



INTERIOR BOARD OF INDIAN APPEALS

White Earth Band of Chippewa Indians v. Minneapolis Area Director,
Bureau of Indian Affairs

23 IBIA 216 (03/03/1993)



United States Department of the Interior

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

WHITE EARTH BAND OF CHIPPEWA INDIAN
v.
MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-143-A

Decided March 3, 1993

Appeal from the approval of a gaming contract containing terms different than those negotiated between the tribe and the management company.

Affirmed in part, vacated and remanded in part.

1. Indians: Generally--Indians: Gaming--Statutes

Self-executing legislation contains the standards necessary for its enforcement without the need for implementing regulations.

2. Indians: Gaming

The Indian Gaming Regulatory Act, 25 U.S.C. § 2711(c), requires the Bureau of Indian Affairs to examine the capital investment structure against the income projections for the gaming activity in determining whether or not to approve a split of income between a tribe and a management company under which less than 70 percent of the net income would go to the tribe.

3. Indians: Gaming

The Indian Gaming Regulatory Act, 25 U.S.C. § 2711(b), requires the Bureau of Indian Affairs to compare the capital investment required and the income projections for the gaming activity in determining whether or not to approve a gaming management contract with a term exceeding 5 years.

4. Administrative Procedure: Administrative Record--Bureau of Indian Affairs: Administrative Appeals: Generally

When the administrative record and the decision in an appeal from a Bureau of Indian Affairs Area Director's

decision are inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

APPEARANCES: Peter W. Cannon, Esq., Mahnomen, Minnesota, for appellant; Marcia M. Kimball, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant White Earth Band of Chippewa Indians seeks review of a March 6, 1992, decision of the Minneapolis Area Director, Bureau of Indian Affairs (BIA; Area Director), approving a gaming management contract between appellant and Gaming World International, Inc. (GWI), on terms different than those negotiated by appellant and GWI. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part and vacates and remands it in part. 1/

1/ On Mar. 26 and Apr. 2, 1992, respectively, the Board received letters from Lowell Bellanger and Erma J. Vizenor. Both individuals appear to be tribal members, and stated that they were "interested" in the outcome of this case. Vizenor also identified herself as Leader of "Camp Justice," "a broad and large constituency of White Earth tribal members who seek open government, fair elections, and accountability within the White Earth Reservation Business Committee." In its Apr. 9, 1992, amended pre-docketing notice, the Board indicated that "[t]he right of these individuals to participate in this appeal either on their own or as representatives of a group of tribal members has not yet been determined." In its May 11, 1992, notice of docketing, the Board informed Bellanger and Vizenor that they could "file briefs during the time for filing answer briefs, with the understanding that the Board has not yet determined their standing, either as interested parties or as *amici curiae*."

Neither Bellanger nor Vizenor filed anything else with the Board. The Board has no basis for granting either of them any form of standing in this matter. Accordingly, the letters received from Bellanger and Vizenor have not been considered in reaching this decision.

On Apr. 6, 1992, the Board received a letter from Michael McNally, who identified himself as "a Ph.D. candidate at Harvard [University Divinity School] in the study of religion, and, although a non-Indian myself, I have spent the past summer at White Earth investigating issues of tribal government accountability and gaming-based economic development." 43 CFR 4.331 provides that "[a]ny interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs" may appeal that action or decision to the Board. "Interested party" is defined in BIA's regulations in 25 CFR 2.2 as "any person whose interests could be adversely affected by a decision in an appeal." It is clear from these regulations that McNally is not an "interested party" and, therefore, has no standing in this matter. The letter received from him has also not been considered.

Background

Following passage of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988) (IGRA), 2/ appellant determined to open a high stakes gaming operation on its reservation. Early in 1991, appellant entered into negotiations with GWI to manage the operation and provide training in gaming management for tribal members. In August 1991, appellant submitted a management agreement to the Area Director. The Area Director indicates that he believed the submission was a draft which he was being asked to review; appellant indicates that it was a proposed contract for which it was seeking approval. The submission was reviewed by both the Area Director and the Office of the Field Solicitor (Field Solicitor).

As a result of a continuing review process, the Area Director informed appellant that certain amendments were necessary before he would approve the contract. Ultimately, the amendments required by the Area Director were incorporated into the contract, over appellant's objections to three of the amendments, namely, (1) a 70/30 split of proceeds (with 70 percent going to appellant and 30 percent to GWI), rather than the 60/40 split negotiated with GWI; (2) a contract term of 5 years, instead of the negotiated 7 years; and (3) the requirement that repayment of the principal and interest on appellant's construction loans be deducted from gross proceeds. The Area Director approved the contract, including the required amendments, on March 6, 1992. Appellant's Shooting Star Casino has been opened and is apparently being operated under the contract as approved.

Appellant appealed the approval of the amended contract to the Board. Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

Prior to passage of the IGRA, tribal gaming management contracts were approved by BIA under 25 U.S.C. § 81. 3/ See 25 U.S.C. § 2701(2) ("Federal courts have held that section 81 of this title requires Secretarial review

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

3/ Section 81 provides in pertinent part:

"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 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 indorsed upon it.

* * * * *

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

of management contracts dealing with Indian gaming") See also Jacobs v. Eastern Area Director 20 IBIA 68, 72-73 (1991), and Federal court cases cited therein.

The IGRA provides for the establishment of a National Indian Gaming Commission (Commission) with authority to regulate Indian gaming activities. Section 10 of the IGRA, 25 U.S.C. § 2709, provides that

[n]otwithstanding any other provision of this chapter, the Secretary [of the Interior] shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988 [the date of the enactment of the IGRA], relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations.

Under this authority, BIA has continued to review and approve or disapprove gaming management contracts until the Commission is able to assume its responsibilities under the IGRA.

Appellant contends that because the Commission was not organized and had not prescribed regulations when the Area Director was considering its proposed contract, 25 U.S.C. § 2709 required the Area Director to follow an April 7, 1986, memorandum issued by the Assistant Secretary - Indian Affairs (1986 memorandum; Assistant Secretary). The 1986 memorandum concerned review of gaming management contracts, and was in effect on October 16, 1988. Appellant contends that the Area Director violated the 1986 memorandum both by not sending its contract for review by the Washington, D.C., BIA office, and in several substantive areas.

Appellant's argument concerning the office having authority to review the proposed contract is, in essence, that section 2709 prohibits the Department from changing any procedures relating to the review and approval of gaming management contracts in effect on October 16, 1988. The Board disagrees with this interpretation of the section. Section 2709 states that "the Secretary shall continue to exercise those authorities vested in" him on October 16, 1988. The Secretary's authority was vested in him by section 81. The 1986 memorandum is merely a statement of the manner in which the Secretary determined to carry out his section 81 responsibilities. Section 2709 in no way states, or even implies, that the Secretary cannot change existing intra-Departmental procedures for carrying out his responsibilities under section 81.

Following enactment of the IGRA, the Assistant Secretary issued a memorandum on August 1, 1990, entitled "Review and Approval of Tribal-State Gaming Compacts, Class III Gaming Ordinances and Class III Third Party Contracts" (1990 memorandum). Inter alia, that memorandum provides:

Review and approval of Class II as well as Class III third-party management contracts remain with the Area Office. When reviewing such contracts, you are to use the Department's 1986

Bingo guidelines [1986 memorandum] as well as the [IGRA]. However, where the Bingo guidelines conflict with the [IGRA], you are to follow the Act exclusively. For example, third-party contracts should conform to the term of years and of net revenue provisions of the [IGRA] rather than the 1986 guidelines.

The Board rejects appellant's contention that the Area Director committed reversible error in not sending its proposed contract to the Washington, D.C., BIA office for review. Under the 1990 memorandum, the Area Director had authority to review and approve or disapprove the proposed contract.

Appellant also contends that, in the absence of implementing regulations, the Area Director lacked authority to consider restrictions set forth in the IGRA in reviewing its proposed contract. As seen above, the 1990 memorandum required BIA to apply provisions of the IGRA which conflicted with the 1986 memorandum.

