



INTERIOR BOARD OF INDIAN APPEALS

River Bottom Cattle Co., Inc. v. Acting Aberdeen Area Director,
Bureau of Indian Affairs

25 IBIA 110 (01/06/1994)



United States Department of the Interior

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

RIVER BOTTOM CATTLE COMPANY, INC.

v.

ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-69-A

Decided January 6, 1994

Appeal from denial of a loan guaranty.

Affirmed.

1. Indians: Financial Matters: Financial Assistance

Under 25 CFR 103.10(f), in order to be eligible for a loan guaranty from the Bureau of Indian Affairs, a borrower must have at least 20 percent equity in the business to be financed.

APPEARANCES: Jamie L. Post, Esq., Pierre, South Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant River Bottom Cattle Company, Inc., seeks review of a March 5, 1993, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), denying an application for a loan guaranty in the amount of \$402,000. ^{1/} For the reasons discussed below, the Board affirms the Area Director's decision.

^{1/} The decision was actually signed by an Assistant Area Director. In the pre-docketing notice for this appeal, the Board stated that, although it normally would not have jurisdiction over a decision of an Assistant Area Director, because the decision remained appealable to the Area Director, see 25 CFR 2.4(a); 43 CFR 4.331(a), it would accept jurisdiction in this case if the Area Director ratified the Assistant Area Director's decision. The Area Director ratified the Assistant Area Director's decision when he transmitted the administrative record. Accordingly, the original decision is deemed to have been made by the Area Director.

Both the Area Director's decision and the BIA credit memorandum state that the loan guaranty request was in the amount of \$402,000. The loan guaranty application states that the request was for an 80 percent guaranty of a loan in the amount of \$410,040.

Background

Appellant was incorporated on November 24, 1992, for the purpose of engaging in the livestock and ranching business. Fifty-one percent of appellant's stock is owned by MeLissa E. Wientjes, who is a member of the Cheyenne River Sioux Tribe. The remainder of the stock is owned by MeLissa's husband, Jason Wientjes; her father-in-law, Fred Wientjes; and her brother- and sister-in-law, Kent and Cindy Wientjes. Appellant's headquarters are located on a 1,000-acre ranch owned by Fred Wientjes, who manages the daily operations of the business. MeLissa is employed by BIA. Jason, Kent, and Cindy also hold full-time jobs. None of the four live on the ranch, although all expect to help out as needed.

On December 11, 1992, the Bank of Hoven, South Dakota, submitted an application for a BIA loan guaranty for a loan to appellant. It made the submission through the Credit officer of the Cheyenne River Sioux Tribe. The purposes of the loan were stated to be: (1) the purchase of the assets of Fred Wientjes, (2) the purchase of cattle, and (3) the provision of a line of credit. The tribal Credit Officer recommended approval of the loan guaranty, as did the Superintendent of the Cheyenne River Agency, BIA.

Following review of appellant's application, the Area Director denied it, stating:

We have determined that the proposed majority stockholder, 51%, Melissa Wientjes, does not meet our equity requirements.

Title 25, Code of Federal Regulations, Part 103.1 defines equity as “. . . the borrower's residual ownership, after deducting all business debt, of tangible business assets used in the business being financed, on which a lender can perfect a first lien position.”

(Area Director's Mar. 5, 1993, Decision).

Appellant's notice of appeal from this decision was received by the Board on April 12, 1993. Only appellant filed a brief.

Discussion and Conclusions

25 CFR 103.10 provides: " The following loans are not eligible for guaranty or insurance under this part 103: * * * (f) Loans to a borrower whose equity, as defined in § 103.1, in the business being financed is less than 20 percent."

25 CFR 103.1 provides in relevant part: "Borrower means the Indian organization or individual Indian receiving a guaranteed or insured loan," and "Equity means the borrower's residual ownership, after deducting all business debt, of tangible business assets used in the business being financed, on which a lender can perfect a first lien position."

The credit memorandum prepared by a BIA loan specialist indicates a concern that most of the assets of the new corporation were to be contributed by the non-Indian stockholders of the corporation. The memorandum states:

Management/Organization/Background Comments: Melissa Wientjes, an enrolled member of the Cheyenne River Sioux Tribe, proposes to be the majority shareholder (51%) in a corporation applying for a loan in the amount of \$402,000. The Wientjes family (non-members) would contribute virtually all the assets/equity necessary for this venture. This concerns me on the legitimacy/intent of the incorporation.

To be a legitimate Indian owned business, the majority stockholders must have 20% equity in 51% of this business. The breakdown is as follows:

$$\begin{aligned} 402,000 \times .51 &= 205,020 \\ 205,020 \times .20 &= \underline{\$41,004 \text{ equity}} \end{aligned}$$

The credit memorandum indicates that only the personal assets of MeLissa and Jason Wientjes were considered in determining whether MeLissa met the equity requirement. Their financial statement shows that their net worth, as of December 14, 1991, was \$7,242.29.

On appeal, appellant argues that BIA erred in considering only the personal assets of MeLissa and Jason Wientjes. It contends:

According to the Bank of Hoven's letter of December 11, 1993 [sic, should be 1992], the shareholders were contributing capital in the amount of \$249,035. [2/] These assets would be brought into the corporation once the loan was guaranteed. At that time, MeLissa Wientjes as the majority stockholder, would own 51 percent of the \$249,035 and 51 percent of the equity of the contributed capital.

(Appellant's Brief at 13).

A financial statement for appellant, dated November 13, 1992, shows appellant's net worth as \$249,035. Since this is the same amount referred to in appellant's brief as capital to be contributed by the stockholders

2/ The Bank's letter states: "The shareholders are contributing \$249,035 of capital into the corporation which will all be pledged as collateral for the loan. Collateral will be taken by placing a first lien on all livestock, feed, grain, supplies, machinery and equipment. * * * All shareholders of the corporation will be required to personally guaranty the debt of the corporation. There is a personal net worth position of \$245,000 collectively from the shareholders."

after the loan is guaranteed, a question is raised as to whether the financial statement is accurate-- that is, whether the assets shown as assets of the corporation in November 1992 were in fact assets of the corporation at that time. The financial statement does not appear to have been prepared by a certified public accountant.

To the extent that unencumbered assets, upon which a first lien may be obtained, 3/ are actually property of the corporation, the Board agrees with appellant that Melissa may be deemed to hold a 51 percent interest in those assets. The Board also agrees that any such unencumbered assets may be counted toward the 20 percent equity requirement. However, none of the materials submitted by appellant are adequate to show that these assets are in fact the property of the corporation. 4/ And in its brief before the Board, appellant concedes that they are not.

Appellant bears the burden of proving error in the Area Director's decision. E.g., Jerome v. Acting Aberdeen Area Director, 23 IBIA 137 (1993); S & H Concrete Construction, Inc. v. Acting Phoenix Area Director, 20 IBIA 176 (1991). Appellant has failed to carry its burden here.

3/ Both the November 1992 financial statement and the loan guaranty application show that the Farmers Home Administration holds a chattel mortgage. The financial statement shows it in the amount of \$90,000, and the application shows it in the amount of \$100,000. Presumably, whatever assets serve as collateral for this mortgage would not count toward the 20 percent equity requirement, because a first lien could not be obtained on them.

4/ At the least, some written proof of the transfer of assets to the corporation and a financial statement for the corporation prepared by a certified public accountant would appear to be necessary.

In a case where the proposed structure of an economic enterprise, vis-a-vis the facts surrounding it, raises questions as to its legitimacy, it is incumbent upon BIA to satisfy itself that the enterprise is a valid Indian-owned entity. Here, Melissa is contributing few, if any, assets to the corporation. If the true ownership of the business will be as reflected in its papers, the other family members are making a very generous gift to Melissa. Yet, there is nothing whatsoever in appellant's submissions to explain their motivation for making such a gift.

In a case such as this one, BIA is justified in requiring, prior to approval of a loan guaranty, irrefutable proof that the ownership of the corporation assets is as stated. Further, if a guaranty were to be approved, it appears that BIA could require periodic reports as to ownership. See 25 CFR 103.7: "If Indian ownership of an economic enterprise falls below 51 percent, the borrower shall be in default and the guaranty shall cease."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's March 5, 1993, decision is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge