



INTERIOR BOARD OF INDIAN APPEALS

Shoshone-Bannock Tribes v. Portland Area Director, Bureau of Indian Affairs

35 IBIA 242 (11/20/2000)



# United States Department of the Interior

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

SHOSHONE-BANNOCK TRIBES, Appellant	: Order Affirming Decision : : :
v.	: :
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	: Docket No. IBIA 00-12-A : : : November 20, 2000

This is an appeal from a September 13, 1999, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the award of a concession permit to Norman Phillips. The permit covers Federal land on the shore of the Blackfoot Reservoir, which is within the Fort Hall Irrigation Project (Project) but outside the Fort Hall Reservation. 1/ For the reasons discussed below, the Board affirms the Area Director's decision.

The Project was authorized by the Act of March 1, 1907, 34 Stat. 1015, 1024, which also authorized acquisition of the land necessary for construction of a reservoir. Concession permits on Project lands are granted by BIA under 25 U.S.C. § 390 2/ and 25 C.F.R. Part 173. Funds

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1/ In the prospectus for the permit at issue in this appeal, the land is described as "about 30 acres in size and \* \* \* located on the eastern shore of the Blackfoot Reservoir adjacent to State Highway 34 near Henry, [Idaho]." Prospectus at 2.

The Tribes state that the Blackfoot Reservoir is about 15 miles from the reservation. Tribes' Opening Brief at 3. In an Apr. 19, 1999, memorandum, the Superintendent, Fort Hall Agency, BIA (Superintendent), stated that the particular tract at issue here is about 40 miles from the reservation.

2/ 25 U.S.C. § 390 provides:

"The Secretary of the Interior be, and he is hereby, authorized, in his discretion, to grant concessions on reservoir sites, reserves for canals or flowage areas, and other lands under his jurisdiction which have been withdrawn or otherwise acquired in connection with the San Carlos, Fort Hall, Flathead, and Duck Valley or Western Shoshone irrigation projects for the benefit in whole or in part of Indians, and to lease such lands for agricultural, grazing, or other purposes: \* \* \* Provided further, That such concessions may be granted or lands leased by the Secretary of the Interior under such rules, regulations, and laws as govern his administration of

generated by the permits are used for operation and maintenance of the Project.

On April 17, 1989, the Superintendent issued a concession permit to Cedar Bay Marina, c/o Randy Hadlock and Ronald K. Whitelock, for the development and operation of recreational facilities. The permit had a 10-year term, beginning April 1, 1989, and ending March 31, 1999. Paragraph 14, Renewal, provided:

In the discretion of [BIA], a concession permit covering the premises herein, may be offered for competitive bidding at the expiration of this permit, subject to the right of the Permittee herein to meet the highest acceptable bid, providing the Permittee herein has performed satisfactorily during the terms of this permit in the opinion of the Permitter.

On April 1, 1997, Cedar Bay Marina, through Ronald K. Whitelock, assigned the permit to Norman Phillips. The Superintendent approved the assignment effective April 1, 1997.

In January 1999, the Superintendent issued a prospectus and invitation for proposals for the ten-year permit period beginning April 1, 1999. The prospectus stated on page 1 that "sealed proposals, subject to the conditions contained herein" would be accepted until 2:00 p.m. MST on February 18, 1999.

The two paragraphs of the prospectus most relevant here are titled "Data to Accompany Bid" and "Award." They provide as follows:

Data to Accompany Bid. The following will be submitted to the Superintendent \* \* \* to become a part of the bid until 2:00 P.M. MST, February 18, 1999:

1. A current financial statement.
2. Proposed facilities, cost estimates, and complete schedule for development.
3. A listing of services and accommodations to be furnished to the public.

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fn. 1 (continued)

the public domain as far as applicable, for such considerations, monetary or otherwise, and for such periods of time as he may deem proper, the term of no concession to exceed a period of ten years: Provided further, That the funds derived from such concessions or leases, except funds so derived from Indian tribal property withdrawn for irrigation purposes and for which the tribe has not been compensated, shall be available for expenditure in accordance with the existing laws in the operation and maintenance of the irrigation projects with which they are connected."

4. A preliminary site plan. Said drawing shall fully illustrate the applicant's proposed development, including the location of proposed buildings, boat docks, ramps, parking areas, access and service roads, camping and picnic areas, swimming beach, water system, sewage disposal system, drainage facilities, grading plan, and any other information the applicant may include to fully present his proposed development.

5. Applicant's statement of experience in planning, developing and operating comparable enterprises.

6. A schedule of anticipated rates to be charged.

7. Statement of fees to be paid to [BIA] for the privileges of conducting business on said property.

8. Other information which the applicant considers to be of value in making the determination as to financial responsibility, managerial ability, accuracy of proposed development, and outstanding features of the proposed plan.

Award. Proposals will be judged by [BIA] on, but not limited to, the following:

1. Plan which, in the judgment of [BIA] provides the best facilities and services for the public.

2. Financial ability to fulfill the development schedule and operate it successfully.

3. Business ability and recreation experience.

4. Consideration offered for the permit. The current permittee has preferential consideration for the renewal of the permit should he meet the highest and most satisfactory offer contained in the various proposals.

[BIA] reserves the right to reject any or all proposals.

Prospectus at 6-7.

Proposals were submitted by Norman Phillips, Patrick Murillo, and the Tribes. The Tribes' proposal consisted of a February 17, 1999, letter to the Superintendent from the Tribes' Land Use Policy Commission and a February 16, 1999, resolution enacted by the Tribes' Enterprise Board. The letter included a discussion of Indian preference policy and contended

that the permit should be awarded to the Tribes under that policy. However, it did not include any of the data specified in the prospectus. The resolution stated: "[A]pproval is hereby given to the Land Use Policy Commission to prepare and submit a proposal for permitting a commercial concession on Cedar Bay Marina on the Blackfoot Reservoir, and submit a bid of One Thousand Two Hundred Dollars (\$1,200) for the ten year permit."

Upon review of the three proposals, BIA found that Phillips had submitted all the required data, Murillo had submitted incomplete data, and the Tribes had not submitted any data at all. BIA considered Phillips' proposal to be the only acceptable one. However, it asked for advice from the Solicitor's Office concerning the Tribes' Indian preference argument. An attorney in the Solicitor's Office responded: "In our opinion, BIA is not free in 1999 to exercise discretion based on Indian preference, since BIA in 1989 negotiated and granted the present permittee's contract right to match the highest bid and renew at the end of his ten year term." Mar. 16, 1999, Solicitor's Office Memorandum.

By letter of April 6, 1999, the Superintendent informed the Tribes that he intended to award the permit to Phillips. He stated that, "since [Phillips] had the highest acceptable bid and performed satisfactorily during the previous permit period, the BIA is obligated to award the new permit to him."

The Tribes appealed the Superintendent's letter to the Area Director, who affirmed it on September 13, 1999. The Tribes then appealed to the Board. Briefs have been filed by the Tribes, the Area Director, and Phillips.

On appeal to the Board, the Tribes contend that the assignment of the 1989-1999 permit to Phillips was invalid and that, even if it was valid, it did not grant Phillips the renewal preference right contained in the original permit. They also contend that Phillips should have been required to meet the high bid made by Murillo and that a BIA appraisal should have been completed before a permit was awarded. Finally, in their principal argument, they contend that Indian preference should have been recognized in the award of the permit and that "the proposal of the Tribes should have taken precedence over the bidding process." Tribes' Opening Brief at 18.

The Tribes contend that the assignment was not valid because it did not expressly state to whom the assignment was made, because Whitelock's signature was not notarized, and because the assignment document was not dated.