[1] Appellant's argument assumes that the Department can ignore specific requirements set forth in legislation until such time as implementing regulations are promulgated. While it is at least arguable that enforcement of legislation which grants an agency general authority to act in a particular area of concern or requires further definition may be delayed until such time as the agency has promulgated regulations, enforcement of legislation, or those sections of legislation, that are essentially self-executing is not delayed by the failure to promulgate regulations. Self-executing legislation contains the standards necessary for its enforcement without the necessity of further regulatory refinement or definition. *Cf., e.g., Jones v. Buford*, 365 A.2d 1364, 1366, 71 N.J. 433 (1976) (dealing with state legislation: "Self-executing legislation * * * requires no act of implementation at the local level"). As set forth in the context of the specific discussions below, the Board finds that those portions of the IGRA upon which the Area Director relied are essentially self-executing.

Appellant contends that the Area Director should not have required a 70/30 split of proceeds from the gaming operation. ^{4/} Appellant argues:

^{4/} Although appellant now argues that the negotiated contract provided for a 60/40 split of revenues and a 7-year term, the proposed contract originally submitted to the Area Director stated in paragraph 2.B:

"Unless a seven year term is approved pursuant to part 2.D below, the term of this Agreement shall commence as of the date hereof and shall terminate on a date which is 5 years after the date upon which the facility for conduct of gaming activities permitted hereunder first opens for business to the general public."

Paragraph 2.D provides in pertinent part: "Pursuant to [25 U.S.C. § 2711, appellant] agrees to request the Secretary and/or the Chairman to

It is clear * * * that the Area Director used the statutory provisions of the [IGRA] to determine the appropriateness of the contract terms of the management agreement * * * [T]he Area Director applied the provisions of 25 U.S.C. Sect. 2701 et seq. without the guidance of regulations, which have a hearing process before they are adopted, and without any other statutory, regulatory, or directive [sic] to aid him in applying those provisions. The congressional findings as set forth in 25 U.S.C. Sect. 2701(2) clearly indicate that management contracts are covered by Section 81 of Title 25. The findings also clearly indicate that there are no standards for approval in Section 81. Therefore, any standards which are applied to the management agreement * * * would have been wholly arbitrary, capricious and without force of law.

(Opening Brief at 15).

25 U.S.C. § 2711 deals with approval of management contracts. Subsection (c) of section 2711 provides:

(1) The Chairman [of the Commission] may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that

fn. 4 (continued)

authorize a contract term of seven (7) years, and to approve a management fee based upon 40% of the “net operating profits” of the tribal gaming activities.”

Other sections of the contract as originally submitted speak in terms of a 60/40 split of net proceeds. See, e.g., paras. 3.E.iii and 4.

A revision to the contract received by the Area Director on Nov. 6, 1991, similarly provided in paragraph 2.B:

“This Agreement, of either five (5) or seven (7) years as approved by the Secretary of the Interior or it’s designee in the Bureau of Indian Affairs, commences when the Manager accepts the Shooting Star Casino (primary facility) for gaming purposes. The Agreement expires after five (5) or seven (7) years, (whichever is approved); the day prior to the anniversary date of acceptance of the primary facility named the Shooting Star Casino.”

Paragraph 2.D in the Nov. 6, 1991, amended contract contained the same provision as paragraph 2.D in the original submission.

exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections for such tribal gaming activity require the additional fee requested by the Indian tribe. [Emphasis added.]

[2] The Board holds that section 2711(c) provides the necessary standards for action by BIA without the necessity of implementing regulations. Section 2711(c) requires that, in determining whether a split of income between a tribe and a management company under which less than 70 percent of the net income would go to the tribe, the Area Director must examine the capital investment structure against the income projections. The section furthermore grants discretion to the decisionmaker in making this determination. Although the Commission may decide to promulgate regulations providing guidelines for the Chairman's exercise of discretion, the Board does not believe that such refinement is a necessary prerequisite to enforcement of the section's requirements. As in other cases involving the exercise of discretion, the decision is reviewable to determine that all legal prerequisites to the exercise of discretion were met, and the decision is reasonable. See, e.g., Ponca Tribe of Oklahoma v. Acting Anadarko Area Director, 22 IBIA 199, 203 (1992), and cases cited therein. The Board holds that the Area Director properly considered the percentage restrictions set forth in section 2711(c) in reviewing appellant's proposed contract.

Appellant's arguments for the originally negotiated 60/40 split are that GWI has encountered additional expenses relative to its location of a major gaming operation in rural Minnesota, including providing incentives for experienced gaming professionals to relocate for a short time, and has already expended more than it originally agreed to commit to the operation (up from a commitment of \$5,000,000 to more than \$7,500,000), including expenditures for the initial start-up of the casino and hotel furnishings.

In his answer brief at pages 8-10, the Area Director discusses his determination that a 60/40 split was not justified in this case. This discussion highlights information in the administrative record.

When the Area Director reviewed the proposed White Earth agreement, he considered the risk of the management company compared to the total cost of the project and the income projections for the facility * * *.

* * * * *

* * * The management company agreed to put up to \$5 million into the project. Although that is a sizeable investment, [appellant] itself had withdrawn more than \$11 million from the settlement funds which came from the White Earth Land Settlement Act. [5/] The use of the settlement funds was explained in a

5/ Section 12 of the Act of Mar. 24, 1986, the White Earth Reservation Land Settlement Act (WELSA), P.L. 99-264, 100 Stat. 61, 69, provides in pertinent part:

statement of pertinent facts supplied to the First National Bank of Aitkin, Minnesota, in [appellant's] request for a \$5.5 million loan. As this project developed, [appellant] found it necessary to borrow from the First National Bank of Aitkin and seek a loan guarantee from BIA. * * *

When the investment of the management company is compared to the total investment from all sources * * *, the risk is not of such a magnitude as to justify the higher percentage of net revenues * * *. The manager in this case, with a contractual guarantee of \$5 million, was investing approximately 25 per cent of the total amount at risk.

Although the Area Director does not specifically address appellant's assertion that GWI has committed more than its contractually required amount to appellant's gaming operation, the Board notes that the additional monies committed do not substantially increase GWI's percentage investment when compared to the total investment. The Board holds that the Area Director properly considered the capital investment structure against the income projections for this project and reasonably determined that the percentage investment of GWI did not warrant less than 70 percent of the net revenues coming to the tribe.

Appellant also contends that the Area Director has approved management contracts for other tribes under his jurisdiction in which the tribe involved will receive less than 70 percent of the net income. The Area Director argues that each contract must be examined on a case-by-case basis, and that different investment structures and income projections make comparisons between contracts difficult. The Board agrees, and holds that differences between contracts are, at most, illustrative.

Appellant contends that the Area Director improperly reduced the term of the contract from the negotiated 7 years to 5 years.

25 U.S.C. § 2711(b) provides:

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

fn. 5 (continued)

“(a) There is established in the Treasury of the United States a fund to be known as the White Earth Economic Development and Tribal Government Fund. Money in this Fund shall be held in trust by the United States for the White Earth Band of Chippewa Indians * * *.

* * * * *

“(c) Income from the fund may be used by the authorized governing body of the band for band administration. Principal and income may be used by the authorized governing body of the band for economic development, land acquisition, and investments * * *.”

* * * * *

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years, but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time. [Emphasis added.]

[3] Again, the Board holds that this provision of the IGRA provides the standards necessary for its implementation without the promulgation of regulations. The standard involves a comparison of the capital investment required and the income projections.

Appellant argues that the longer term is needed because of the time necessary to train tribal members in all aspects of management of a gaming operation of this magnitude. This is clearly not a reason cognizable under the IGRA for a contract term exceeding 5 years. Therefore, appellant has failed to show error in the Area Director's decision to require a contract term of 5 years.

Finally, appellant contends that its construction loans should be repaid out of net proceeds, rather than gross proceeds. Appellant states that it has drawn down \$11,800,000 from the WELSA economic development fund and has a \$5,500,000 bank loan. Appellant argues that it "does not see why [GWI], who will be involved [in the gaming operation] for a brief period, should bear [30] percent of the principal costs of [appellant's] building" (Mar. 13, 1992, Notice of Appeal at 4). In its opening brief at page 14, appellant contends:

The requirement by the Area Director that the construction funds come out of the operating account is totally contrary to any business practice. The costs associated with building construction are a matter of depreciation and not a matter of an operating expense. * * * [F]rom the legislative history of the [IGRA], it was not contemplated that such expenses would be deducted as an operating expense.

