



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Skokomish Indian Tribe v. Portland Area Director, Bureau of Indian Affairs

Docket No. IBIA 97-90-A (08/14/1997)

Related Indian Self-Determination Act case:

Interior Board of Indian Appeals decision, 31 IBIA 156



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
HEARINGS DIVISION  
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SKOKOMISH INDIAN TRIBE	)	
	)	
Appellant	)	No. IBIA 97-90-A
	)	
-v-	)	RECOMMENDED DECISION
	)	
PORTLAND AREA DIRECTOR	)	
BUREAU OF INDIAN AFFAIRS	)	
	)	
Appellee	)	

The genesis of this case is the Tribe's appeal from the refusal of the Secretary of the Interior, via the Portland Area Director, Bureau of Indian Affairs, to amend the Tribe's P.L. 93-638 contract (hereafter 638 contract or contract) to add FY 1997 funds in the approximate amount of \$480,000.00. An analysis of the case discloses the following important events.

According to the statements contained in page 2 of the Tribe's Notice of Appeal, the Bureau of Indian Affairs, through the Portland Area Director, and the Skokomish Tribal Council entered into a "cost reimbursement contract to operate a Cushman Hydroelectric Project on the Skokomish Indian Reservation in accordance with the contract terms, provisions, and conditions attached hereto" (referring to Exh.1, App. at 1 of the Notice of Appeal). The contract was a 93-638 contract between the Area Director (hereafter sometimes "Bureau") and the Tribe.

In the Notice of Appeal (page 2), the Tribe alleges that since 1993 the Tribe has "contracted to study the impacts of the unlicensed Cushman Project and to identify and take steps to protect its trust property and treaty rights. In each year of the 638 contract's duration, the Tribe has sought and obtained--eventually--the Secretary's addition of funding for the Tribe's research and activities related to the Cushman Project." The record establishes that in each FY 1994 and FY 1995, the Tribe received \$480,000.00 by way of Congressional appropriations for the Tribe's participation in the Cushman Hydroelectric Project. The Tribe sought a similar amount for FY 1996 and, after a dispute between the Tribe and the Bureau over FY 1996 funding, an approved settlement was entered whereby the Tribe received \$250,000.00 through its self-governance Annual Funding Agreement.

By letter dated October 30, 1996, the Chairman of the Tribal Council submitted to the Area Director the Tribe's proposal to amend the contract to add \$480,000.00 in FY 1997 for funding for Cushman Project activities. Accompanying such proposal was a tribal resolution and a scope of work. By letter dated January 31, 1997, the Area Director advised the Tribe that he was returning the Tribe's request to amend the contract because "there presently is (sic) no funds available for this project."

Thereafter, the Tribe filed a Notice of Appeal and the matter was remanded to the Hearings Division of the Office of Hearings and Appeals and assigned to this forum for further action and recommended decision. After the Area Director's response to the Notice of Appeal, the Tribe filed a Reply and Cross Motion for Summary Judgment. This forum denied the motion for summary judgment as a procedural matter and not on its merits, advising the parties that the matters covered by the motion would be addressed in the recommended decision.

Obviously, the Tribe's proposal for FY 1997 funding was not declined within a ninety day period from November 1, 1997, when it was received by the Area Director. It is provided under 25 CFR 900.18 that:

A proposal that is not declined within 90 days (or within any agreed extension under (sec) 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to Section 106(a) of the Act.

In his response to the Notice of Appeal, the Area Director admits that the proposal was not declined within the required ninety day period and further admits that the Tribe has the right to have the contract (proposal) approved. However, the Area Director alleges that the proposal should not be approved in the amount requested by the Tribe but in the amount of \$50,000.00 for the reasons set forth in his response to the Notice of Appeal and in his response to the Tribe's Reply and Cross Motion for Summary Judgment. While the sum of \$480,000.00 was mentioned in the Notice of Appeal, the Tribe requested payment of the sum of \$300,000.00 in its Reply and Cross Motion for Summary Judgment and this is the figure which this forum considers as being the sum requested by the Tribe. Since the Area Director has admitted that the declination was not filed within the time required by the regulation, the sole issue appears to be the compensation to which the Tribe is entitled.

By admission of his failure to comply with the requirements of 25 CFR 900.18, the Area Director assumed the burden of proving the amount to which the Tribe is entitled. The only reference to a burden of proof which this forum could find in the pertinent regulations is set forth in 25 CFR 900.163, which reads as follows:

For those appeals, the Secretary has the burden of proof (as required by Section 102(e)(1) of the Act) to establish by clearly demonstrating the validity of the grounds for declining the contract proposal. (emphasis added)

This is a vague standard of proof and it could certainly be argued that it was intended that the standard of proof be "clear and convincing," however, this forum accepts a "preponderance of the evidence" as being the rule to apply in this appeal.

#### AREA DIRECTOR'S THEORY OF LIMITATION TRIBE'S RECOVERY

The Area Director appears to base his position that the Tribe is entitled only to \$50,000.00 on the proposition that "the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals" and that if the Bureau contracted with the Tribe for the Tribe to perform the 4(e) and 10(e) functions (license conditions and annual fee charges) of the Federal Power Act, 16 U.S.C. Secs. 797(e) and 803(e), this would constitute an impairment of the Secretary's ability to discharge his responsibilities. Therefore, the Area Director reasons that he could not have awarded any amounts for that part of the Tribe's proposal (see Tribe's scope of work) which covered these activities and that that part of the proposal which could have been awarded would have been the Tribe's participation in the Cushman Project not involved with 4(e) and 10(e) activities.

Apparently based solely on tribal participation contracts awarded to other tribes (see Exhibit G of the Area Director's Response) and "prefiling consultations in other FERC proceedings under Program Code 12320" (Page 7 of the Area Director's Response), the Area Director determined that the amount which the Bureau would have "otherwise provided for tribal participation" to the appellant was \$50,000.00.

The only support for the Area Director's theory that contracting with the Tribe for the Tribe to perform 4(e) and 10(e) activities would impair the Secretary's trust responsibility appears to be a memorandum dated May 31, 1984, from the Associate Solicitor, Division of Indian Affairs, to the Assistant Secretary--Indian Affairs, subject: "contracting for collection of evidence to support water rights quantifications" and the authorities cited therein (Exhibit H of Area Director's Response) and correspondence between the Tribe

and the Interior Department which reflects disagreement of the Tribe with draft 4(e) conditions submitted by the Department of the Interior to Federal Energy Regulatory Commission (Exhibit I of Area Director's Response).

At the outset it is noted that the memorandum dated May 31, 1984 relates to issues pertaining to water rights litigation and not issues arising from matters before the FERC; notwithstanding, the Area Director urges that the memorandum be given even application to this appeal. This forum is not convinced that the views expressed in the memorandum should be translated to have equal force over 4(e) and 10(e) activities before the FERC. Furthermore, the arguments advanced in the memorandum for the Department's not contracting with a tribe over water rights, are seriously, if not fatally, flawed by the fact that the Area Director has effectively delegated his trust responsibility by contracting with a non-tribal contractor to perform 4(e) and 10(e) activities. Standing alone, Exhibits H and I, leave this forum unconvinced that, if the Tribe had the requisite personnel, expertise, and experience to perform such activities, the Secretary would impair his trust responsibilities by entering into a contract with the Tribe to perform these activities rather than contracting with a non-Tribal contractor to perform them.

If the Bureau is concerned that the Tribe does not have the necessary expertise, experience and personnel, this would have been a legitimate reason for declination of the proposal, and such reason would have fit within the criteria on which the Secretary can base a declination (see 25 CFR 900.22).

Since the Area Director has not offered any evidence that the Tribe cannot perform the 4(e) and 10(e) activities and since the evidence he does offer (primarily, if not exclusively, Exhibit H and the authorities cited therein and Exhibit I) is not persuasive why the Tribe should not have been considered for award of funds to perform the 4(e) and 10(e) activities, I find that the Area Director has not met, by a preponderance of the credible evidence, his burden of proving that the Tribe's recovery should be limited to \$50,000.00.

However, such finding and ruling notwithstanding, this forum is concerned that if the Tribe is awarded the \$300,000.00 which it seeks that (1) the Area Director could acquire uncommitted funds to satisfy such an award and (2) that the Tribe would receive a large amount of money for work it has not performed, i.e., 4(e) and 10(e) activities for fiscal 1997, albeit it might have been prevented from performing such activities because the Bureau contracted with a non-tribal contractor to perform them during fiscal 1997. To forestall such latter circumstance, this forum finds that the Tribe is

entitled to \$50,000.00 and to any additional amount between \$50,000.00 and \$300,000.00 which the Tribe can establish will be devoted to Cushman Project activities during the balance of the contract year. Accordingly, this forum recommends that by August 25, 1997, the Tribe submit to the Interior Board of Indian Appeals a tribal plan demonstrating to the Board the manner in which the tribe will commit the full amount of the \$300,000, or any portion thereof in excess of \$50,000.00, solely to Cushman Project activities during the balance of the contract year. Since the amount to be awarded is not founded on any credibility of witness issues, this forum is not aware of any reason why the Board, as deciding entity, would be precluded from determining the amount of the award to the Tribe.

Under 25 CFR 900.165(c), it is required that a recommended decision contain the following language:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.165(c). An appeal to the IBIA under 25 CFR 165(c) shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

Pursuant to the order issued by this forum on July 31, 1977, which incorporated an expedited schedule to which both parties agreed, the parties have until August 25, 1997, within which to file objections to the recommended decision.

This forum would be remiss if it failed to comment on counsel for each of the parties. They maintained a high sense of professionalism and demonstrated legal acumen throughout these proceedings. It was a pleasure to work with them and, hopefully, their sterling performance will not go unremarked by their clients.

This recommended decision is entered at Sacramento, California on August 14, 1997.

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//original signed  
William E. Hammett  
Administrative Law Judge