



INTERIOR BOARD OF INDIAN APPEALS

Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director,
Bureau of Indian Affairs

22 IBIA 153 (06/26/1992)



United States Department of the Interior

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

NAVAJO PRECISION BUILT SYSTEMS, INC.

v.

ACTING NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-97-A

Decided June 26, 1992

Appeal from the disapproval of a loan guaranty request.

Affirmed as modified.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--Federal Employees and Officers: Generally

A decision signed by an Acting Area Director of the Bureau of Indian Affairs has the same status as a decision signed by the Area Director.

2. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

3. Administrative Procedure: Burden of Proof--Indians: Financial Matters: Financial Assistance

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

4. Indians: Financial Matters: Financial Assistance

Although regulations in 25 CFR Part 103, governing the Indian Loan Guaranty and Insurance Program, require that an economic enterprise be at least 51 percent Indian-owned in order to be eligible for a loan guaranty, they

do not specifically require that the economic enterprise be Indian-controlled.

5. Indians: Financial Matters: Financial Assistance

The regulations in 25 CFR Part 103, governing the Indian Loan Guaranty and Insurance Program, require that an economic enterprise seeking a loan guaranty must contribute beneficially to the economy of an Indian reservation.

APPEARANCES: Wayne Matlock for appellant; Thomas O'Hare, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for the Area Director; Gary S. Seaton, Vice President and Senior Lender, for Sunwest Bank of Gallup, New Mexico.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Navajo Precision Built Systems, Inc., seeks review of an April 17, 1991, decision of the Acting Navajo Area Director, Bureau of Indian Affairs (BIA; Area Director), disapproving an application for a loan guaranty in the amount of \$500,000. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified in this opinion.

Background

On March 11, 1991, Sunwest Bank of Gallup, New Mexico (bank), filed with the Area Director, a request for a loan guaranty in the amount of \$500,000 on behalf of appellant. The application stated that the loan was for start-up working capital for the manufacture and distribution of panelized residential and commercial buildings. The bank's accompanying analysis of appellant's proposed project ^{1/} sets forth the bank's determination that although there was a reasonable prospect that appellant would succeed, it would not make the loan without a BIA guaranty.

The information presented to BIA indicated, *inter alia*, that appellant's Board of Directors would include both Navajo and non-Navajo members; a majority of the Board of Directors would be Navajo; at least 51 percent of the corporate stock, designated Class A, would be restricted to ownership by Navajos, with 49 percent of the stock, designated Class B, being unrestricted; 62 percent of the corporate stock was presently owned by Indians, including 25 percent in a "Navajo Peoples Trust"; and proprietary technology, and engineering, consulting, and management services would be provided to appellant by Precision Built Systems, Inc. (PBSI), a non-Indian Kansas corporation headquartered in Wichita, Kansas, which had developed the process appellant was to employ.

^{1/} This analysis appears to be incorrectly dated Mar. 11, 1990.

By letter dated March 14, 1991, the Area Director wrote the bank, outlining various problems that had been found in the application. The Area Director requested additional market information; clarification of appellant's ownership and management; clarification of patent rights and engineering and technological capabilities; reconsideration of the location of the facility; information on the acceptability of the plans and specifications for appellant's product by tribal, state, and Federal housing authorities; additional cash flow and financial data; and clarification of the 20-percent up-front equity contribution.

Appellant provided additional information in response to this request.

The application was considered by the Navajo Area's Loan and Grant Committee, which, on April 11, 1991, voted to disapprove the loan guaranty. The committee indicated five reasons for its decision: "1. lack of local market for type of business 2. No financial risk on part of [PBSI] 3. Lack of management control by Indian ownership 4. No prior track record of success demonstrated by [PBSI] providing the expertise 5. Insignificant impact on reservation, income and wages going off-reservation."

By letter dated April 17, 1991, the Area Director disapproved the loan guaranty application. The disapproval letter stated:

We are disapproving the loan guaranty application based upon a determination that the loan could not reasonably be repaid as specified in Title 25, Code of Federal Regulations (CFR) parts 103.11, 103.15b and 103.2 for the following reasons:

1. [Appellant] failed to demonstrate a demand and a market exists for this type building structure (steel studded panels and framing) on the Navajo Reservation and its surrounding communities to achieve its projected sales and to cover debt service with a required balloon payment in the fifth year. In addition, there is no assurance of acceptance by local building architects to specify this system in the bidding specifications as alternative to wood frame structures. Also, the real estate market on the reservation is limited because lenders are unwilling to make loans on Indian trust lands.

2. As required by 25 CFR Part 103.15b, [appellant] lacks management control with limited evidence of efficient management in place and experience in the operation. The organizational chart shows the position of general manager will be held by [a yet] unnamed Navajo.

- Pursuant to the consulting and engineering agreement, [PBSI] will furnish a management team for all phases of the operation. This usurps the authority and diminishes the management ability of the general manager. It is our opinion the non-Indian interest or PBSI is the management of [appellant] since it will control the financial system, the accounting,

the production, the checking account, legal assistance, and will hold all key positions of the business.

- [Appellant's] checking account will be maintained at PBSI's corporate office at Wichita, Kansas which decreases control and management over funds and accounting management by [appellant].

- Further, the Articles of Incorporation refer to resolution of disputes by arbitration. We feel this clause only compromises the Board of Director's decision on the Indian management and ownership of [appellant].

3. The success of [appellant] is solely dependent upon the building system technology owned by PBSI and furnished to [appellant] pursuant to the consulting & engineering agreement; but PBSI does not exhibit any past successful performance as indicated by their financial statements submitted by Heidebrecht & Howell which omits certain financial disclosures and statements. The prospects for repayment and the capabilities of PBSI cannot be measured. Coupled with information on a corporate officer of PBSI which indicates past credit was not expeditiously handled and this casts doubt on the financial position of PBSI.

- PBSI can terminate its agreement with [appellant] and the loan applicant has no recourse against PBSI because there are no financial liability or penalty to be assessed against PBSI for breach of agreement. The stock ownership of PBSI represents primarily the proprietorship of steel framing concept and its engineering capabilities. Its 20% interest in the corporation is established only by its capital asset investment with little cash risk while [appellant] assumes all the financial risk and liability should PBSI fail to be involved in the new corporation.

4. Finally, as specified in 25 CFR 103.2, [appellant] failed to show significant economic benefit to the Navajo Reservation, since a major portion of the company's earnings, purchases, and wages will be transacted off the reservation.

By a separate letter of the same date, appellant was informed of its appeal rights.

On April 29, 1991, before filing an appeal from the disapproval, appellant requested that the Area Director reconsider his decision, and provided additional information. By letter dated May 6, 1991, the Area Director acknowledged receipt of appellant's request for reconsideration, but stated that "[w]e feel that the review of the information available to us on the application was adequate for our decision and any additional information received at this time would not be acceptable. Therefore, our previous decision [remains] unchanged and final."

The Board received appellant's notice of appeal on May 22, 1991. Briefs were filed by appellant and the Area Director. In addition, a letter was submitted by the bank.

Discussion and Conclusions

[1] Appellant expresses concern that the decision in this matter and much of the correspondence were signed by acting Area Directors rather than by the actual Area Director. The Board has previously held that when individuals serve as Area Director in an acting capacity, they "ha[ve] the same authority to issue decisions as the Area Director himself. Accordingly, their decisions have the same status as decisions issued by the Area Director." Hayes v. Acting Anadarko Area Director, 22 IBIA 65, 70 (1992). See also Ute Mountain Ute Tribe v. Acting Assistant Secretary for Indian Affairs, 11 IBIA 168, 90 I.D. 169 (1983). It is, therefore, not relevant that the decision, or any other document relating to this matter, was signed by an acting Area Director.

