealed only the last of these denials. The Board finds that this appeal must be dismissed as being an untimely appeal from appellee's January 9, 1985, refusal to approve the agreements and/or his July 21, 1987, refusal to approve the agreements retroactively. In either case, appellee's decision became final when no timely appeal was taken. Under 43 CFR 4.332(a), the Board lacks jurisdiction over an untimely appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed as being untimely filed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge