



INTERIOR BOARD OF INDIAN APPEALS

Donald S. Jacobs v. Eastern Area Director, Bureau of Indian Affairs

20 IBIA 68 (06/10/1991)

Reconsideration denied:
20 IBIA 142



United States Department of the Interior

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

DONALD S. JACOBS

v.

EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-1-A

Decided June 10, 1991

Appeal from approval of a tribal bingo management agreement.

Dismissed.

1. Administrative Procedure: Standing--Board of Indian Appeals: Generally

Where an appeal to the Board of Indian Appeals should have been filed by or on behalf of a partnership, a limited partner lacks standing if he would lack authority to bring a derivative action under the state law governing the partnership.

2. Indians: Contracts: Formation and Validity: Generally--Indians: Lands: Tribal Lands

The principle that tribal bingo management agreements are invalid absent approval under 25 U.S.C. § 81 (1988) applies to tribal agreements for bingo enterprises on tribal land within the St. Regis Mohawk Reservation.

APPEARANCES: William J. Crimmins, Esq., Phoenix, Arizona, for appellant; John H. Harrington, Esq., Office of the Regional Solicitor, Southeast Region, U.S. Department of the Interior, Atlanta, Georgia, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Donald S. Jacobs seeks review of an August 13, 1990, approval by the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), of a bingo management agreement between the St. Regis Mohawk Tribe (Tribe) and Basil Cook Enterprises. 1/ For the reasons discussed below, the Board dismisses this appeal.

1/ Appellant states that he appeals in the following capacities:

“1. Individually;

“2. On behalf of himself as a Limited Partner of the St. Regis Mohawk Development Company [(Partnership)], a Nevada Limited Partnership * * *;

“3. On behalf of Donald S. Jacobs, Retirement Trust, a limited partner of [the Partnership];

Background

On July 24, 1984, the Tribe entered into a bingo management agreement with the St. Regis Mohawk Development Corporation (Corporation), whose shareholders are Basil Cook, Guilford White, Emmet F. Munley, and John Jenkins. ^{2/} Cook and White are enrolled members of the Tribe. Under the agreement, the Corporation was to construct a bingo facility on property to be leased from Cook and White, and then manage the bingo enterprise. Profits were to be divided 51 percent to the Tribe and 49 percent to the Corporation, except that the Corporation was to be reimbursed for the costs of construction from the Tribe's share of the profits. The term of the agreement was 5 years, commencing with the opening of the bingo facility. The Corporation was given an option to renew the agreement for an additional 5 years. The agreement was not approved by any BIA official.

On March 12, 1985, the Corporation entered into a lease with Cook and White for a parcel of land in Bombay, New York, on the St. Regis Mohawk Reservation, on which the bingo facility was to be constructed. The lease term was 5 years, with an option in the Corporation to extend the lease for an additional 5 years. The lease was not approved by any BIA official.

On April 22, 1985, the Tribe consented to an assignment of the bingo management agreement to a limited partnership called the St. Regis Mohawk Development Company (Partnership). The agreement under which the Partnership was organized, dated April 23, 1985, shows that the Corporation is the managing and general partner and that the limited partners are: Donald S. Jacobs; Donald S. Jacobs, as trustee of the DSJ Retirement Trust; Barbara J. Gottlieb; and North American Bingo, Inc.

Also on April 22, 1985, Cook and White signed a document in which they agreed not to engage in bingo operations within a 50-mile radius of the bingo facility for a period of 10 years from its opening.

On April 24, 1985, Cook and White signed an agreement with the Tribe "acknowledging and agreeing" that the bingo facility was jointly owned, *i.e.*, 50 percent by Cook and White and 50 percent by the Tribe. Further,

fn. 1 (continued)

"4. Derivatively and with the consent of Emmett Munley, the majority shareholders of the General Partner of [the Partnership], the St. Regis Mohawk Development Corporation [(Corporation)], a New York Corporation, of said partnership to act to protect the interests of [the Partnership] 'in toto;'

"5. Derivatively and with the consent of Emmett Munley, the majority shareholder of the General Partner on behalf of [the Corporation] to act to preserve the rights of said corporation and [the Partnership]." (Notice of Appeal at 1-2).

^{2/} Jenkins' name appears to be crossed out in the record copy of this agreement.

the agreement provided that Cook and White would have an option to buy out the Tribe's interest within 1 year of conclusion or termination of the bingo management agreement.