[2, 3] The Board has previously set forth its standard of review in cases arising under Indian Financing Act programs. In Gauthier v. Portland Area Director, 18 IBIA 303, 305 (1990), the Board stated:

[D]ecisions concerning whether or not a particular request for a loan guaranty should be approved are committed to the discretion of BIA. In reviewing such decisions, it is not the Board's role to substitute its judgment for that of BIA. Instead, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

See also McCloud v. Acting Aberdeen Area Director, 21 IBIA 254, 256 (1992); Power Fuel Producers, Inc. v. Acting Anadarko Area Director, 20 IBIA 219, 221 (1991), and cases cited therein. The appellant bears the burden of showing error in the Area Director's decision. Ames v. Acting Billings Area Director, 20 IBIA 246, 247 (1991), and cases cited therein.

The Board has also held that

in reviewing appeals filed under the various Indian Financing Act programs, it will not apply the usual rule of appellate procedure that reviewing bodies do not normally consider information and/or arguments presented for the first time on appeal. This deviation from usual procedure is intended to ensure that BIA's decisions in this area are based upon consideration of all relevant information, while keeping the adversarial nature of the proceedings to a minimum.

Nockey Construction, Inc. v. Portland Area Director, 22 IBIA 38, 39-40 (1992), and cases cited therein. The Board suggested in Nockey that BIA might consider the issuance of a preliminary disapproval determination in order to allow the applicant to address BIA's concerns about its application prior to the initiation of a formal appeal. In Wounded Head v.

Aberdeen Area Director, 22 IBIA 41, 42 n.1 (1992), the Board elaborated: Whether a preliminary determination is issued or some other "method is chosen, BIA should allow the applicant an opportunity to address BIA's concerns while the application is still pending before BIA, rather than require the applicant to file an appeal in order to get his responses heard."

The Area Director's March 14, 1991, letter to appellant served the same purpose as the preliminary determination suggested by the Board in Nockey Construction. This letter placed appellant on notice that the Area Director believed that, among other things, a comprehensive marketing plan and analysis for the reservation were needed to support the application. In his April 17 decision, the Area Director found that appellant had failed to demonstrate that a market existed.

In its submissions to the Area Director appellant indicated that the reservation was to be its primary marketing focus, but much of the marketing discussion was devoted to potential off-reservation and foreign markets. The supplemental information provided in response to the Area Director's March 14 letter did not include a comprehensive market analysis for the reservation. Based upon the information presented to him initially and in response to his specific request for supplemental data, the Area Director was justified in finding that appellant had failed to show that a viable market existed on the reservation. 2/

With its notice of appeal, appellant submitted additional information relating to markets, including letters from various Navajo housing officials and architects indicating that appellant's product appeared to be acceptable. In addition, appellant presented some figures allegedly showing present housing construction activities on the reservation. Even this additional marketing information does not constitute a market analysis. Appellant has failed to show error in the Area Director's decision. 3/

2/ Appellant submitted further information in its Apr. 29, 1991, request for reconsideration. Although the Area Director was not precluded from considering this additional information prior to the filing of a notice of appeal to the Board, and could have asked for a remand from the Board if a notice of appeal had already been filed, he was not required to continue to request and consider additional information. The Board's practice in regard to Indian Financing Act cases does not require BIA to continue to seek additional information until every application can be approved.

3/ The Area Director, both in his Apr. 17, 1991, decision, and in his Mar. 14, 1991, letter to the bank, indicated specific concern about appellant's ability to make the balloon payment of \$350,000 to \$375,000 that was due after 5 years. 25 CFR 103.25 states that "[b]alloon installments shall be avoided."

Appellant stated in its Apr. 29, 1991, letter to the Area Director and in its reply brief that the bank had agreed to remove the balloon payment. In an Oct. 21, 1991, letter to appellant, a copy of which was sent to the Board, the bank denied that it had made this agreement. At the very least, this dispute raises questions about appellant's credibility.

The Area Director next indicated his belief that appellant was actually not Indian-controlled. This conclusion was based upon the Area Director's determination that appellant's real managers would be from PBSI.