Appellant supports its last comment by reference to 25 U.S.C. § 2703(d), which defines "net revenues" as "gross revenues of an Indian Gaming Activity less amounts paid out as, or paid out for, prizes and total operating expenses, excluding management fees." It further cites the legislative history of the IGRA as indicating that operating expenses include services, materials, supplies, and equipment. ^{6/}

^{6/} The portion of the legislative history to which appellant refers appears to be contained in S. Rep. No. 100-446, reprinted in 1988 U.S. Code Cong. & Admin. News 3071, 3085:

It appears that the language to which appellant objects is found in the definition of "all development costs" in section 5.B of the contract as approved:

BE IT FURTHER PROVIDED HOWEVER, that the principal and interest payable on the five million five hundred thousand (\$5,500,000.00) dollar loan, and the principal and interest of the monies expended from the WELSA funds, said funds being borrowed for the purpose of completing construction of the Shooting Star Casino, will be an allowable deduction as an operating expense from the gross revenues of the Gaming Enterprise and related activities.

This proviso was not found in the proposed contract as it was originally submitted to the Area Director. Based upon a review of the versions of the contract appearing in the administrative record, it was apparently added in the last series of amendments, immediately prior to the Area Director's March 6, 1992, approval of the contract.

Because the Area Director did not respond to this argument in his answer brief, the Board has examined the administrative record for support for the requirement. The Board found only three references to the issue in the administrative record. A December 10, 1991, letter to the Area Director from the Field Solicitor, states at page 2:

Further, I am concerned that the language used in the definition [of "all development costs"] may allow for the repayment of principal on loans to be classified as a development cost rather than just the interest on the loans which is the expense associated with borrowing money, being classified as a development cost.

A February 27, 1992, memorandum from the Area Director to the Superintendent states at paragraph 17:

The definition of "all development costs" and "operational expenses" both need to be clarified. Does development costs include principal payments on all loans?
* * * Does the interest included under the operating expenses include interest on Tribal loans? * * * We request that both these definitions be rewritten to provide sufficient detail.

Finally, a March 4, 1992, memorandum to the Area Director from Area Office staff, discussing criteria for evaluating the net revenue split under the

fn. 6 (continued)

"The term 'management contract', does not include contracts or agreements for the procurement of particular services, materials or supplies. These services or supply agreements, including the supply of gaming aids * * * are subject to regulation under [25 U.S.C. § 2710(b)(2)(D)]. Charges associated with such services, materials, supplies or equipment are to be included as part of the total operating expenses in determining the net revenues under [25 U.S.C. § 2703(9)]."

IGRA, states the conclusion, *inter alia*, that "[t]he payback on the total capital investment (i.e., loans, notes, etc.) must be considered an operating expense prior to determining the distribution of net revenues." This conclusion is not discussed further in the memorandum.

[4] It is readily apparent that the Area Director has presented no justification for the determination that principal and interest payments on appellant's loans must be deducted from gross revenues. In fact, it appears that the statements contained in the administrative record are contradictory. Without justification, the Area Director's decision is not supported by the record. McCloud v. Acting Aberdeen Area Director, 21 IBIA 254, 257 (1992), and cases cited therein. Accordingly, this aspect of the Area Director's decision must be vacated, and the matter remanded to the Area Director for further consideration. 7/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 6, 1992,

7/ Except to the extent discussed *infra*, appellant's remaining arguments have been considered and rejected.

In its opening brief at page 6, appellant contends that

"[t]he question pending before the Office of Hearings and Appeals is whether the Area Director acted properly in neither approving or disapproving the contract which was submitted in August of 1991. The further question is whether the Area Director acted properly in extending the time during which modifications could be suggested and made."

Appellant later cites the provisions of 25 U.S.C. § 2711(d) in support of its contention that the Area Director did not either approve or disapprove its proposed contract in a timely manner. Section 2711(d) provides:

"By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection." (Emphasis added.)

Although appellant clearly believes that the Area Director erred in the length of time he took to review the contract, it does not indicate what relief it believes it is entitled to because of the error. Neither is there any indication that appellant attempted to follow the procedures established in section 2711(d) for violation of the time restrictions.

Appellant also contends that the Area Director did not negotiate with it in good faith, threatened it with criminal prosecution and closure of the gaming facility if the amendments were not made, and made decisions in a paternalistic manner. Although it is clear that appellant believes it negotiated a contract that was in its best interests, the Area Director was required to follow the mandates of the IGRA in his review of that contract.

decision of the Minneapolis Area Director is affirmed in part and vacated in part. That portion of the decision which was vacated is remanded to the Area Director for further consideration.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge