FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA
****

STENSLAND & SONS CONSTRUCTION,
Plaintiff/Appellee,

vs. **Appeal No. 111**

FORT PECK HOUSING AUTHORITY,
Defendant/Appellant.

THIS APPEAL is based on a **PETITION FOR EMERGENCY RELIEF** brought by Defendant/ Appellant Fort Peck Housing Authority. The basis for the Petition was that the Port Peck Tribal Court, Judge Terry L. Boyd presiding, had denied

Defendant's/Appellant's **MOTION FOR JUDGMENT ON THE PLEADINGS AND TO DISSOLVE A PRELIMINARY INJUNCTION** issued by the Court.

APPEARING FOR DEFENDANT/APPELLANT (Fort Peck Housing Authority): Carol A. Connor, Carol Connor & Associates, 2025 Rio Grande Blvd. NW, Albuquerque, New Mexico 87104.

APPEARING FOR PLAINTIFF/APPELLEE (Stensland & Sons Construction): Thomas E. Towe, Towe, Ball, Enright & Mackey, Attorneys at Law, 2525 Sixth Avenue North, Billings, Montana 59101.

Argued: June 22, 1990

Decided: July 5, 1990

OPINION by Gerard M. Schuster, Chief Justice, joined by Justices Gary James Melbourne and Debra Johnson.

HELD: THE PRELIMINARY INJUNCTION ISSUED BY THE TRIBAL COURT IS DISSOLVED. PLAINTIFF'S/APPELLEE'S COMPLAINT IS DISMISSED.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

On January 18, 1990, the Tribal Court entered a PRELIMINARY INJUNCTION prohibiting the Fort Peck Housing Authority (FPHA) from issuing a Notice to Proceed to Sansaver/Braden-Pehlke, which had been awarded the bid on Port Peck Housing Authority Project MT9-314 (the project), which involves the construction of 45 homes on the Fort Peck Indian Reservation. The Fort Peck Housing Authority had advertised for bids on the Project restricting the bidding to qualified, Indian-owned economic enterprises and Indian-owned organizations as determined by the Fort Peck Housing Authority in accordance with the U.S. Department of Housing and Urban Development (HUD) regulation (24 C.F.R. §905.204) (1989). The FPHA received bids from three such economic enterprises, including Plaintiff/Appellee Stensland. The bid opening was held August 16, 1990. Appellee Stensland was the low bidder. However, the FPHA rejected the Stensland bid as being **"non-responsive",** because it failed to furnish a bid guarantee bond from a bonding company on Treasury Circular 570. The contract was subsequently awarded to the lowest responsive bidder, Sansaver/ Braden-Pehlke.

In issuing the Preliminary Injunction, the Tribal Court relied upon the fact that no harm would result to Defendant/ Appellant by issuance, since the project could not be commenced in any event before spring.

While the Court proceedings were pending, the parties attempted to resolve the matter informally and arrived at a proposed settlement pursuant to which the Plaintiff/Appellee and the lowest responsive bidder Sansaver-Braden/Pehlke, would share the contract. However, upon administrative review by HUD, the proposed settlement was rejected. HUD concluded that Plaintiff's/Appellee's bid was properly and necessarily rejected because it was "non-responsive".

Although there are a number of secondary and procedural issues in the voluminous file on this matter, the primary issues before this Court are two:

1. WHETHER THE PRELIMINARY INJUNCTION ENTERED BY THE TRIBAL COURT TN JANUARY OF 1990 SHOULD BE DISSOLVED, and

2. WHETHER THE UNDERLYING ACTION SHOULD BE DISMISSED FOR FAILURE TO JOIN AN INDISPENSABLE PARTY; ie. THE UNITED STATES GOVERNMENT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD).

I.

When Plaintiff's/Appellee's Motion for a Preliminary Injunction was granted in January of 1990, the Tribal Court relied in part on the following Findings of Facts:

> "Although the parties have been notified of the Defendant's resolution to award the bid to Sansaver-Braden/Pehlke, a Notice to Proceed has not yet been issued and according to the Executive Director, the project cannot now be commenced until spring."

> "No harm would result to Defendant from the issuance of a Preliminary Injunction so long as the matter can be resolved before spring."
>
> "Plaintiff will suffer irreparable harm if the Defendant is allowed to issue a Notice to Proceed and award the Montana 9-34 Project contract to Sansaver-Braden/Pehlke Construction. Plaintiff will lose the contract that it claims rightfully belongs to it if federal law is properly applied."

Hardships and the likelihood of the Plaintiff's/Appellee's success on the merits have changed substantially since the issuance of the injunction. Additionally, the harm to the public interest caused by continued stay against issuance of the Notice to Proceed increases daily.

It is established that:

> "A district court may consider four factors when evaluating a motion for a preliminary injunction. Those factors are probability of success on the merits, irreparable injury to the Plaintiff, harm to other interested parties, and public interest".

Glaxo, Inc. v. Heckler, 623 P. Supp. 69, 70 (D.C.N.C. 1985), citing Blackwelder Furniture Company v. Selig Manufacturing Company, 550 F.2d 189, 193 (4th Cir. 1977). "The Public interest is always to be considered". 623 F. Supp. at 71, Blackwelder Furniture Company, supra. "When, as here, there is any question as to whether the public safety and welfare is threatened, the Court must rule on the side of the public interest". Martinez v. School Bd. of Hillsborough County, Fla., 675 F. Supp. 1575, 1582 (M. D. Fla. 1987), rev'd on other grounds 861 F. 2d 1502 (11th Cir. 1988).

Each of these factors has been considered in the present case and Defendant/Appellant prevails as to the merits of each:

Likelihood of Success on the Merits

It is now clear that Plaintiff/Appellee cannot succeed on the merits of its case. In Connecticut Legal Services, Inc. v. Heintz, 689 F. Supp. 82 (D.Conn. 1988), the court held that an unsuccessful bidder for a contract with a government agency was not likely to succeed on the merits of its claim that the contract was awarded to another bidder in violation of federal regulation where there was evidence that in making the award the agency considered factors required by federal regulations, precluding preliminary injunction.

Here, also, a federal district court and two federal agencies have found no merit to Plaintiff's/ Appellee's contentions on the facts of this case. The federal district court found the majority of the statutes and regulations on which Plaintiff's/Appellee ' s suit is based to be "entirely inappropriate", with "nothing to do with Plaintiff's (Appellee's) claims", Memorandum and Order, Page 10. The sole regulation found by the Court to be relevant to Plaintiff's claim, 25 CFR §905-204 (Indian Preference), set up an administrative procedure to challenge HUD's actions which Plaintiff/Appellee was required to exhaust prior to seeking judicial review of the agency action. Id., citing McKart v. United States, 396 U.

S. 185-193 (1969),

Plaintiff/Appellee has subsequently exhausted its administrative remedies. The General Deputy Assistance Secretary of HUD has issued a final decision on the administrative review. (Jarris opinion, March 19, 1990, from transcript). The basic conclusion is that Plaintiff's/Appellee's bid was non-responsive. Now, every day that the injunction remains in effect sets back the date of completion of the project. If it is begun too late, the onset of winter may force a delay in completion. The relatively insubstantial harm to FPHA resulting from the injunction in January has now changed substantially. Also, the "public interest" at issue herein is that members of the Fort Peck Tribes require safe and sanitary housing. The interest of the public are paramount and must be met.

It is the finding and conclusion of this Court that all of the tests set forth above have been met in favor of the dissolution of the preliminary injunction in the present case.

II.

The next issue is whether the Plaintiff/Appellee has failed to join an indispensable party under the Federal Rules of Civil Procedures, Rule 19(a) provides that:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk or incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest..."

Rule 19(a) defines a person to be joined if feasible. Rule 19(b) sets forth the procedure to be followed when joinder of such a person is not feasible:

> "If a person described in subdivision a(l)-(2) hereof cannot be made a party, the Court shall determine whether in equity or good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder".

The facts here show that HUD is an indispensable party to this action. Plaintiff/Appellee alleged in its verified
complaint filed in Federal District Court that HUD can "dictate the activities of Defendant Fort Peck Housing Authority". In its administrative review, HUD concluded that Plaintiff/Appellee failed to submit a responsive bid, and that HUD would not approve Plaintiff's/Appellee's bid. Without HUD's approval, it is not possible for FPHA to award the contract or any portion thereof to the Plaintiff/Appellee.

In the absence of HUD, therefore, complete relief cannot be accorded among those already parties. A judgment rendered in the absence of HUD would be prejudicial to FPHA and to the Tribes.

There are two fundamental reasons why HUD cannot be joined in the instant action. First, as an agency of the federal government, the Tribal Court has no jurisdiction over HUD, and the addition of HUD as a party would destroy the jurisdiction of this Court, mandating dismissal. Steel Valley Authority v. Union Switch and Signal Division, 809 F.2d. 1006 (1987). Second, it is beyond dispute that the United States, and any agency thereof, is immune from suit. United States v. Testan, 424 U.S. 392 (1976). This court may only assert jurisdiction over HUD if HUD has waived its sovereign immunity, and if there is a separate basis of jurisdiction over Plaintiff's claim against HUD. Weeks Construction Company v. Ogala Sioux Housing Authority, 797 F.2d. 668, 675 (8th Cir. 1986). Plaintiff/Appellee here made neither showing.

As HUD is an entity whose joinder is indispensable to the just adjudication of this action without whom relief can not be accorded to those already parties, but which cannot be joined due both to its immunity and the fact that joinder would divest this Court of jurisdiction over this matter, this action must be dismissed.

This Court takes judicial Notice of the Order converting Motion for Judgment on the Pleadings to Motion for Summary Judgment made by Judge Boyd on June 19, 1990. It is the opinion of the Court of Appeals that the opinion issued herein is dispositive of the procedural and other matters before the Court, and accordingly, **IT IS ORDERED** as follows:

1. THAT THE PRELIMINARY INJUNCTION ENTERED BY THE TRIBAL COURT IN JANUARY OF 1990 BE AND THE SAME IS HEREBY DISSOLVED, and

2. THAT THE UNDERLYING ACTION BE AND THE SAME IS HEREBY DISMISSED.

DATED this 5th day of July, 1990.

BY THE COURT OF APPEALS:

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GERARD M. SCHUSTER, Chief Justice

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GARY JAMES MELBOURNE, Associate Justice

DEBRA JOHNSON, Associate Justice