[4] The Board has carefully reviewed 25 CFR Part 103, including 25 CFR 103.15(b), which the Area Director cited, in order to locate a requirement that an economic enterprise be Indian-controlled in order to receive a loan guaranty. 4/ 25 CFR 103.1(i) clearly requires that an economic enterprise be Indian-owned: "'Economic enterprise' means any Indian-owned, commercial, industrial, agricultural or business activity established or organized for the purpose of profit, provided that eligible Indian ownership constitutes not less than 51 per centum of the enterprise." The Board has, however, been unable to locate any requirement in 25 CFR Part 103 that an economic enterprise must be Indian-controlled. The Area Director concedes that the regulations do not address Indian control of an economic enterprise seeking a loan guaranty:

While the guaranty loan regulations do not address control of a business as pivotal, Indian ownership is. One of the most important attributes of ownership of a business, especially closely held corporations, is control of the corporation and its business. Without such control, ownership becomes a sham. Here, [after] a thorough review of the documents submitted with the Appellant's opening brief it is clear that * * * a non-Indian, is the primary owner and controller of the Appellant. [5/]

(Area Director's Answer Brief at 6-7).

The absence of a requirement in Part 103 for Indian control of the economic enterprise differs from the requirement in regard to financial assistance provided under the Indian Business Development Program in 25 CFR Part 286. 25 CFR 286.3 provides:

Associations, corporations or partnerships shall be at least fifty-one percent owned by eligible Indians or an eligible

4/ Section 103.15(b) provides in pertinent part: "Reasonable assurance of repayment will be considered to exist: (1) In the case of individuals, where past operations and future prospects of the applicant's operations demonstrate ability to repay the loan from production, earnings, or other assets. Full consideration will be given to the applicant's managerial ability and experience."

5/ Appellant concedes as much in its Apr. 29, 1991, letter: "Most Native Americans do not have the capital to set up a business, so someone with outside capital comes into the picture, and no matter what the organizational structure appears to be, the reality of the matter is that the outside private capital, in one way or another, controls the operation." As the Area Director notes, funds made available under the Indian Financing Act programs are intended to be the "outside private capital," thus allowing for Indian ownership - and ultimately control - of the economic enterprise.

Indian tribe. This Indian ownership must actively participate in the management and operation of the economic enterprise by representation on the board of directors of a corporation or cooperative association proportionate to the Indian ownership which will enable the Indian owner(s) to control management decisions. * * * The legal organization documents shall provide safeguards which will prevent Indian ownership and control from decreasing below fifty-one percent. [6/]

The Board reviewed the proposed revisions to 25 CFR Part 103, published at 56 FR 48082 (Sept. 23, 1991), and found that no change was proposed that would require Indian control of an economic enterprise under the loan guaranty program. Despite the Area Director's understandable concern about the relationship between Indian ownership and Indian control of an economic enterprise, his decision must be based upon the regulations. To the extent that the Area Director concluded that the loan guaranty program required appellant to be Indian-controlled, this aspect of his decision cannot be sustained. 7/

The Area Director next found that appellant's success would be solely dependent upon the proprietary technology to be shared with it by PBSI, but that no evidence of PBSI's past performance had been submitted; credit information relating to a corporate officer of PBSI indicated prior credit problems; and PBSI could terminate the engineering and consulting agreement at any time with impunity, thereby depriving appellant of its ability to manufacture and distribute its single product.

The Area Director in part based his conclusion that there was no information about the managerial abilities and experience of PBSI and the consultants to be provided to appellant upon a statement made in a January 21, 1991, "Accountants Compilation Report" submitted to PBSI by an accounting firm. The statement is:

6/ The Board notes that, with the possible exception of the arbitration clause cited by the Area Director, appellant's organizational documents may arguably meet the standards for Indian control set forth in 25 CFR 286.3.

7/ Appellant disputes the Area Director's conclusion that it is not Indian-controlled, stating that its Indian manager, not PBSI, will be in charge of operations. As one example of this alleged Indian control, appellant contends that "[t]here will be no checking accounts in Wichita, Kansas and certainly none controlled by PBSI when funding is completed so that operations can be started" (Reply Brief at 5). The Area Director apparently based his statement regarding the location of appellant's checking account on an item in the minutes of the First Meeting of Incorporators. That item recites that the depository for corporation funds is the Citizen Bank and Trust Co. of Abilene, Kansas. The Board finds nothing in the record or documents submitted by appellant showing that appellant's bank had, or would be, changed. In making his decision, the Area Director was entitled to rely on the information appellant submitted.

Management has elected to omit the statements of earnings and retained earnings and cash flows and substantially all the disclosures required by generally accepted accounting principles. If the omitted statements and disclosures were included, they might influence the user's conclusions about the company's financial position. Accordingly, these financial statements are not designed for those who are not informed about such matters. ^{8/}

Appellant contends that the Area Director is making too much of a standard accounting disclaimer.

Whether or not the paragraph represents a standard accounting disclaimer, the statements made in it appear to be particularly true. PBSI presented little or no past performance information to the Area Director, and the information the Area Director was able to obtain about the credit background of one of the principals of both PBSI and appellant indicated some kind of repayment problem. Appellant was essentially asking the Area Director to make a decision in an information vacuum.

Furthermore, appellant has not disputed the Area Director's interpretation of the agreement between PBSI and appellant, under which PBSI can apparently breach the agreement with impunity, with appellant's only recourse being to terminate the agreement, thereby obligating itself to return all proprietary information to PBSI, and forcing a shutdown of its own operations. Instead of showing that the Area Director's interpretation was incorrect, appellant contends that PBSI is a good organization with good intentions. However, the Board finds nothing in the Articles of Incorporation, the consulting agreement, or any other document supplied to BIA by appellant to require PBSI to abide by its contract, or to provide appellant with a meaningful remedy in the event PBSI breaches the contract.

The Board finds that the Area Director reasonably concluded that he had no basis for evaluating PBSI's past performance or future prospects, and that the contractual agreement between PBSI and appellant left appellant with no recourse in the event of a breach by PBSI. Appellant has not shown that these conclusions are in error.

Finally, the Area Director determined that appellant's proposal did not meet the requirements of 25 CFR 103.2 in that it failed to show that a significant economic benefit would accrue to the Navajo Reservation. This conclusion was based upon the fact that the economic enterprise would be located off the reservation, and that a major portion of appellant's earnings, purchases, and wages would be transacted off the reservation. Section 103.2 provides that financial assistance is made available to "economic enterprises which contribute beneficially to the economy of an Indian reservation."

^{8/} A similar, although not identical, statement appears in the Mar. 25, 1991, Accountants Compilation Report sent to appellant concerning its forecasted financial statements and position.

Appellant responds that it has a broader view of the term “reservation” than does the Area Director. Appellant states that, to it, “reservation” means not just the land, but also the people. Because appellant argues, it intends to employ a significant number of Navajo people in and around Gallup, it will benefit the “reservation” by benefiting the Navajo people. Furthermore, it argues it will benefit the Navajo people by providing better housing.

[5] “Reservation” is defined in 25 CFR 103.1(h) to mean “Indian reservations, unterminated California rancherias, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claim Settlement Act (85 Stat. 688).” It is clear from this definition that 25 CFR Part 103 contemplates that an economic enterprise will contribute beneficially to the economy on an actual reservation. Appellant was responsible for familiarizing itself with the requirements set forth in Departmental regulations. See, e.g., Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

Appellant bore the responsibility to prove that the Area Director erred in concluding that its operations would not contribute beneficially to the economy of the Navajo Reservation. Appellant's claimed benefit of improving housing on the reservation is not a benefit to the economy. Furthermore, appellant's mere statement that it intends to hire people who live on the reservation and to buy some products from the reservation is not sufficient to show that its operations would have more than a minimal impact upon the reservation's economy. Appellant has failed to carry its burden of proving error in the Area Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1. the Acting Navajo Area Director's April 17, 1991, decision is affirmed as modified by the Board's holding that appellant was not required under 25 CFR Part 103 to show it was Indian-controlled.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

9/ This decision does not preclude appellant from continuing to work on the deficiencies in its proposal that were identified by the Area Director, and from submitting a revised application.