The Tribes are plainly mistaken in their first and third allegations. The assignment identifies the assignee, Phillips, and bears his notarized signature as such. Further, it is dated. The date April 1, 1997, appears on both page 1 and page 2 of the assignment. On page 1, it is shown as the date of Phillips' signature, signifying his acceptance of the assignment. On page 2, it is shown as the date as of which the Superintendent approved the assignment.

It is true, as the Tribes contend, that Whitelock's signature is not notarized. However, neither the relevant regulation, 25 U.S.C. § 173.7, nor the relevant provision of the permit, paragraph 13, requires that an assignor's signature be notarized. <sup>3/</sup> The form on which the assignment was prepared includes a space for the notarization of the assignor's signature. However, that form (BIA Form 5-5444 (May 1948)) was intended for the assignment of an agricultural or business lease <sup>4/</sup> and thus is not evidence of a notarization requirement for assignment of concession permits. In the absence of any regulatory or contractual requirement for the notarization of assignments of concession permits, it was within the Superintendent's authority to approve the assignment without requiring notarization of the assignor's signature.

The assignment was approved by the Superintendent and is thus prima facie valid. The Tribes have not shown that the assignment is invalid.

Next, the Tribes argue that, even if the assignment is valid, Phillips should still not receive preference in the bidding process because (1) the permit did not expressly provide that an assignee would succeed to the preference right stated in paragraph 14 of the permit; (2) the assignment document is not integrated into the original permit; and (3) Phillips held the permit for only two years.

In the April 1, 1997, assignment, Whitelock assigned "all his right, title and interest" to Phillips, and Phillips agreed "to fulfill all obligations, conditions, and stipulations" in the permit. The Tribes fail to show that the assignment was anything other than the complete assignment recited in the document. They also fail to show any lack of "integration" or any requirement that an assignee hold an assignment for more than two years in order to invoke the renewal preference. The Board finds that Phillips acquired all rights under the permit on April 1, 1997, including the renewal preference.

Next, the Tribes contend that Phillips should have been required to meet the high bid made by Murillo.

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<sup>3/</sup> 25 C.F.R. § 173.7 provides: "Permits may be transferred only with the approval of the Secretary."

Paragraph 13 of the permit provides:

"Assignment and Subpermit. The Permittee shall not assign or transfer this permit, including assignment by operation of law in the event of Permittee bankruptcy or insolvency, without approval of the Permitter. The Permittee shall not sublet the premises or any part thereof, nor grant any interest, privilege or license whatsoever in connection with this permit without the written approval of the Permitter."

<sup>4/</sup> Presumably, this form was used because there was no existing form for the assignment of concession permits.

25 C.F.R. § 173.18, concerning renewal of concession permits, provides in relevant part:

Should there be an application or applications other than the renewal application for a permit covering the same area, the renewal application may, if the applicant has met all the requirements of the expiring permit and has been a satisfactory permittee, be given preferential consideration for the renewal of the permit should the applicant meet the highest and most satisfactory offer contained in the several applications.

This provision describes a preference for a permit holder who meets the highest and most satisfactory offer. Murillo's offer was rejected by BIA. Clearly, it was not the most satisfactory offer. The Board finds that Phillips was not required to meet Murillo's bid.

Next, the Tribes contend that BIA should have prepared an appraisal before awarding the permit.

A June 8, 1999, memorandum from the Superintendent to the Area Director indicates that he had requested an appraisal in December 1997 but had not yet received it and thus was not able to determine whether Phillips' proposal represented fair market value.

Nothing in 25 C.F.R. Part 173 requires that appraisals be prepared prior to award of permits. Further, the lands at issue here are Federal lands, not Indian lands. Thus, BIA does not function as a trustee in awarding permits on that land. The Board finds that BIA was not required to prepare an appraisal prior to awarding a concession permit.

Finally, the Tribes contend that Federal policies concerning Indian preference, Indian self-determination, and the government-to-government relationship between the Federal Government and Indian tribes all require that BIA grant the Tribes a preference in this case. This argument is, at least in part, a challenge to the regulation in 25 C.F.R. § 173.18, which does not recognize such a preference but does explicitly recognize a preference for renewal applicants.

The Board has no authority to disregard a duly promulgated regulation or to declare such a regulation invalid. Van Mechelen v. Portland Area Director, 35 IBIA 122, 125 (2000), and cases cited therein. Accordingly, the Board cannot order BIA to ignore the preference authorized by 25 C.F.R. § 173.18. Moreover, the 1989-1999 permit includes a contractual right to a renewal preference. Because that contractual provision was approved by BIA and is consistent with the regulation, BIA is bound by it. Cf., e.g. First Mesa Consolidated Villages v. Phoenix Area Director, 26 IBIA 18, 30 (1994) (BIA is bound by the terms of leases it has approved, when those terms are not in conflict with governing regulations). Under these circumstances, the Board cannot order BIA to ignore Phillips' contractual right.

There is another problem with the Tribes' contention that they should be granted the permit as a matter of Indian preference. They do not show that they submitted a proposal which was even minimally qualified under the prospectus.

As noted above, the Tribes' proposal consisted of a letter discussing Indian preference policy and a resolution authorizing the submission of a proposal. The letter is dated February 17, 1999; thus the proposal was presumably submitted on February 17 or 18, 1999.

The Tribes contend that, in addition to the two documents included in their proposal, they submitted another document to BIA on February 3, 1999. This document, a copy of which is furnished by the Tribes, is an undated two-page document titled "Blackfoot Reservoir Marina Recreation Center," signed by members of the Tribes' Land Use Commission and recommending that the Tribes submit a bid for the concession permit.

There is conflicting information in the record as to whether the Tribes actually submitted this document to BIA on February 3, 1999, or at any time prior to the bid opening. Further, although the Tribes state that they requested BIA to consider the document as a part of their proposal, their proposal does not refer to it. Even so, the Board gives the Tribes the benefit of the doubt and presumes that the document was submitted to BIA on February 3, 1999, and that it could have been considered as a part of the Tribes' proposal despite not having been included with the proposal or specifically referenced therein.

Although the Tribes describe the document as a plan for the 30-acre tract, it is a plan only in the most general sense. <sup>5/</sup> It clearly is not the "preliminary site plan" called for by the

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<sup>5/</sup> The section of the document titled "USE AND PLANNING" states in its entirety:

"If the Tribes were to consider leasing this property, we believe that it could generate income in many areas. First, the current property in and around the marina would need to be cleaned up. Last time while we were up there, it was tidy, but it could be made to look more attractive.

"Enhancing the store/cafe, advertising and making it more visible and accessible to those looking for it would be a great benefit. There is a lot of traffic that travels Highway 30, throughout the year. Perhaps a small smoke shop, such as the Smoke Signal that carries cigarettes as well as pop, water and other snack items would be a good idea. The Tribes might even consider a small gaming establishment at a later date.

"With the large amount of tourism traffic through this area, it is the scenic route between Salt Lake City and Jackson, Wyoming, Shoshone-Bannock arts and crafts would probably be a very good money making project if located in a highly visible area of the marina. This could be one of the biggest attractions with the Olympics coming into the area.

"The Tribes also own about 7-10 acres on the opposite end of the reservoir at China Hat that could be further utilized as economic development and diversity for the Tribes."  
Tribe's Document titled "Blackfoot Reservoir Marina Recreation Center" at 1-2.



prospectus. Nor does it include any of the other information required by the prospectus. Thus, even if this document was a part of the Tribes' proposal, the proposal was incomplete. The Tribes have failed to show that their proposal was a satisfactory proposal under the terms of the prospectus.

For the reasons discussed above, the Board concludes that the Tribes have failed to show error in BIA's decision to award the concession permit to Phillips.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's September 13, 1999, decision is affirmed. 6/

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//original signed  
Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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6/ All arguments made by the Tribes but not discussed in this order have been considered and rejected. All pending motions are denied.