The bingo enterprise opened on May 25, 1985. It appears that construction costs were paid off in March or April 1988. 3/

Relations between Cook and White and the Corporation deteriorated. Appellant states that, in May 1989, Cook and White excluded the management personnel appointed by the Corporation and attempted to manage the bingo enterprise themselves. The Corporation sued Cook and White and, on August 7, 1989, obtained a preliminary injunction requiring them to deliver the premises to the corporation. St. Regis Mohawk Development Corp. v. Basil Cook, No. 89-331 (N.Y. Sup. Ct., Franklin Co. Aug. 7, 1989) (order granting preliminary injunction). Appellant states that, on March 30, 1990, Cook and White were found in contempt of court and ordered to turn the premises over to the Corporation upon its posting of a \$500,000 bond. 4/ Appellant further states that the Corporation has been unable to obtain a bond because of unrest on the reservation.

By an undated notice to the Tribe, mailed on April 26, 1990, and received by the Tribe on April 30, 1990, the Partnership stated that it was renewing the management agreement for an extended term of 5 years. By undated notices to Cook and White, mailed on April 27, 1990, the Corporation stated that it was extending its lease for an additional term of 5 years. It is not clear when Cook received his copy of the notice. White's copy was mailed to his attorney and received in the attorney's office on April 30, 1990. By letter of April 30, 1990, the attorney advised Cook and White that the notice was untimely under the renewal provision of the lease because it had not been mailed prior to 30 days before expiration of the initial term of the lease. Further, the attorney noted that, contrary to the lease requirement, the notice received by him had been sent by certified rather than registered mail.

On May 23, 1990, a meeting was held at the Area Office to discuss the matter. Appellant, Munley, Cook, and White were present, as well as attorneys for the Partnership, Cook and White, and the Tribe. The Tribe

3/ Section 9.3 of the management agreement provided that the Tribe would receive monthly payments of \$10,000 or 25 percent of its share of the profits, whichever was greater, until construction costs were paid off, at which time it would begin to receive its full 51 percent share of the profits. The Tribe apparently received monthly checks of \$10,000 through March 1988. In April 1988, it received a \$40,000 payment. Between May 1988 and March 1989, it received payments varying between \$35,700 and \$102,000.

4/ Appellant attaches to its brief a Mar. 30, 1990, order in which it is "ORDERED, that [an August 18, 1989,] Order to Show Cause be treated as a motion to renew with respect to the injunction order issued by this court on August 7, 1989, and it is further ORDERED that defendants motion to renew be and the same is hereby denied in all respects."

was apparently interested in reopening the bingo facility, which had been closed because of unsettled conditions, and had expressed concern about the ownership of the facility. Following the meeting, BIA concluded, upon advice of the Solicitor's Office, that the bingo facility was the Tribe's property. On June 21, 1990, the St. Regis Mohawk Tribal Council enacted Resolution 90-15, claiming ownership of the facility as of April 11, 1988. 5/

On July 27, 1990, the Tribe entered into a new bingo management agreement with Basil Cook Enterprises. The Area Director approved the agreement on August 13, 1990, subject to certain conditions contained in an August 10, 1990, letter to the Head Chief of the Tribe.

Appellant's appeal from the Area Director's approval was received by the Board on September 12, 1990. Appellant and the Area Director filed briefs.

Discussion and Conclusions

Appellant argues that the Area Director's approval of the July 27, 1990, agreement "has adversely affected the rights to profits of the partners of [the Partnership] in that it has directly taken away from the assets which they had invested well over \$2,000,000,000 as well as their rights to future profits" (Appellant's Statement of Reasons at 6). Appellant further states that he has invested well over \$1,000,000 in borrowed funds, of which approximately \$600,000 remains unpaid, and that he will be forced into personal bankruptcy "should this debt not be repaid." Id.

[1] Appellant does not explain why this appeal was not filed by the Partnership, or by the Corporation, the Partnership's general partner. Under the partnership agreement, the Corporation is vested with full management responsibilities. The agreement states that the Partnership was formed pursuant to the Nevada Uniform Limited Partnership Act, which provides at Nev. Rev. Stat. § 88.610 (1986):

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

It further provides at Nev. Rev. Stat. § 88.620 (1986): "In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort."

5/ The status of this resolution is unclear. Only two Chiefs signed it, although there are signature spaces for three Chiefs and one Chief Elect. Further, the resolution is not certified by the Tribal Clerk, although a signature space appears for her.

The Board finds that this appeal should have been filed by or on behalf of the Partnership. Because the 1984 management agreement was the Partnership's agreement and not that of the individual partners, the partners lack standing to appeal on their own behalves. Further, as a limited partner, appellant lacks standing to appeal on behalf of the Partnership absent the showing required by Nev. Rev. Stat. § 88.620 (1986).

The standing of a limited partner to appeal in these circumstances is a matter of first impression with the Board. Therefore, in order to avoid dismissing the appeal on this previously unaddressed procedural ground, the Board will treat the appeal as if it had been properly filed on behalf of the Partnership. Cf. Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63 (1990). In the future, the Board expects to dismiss for lack of standing appeals filed by limited partners under circumstances like those here.

Another standing issue is apparent in this appeal. This second standing issue, however, is inextricably intertwined with the merits of the appeal. It is appellant's theory that the July 24, 1984, management agreement was valid and in effect on August 13, 1990, the date the Area Director approved the new agreement. If that is the case, the Partnership clearly has standing to bring this appeal. On the other hand, if the 1984 agreement was not valid and in effect on August 13, 1990, the Partnership has no standing to complain of approval of the new agreement because it had no right to prevent the Tribe from contracting with another bingo management company.

Appellant contends that the 1984 agreement was valid even though it was not approved by any Department of the Interior official. Further, it contends that the agreement and lease were validly extended in accordance with the requirements of those documents.

[2] It is now well established that tribal bingo management agreements are subject to 25 U.S.C. § 81 (1988) and are thus invalid unless approved by the Secretary of the Interior or his delegate. ^{6/} See, e.g., United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enterprise Management Consultants, Inc., 883 F.2d 896 (10th Cir. 1989); Barona Group of Mission

^{6/} 25 U.S.C. § 81 (1988) provides:

"No agreement shall be made by any person with any tribe of Indians * * * for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring of any privilege to him, or any other person in consideration of services for said Indians relative to their lands, * * * unless such contract or agreement be executed and approved as follows:

* * * * *

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

All further references to the United States Code are to the 1988 edition.

Indians v. American Management & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987), cert. dismissed, 487 U.S. 1247 (1988); A. K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986); Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (7th Cir. 1985); United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co., 616 F. Supp. 1200 (D. Minn. 1985), appeal dismissed, 789 F.2d 632 (8th Cir. 1986). Appellant contends, however, that this rule is inapplicable in the present case because the land on which the bingo facility is located is neither tribal land nor trust allotted land. The Area Director argues that the land in question is tribal trust land. He submits, in support of this argument, an April 28, 1987, opinion of the Regional Solicitor, Southeast Region, concluding that fee title to the lands within the St. Regis Mohawk Reservation is held by the State of New York subject to the possessory interest of the Tribe; that the lands are subject to the protection of the Indian Non-Intercourse Act, 25 U.S.C. § 177; Z/ and that they constitute a Federal Indian reservation.

Appellant does not dispute the analysis in the Regional Solicitor's opinion and apparently concedes the applicability of section 177 to the land. He continues to argue, however, that section 81 is inapplicable because the land is not Federal trust land.

Initially, the Board notes that section 81 does not explicitly limit its application to "Federal trust lands" or even "trust lands." Instead, it refers only to "their i.e., the Tribe's] lands." Second, it is clear from the Supreme Court's decision in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1973), that Indian lands in the original 13 states, even though not held in Federal trust status, are entitled to the protection of Federal law. 8/ While Oneida and the Solicitor's opinion dealt most directly with section 177, section 81 has a similar protective purpose. See the cases interpreting section 81, cited above. Under the principles enunciated by the Supreme Court in Oneida, and by several Federal courts in the section 81 cases, the tribal lands of the St. Regis Mohawk Reservation

Z/ 25 U.S.C. § 177 provides: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

8/ The Court stated, inter alia:

"The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the States, Fletcher v. Peck, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. [footnote omitted]."
414 U.S. at 670.

are protected under 25 U.S.C. § 81 to the same extent as tribal lands held in trust by the United States. Accordingly, the July 24, 1984, bingo management agreement was invalid under section 81 because it was not approved by any Department of the Interior official.

Appellant argues that the doctrine of laches prevented BIA from taking any action to invalidate the 1984 agreement. The 1984 agreement was invalid as a matter of law; no action of BIA rendered it invalid. Appellant further contends that the Tribe was guilty of laches in failing to submit the 1984 agreement to BIA for approval. See, however, A. K. Management Co., 789 F.2d at 788-89, holding that a tribe has no duty, under principles of contract law, to submit a contract for approval. While laches is an equitable doctrine, and not a principle of contract law, it seems apparent that, if the Tribe had no duty to submit the contract, it cannot be guilty of laches for failing to submit it. In any event, the Tribe is not a party to this appeal, and even if it were, the Board would not have jurisdiction to grant relief against it. Cf. Gillette v. Aberdeen Area Director, 14 IBIA 187 (1986).

Having found that the 1984 agreement was invalid, the Board is not required to address other issues raised by the parties. The Board briefly touches, however, on the Area Director's argument that the Corporation's lease with Cook and White expired, making performance under the 1984 agreement impossible, when the Corporation failed to give timely notice that it was extending the lease. ^{9/} Appellant argues that notice was timely. "[I]n fact," he contends, "the notices have yet to be required in view of the fact that the Force Majeure clause terminated all options and other rights under the lease" (Appellant's reply brief at 6). Appellant states that his argument is explained in an attachment to his reply brief. There were, however, no attachments to appellant's reply brief as received by the Board.

A section of the lease entitled "Effect of Unavoidable Delays" provides:

The provision of this paragraph shall be applicable if there shall occur, during or prior to the lease, any term or extension thereof, any of the following:

- (a) Strike, lockout, or labor dispute affecting the premises;
- (b) Inability to obtain labor or materials or reasonable substitute therefor;

^{9/} The exact nature of the interest of Cook and White in the tract of land at issue here is not clear from the record. It is apparent, however, that the Tribe considers these individuals to have the right to lease the property. Further, no party to this appeal questions the validity of the lease during its initial term. For purposes of this discussion, therefore, the Board assumes that the lease was valid.

(c) Acts of God, governmental (including, but not limited to, the St. Regis Mohawk Tribal government) regulations, or controls; hostile governmental action, civil commotion, insurrection, sabotage or fire, or other casualty, or other conditions beyond the control of the lessee.

* * * If lessee as a result of any such event, shall be unable to exercise any right or option with[in] the time limit provided therefor in this lease, such time limit shall be deemed extended for a period equal to the duration of such event, provided that within 30 days after the happening of any such event, lessee shall send lessors a written notice describing such event.

(Lease at 4-5).

The "Term and Duration" section of the lease provides:

The initial term of this lease shall commence as of July 24, 1984 and unless extended pursuant to the following paragraph, shall end at midnight on July 24, 1989, but in no event shall the initial term be less than five (5) years after opening to the public of the Bingo facility to be constructed under the agreement of July 24th, 1984.

Lessee is hereby given an option to extend the term of this lease for an additional term of five years. Such renewal term shall be on the same terms, covenants and conditions as in this lease provided, except as otherwise specified in this lease.

If lessee elects to exercise such option, lessee shall do so by notice to lessors in writing by registered mail, return receipt requested, prior to 30 days before expiration of the then current term of this lease.

(Lease at 2). Presumably, appellant intended to argue that unrest on the St. Regis Mohawk Reservation prevented the Corporation from giving timely notice. However, the notices to Cook and White were mailed from Las Vegas, Nevada, and appellant relies on a "mailbox rule of mailings" (Appellant's Reply Brief at 6). It is difficult to understand how unrest on the reservation could have prevented the Corporation from exercising its option, when that required nothing more than putting notice in the mail in Las Vegas. The lease term expired 5 years after opening of the bingo facility on May 25, 1985. Thus, at the latest, the notices should have been mailed on April 24, 1990. The two notices were postmarked April 27, 1990, and were therefore untimely.

The Board finds that the Partnership did not have a valid management agreement in effect on August 13, 1990, and therefore lacks standing to object to the Area Director's approval of the new agreement with Basil Cook Enterprises.

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 for lack of standing. 10/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

10/ The Board does not address, as unnecessary to this disposition, some of appellant's other arguments, in particular, his arguments related to the disputes between the Corporation and Cook and White arising out of their relations under the 1984 contract.