INTERIOR BOARD OF INDIAN APPEALS

Frank L. Glaspey, Jr.

7 IBIA 92 (08/17/1978)

United States Department of the Interior

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

ADMINISTRATIVE APPEAL OF FRANK L. GLASPEY, JR.

IBIA 78-12-A Decided August 17, 1978

Appeal from Portland Area Director's decision of September 16, 1976, affirming Yakima Indian Agency Superintendent's denial of petition for permit to enter closed area of the Yakima Indian Reservation.

Affirmed.

1. Indian Tribes: Tribal Authority

   Tribes as a treaty right have the authority to impose restrictions or limitations as to who may be permitted to travel within a closed area of a reservation.

APPEARANCES: Ronald F. Whitaker, Esq., of Walters, Whitaker, Finney & Falk, for appellant, Frank L. Glaspey, Jr.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

Frank L. Glaspey, Jr., hereinafter referred to as appellant, on January 1, 1976, entered into a 1-year lease with Philip Brendale, owner of fee property described as Lot No. 2 of the Southeast quarter of the Northwest quarter of sec. 14, T. 8 N., R. 14 E., Willamette Meridian, situated in Yakima County, Washington. Subsequently, on January 1, 1977, the parties entered into a lease for a 3-year term beginning January 1, 1977, and ending on December 31, 1979.

The above-described property is located within the closed area of the Yakima Indian Reservation. Entry to the closed area is by permit only.

On July 15, 1976, the appellant applied to the Superintendent, Yakima Indian Agency, for a permit to travel to and from the leased premises over Bureau of Indian Affairs' roads via the Mill Creek Guard Station. By letter dated July 16, 1976, the Superintendent, Yakima Indian Agency, denied appellant's application. The Superintendent, as basis for the denial, stated:

> Since the access roads to the above mentioned Fee Patent Land are via Bureau of Indian Affairs System of Roads, the responsibility of closure and issuance of permits for the use thereof rests with the Superintendent. Pursuant to authority vested under 25 CFR 162.6, the Superintendent closed these roads by Public Notice on May 3, 1972. This notice provided that the Superintendent would issue permits for travel on the roads in the closed area "to present owners of record of land within the closed areas."
>
> Since you are not an owner of record pursuant to the Public Notice on May 3, 1972, your request for a permit to enter closed areas on the Yakima Indian Reservation is denied.

The appellant on July 23, 1976, appealed the foregoing decision to the Area Director, Portland Area Office, Bureau of Indian Affairs, giving in support thereof the following reasons:

> That the action of the Superintendent of the Yakima Indian Agency in refusing and denying a travel permit to your petitioner is a depravation [sic] of your petitioner's civil rights under 25 U.S.C.A. § 1302. See Dodge v. Nakai, 298 F. Supp. 17 and 298 F. Supp. 26.
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> That the action of the Superintendent of the Yakima Indian Agency in denying access to closed areas of the reservation except to owners of record as of May 3, 1972, is not authorized by 25 C.F.R. 162.6 and is arbitrary and capricious and violative of petitioner's civil and constitutional rights.

The Area Director, on September 16, 1976, affirmed the Superintendent's decision of July 16, 1976.

The Area Director in affirming the Superintendent, among other things, stated:

> The decision of the Superintendent does not deprive you of civil rights guaranteed under 25 U.S.C. § 1302. This section is directed specifically at actions of Indian tribes and not the United States. Since the decision from which you appeal is a decision of an officer of the United States and not an Indian tribe, 25 U.S.C. § 1302 is not applicable.
>
> Nor can you claim that the action of the Superintendent denied you any rights under the Constitution. The road for which you seek a permit is a road of the

> Bureau of Indian Affairs, and I am unaware of any vested right that you have to use this road. 25 CFR 162.6, under which the Superintendent's action was taken, provides that such roads may be closed when necessary for public safety, fire prevention or suppression, or fish or game protection, or to prevent damage to the unstable roadbed. Since the Superintendent has the authority to close the roads entirely, he has the authority to leave them open for limited use as he did in the public notice of May 3, 1972.
>
> In your appeal you claim that his action is arbitrary and capricious, yet you have given no evidence in support of your contention. I believe that the action of the Superintendent in limiting the use of the roads as set forth in the public notice of May 3, 1972, and his denial of your permit to use these roads is reasonable and within the laws and regulations.

The appellant on October 5, 1976, filed a notice of appeal from the Area Director's decision of September 16, 1976. Under date of April 21, 1978, the appeal was referred to this Board by George V. Goodwin, Acting Assistant Secretary for Indian Affairs, pursuant to the provisions of 25 CFR 2.19. The appeal was received by this Board on May 2, 1978. A docketing notice was issued by the Board on May 4, 1978, wherein the parties were given an opportunity to file further briefs in the matter. A memorandum of authorities in support of the appeal was filed by the appellant with the Board on May 22, 1978. No brief was filed by the Bureau of Indian Affairs in response to appellant's contentions set forth in his notice of appeal and memorandum of authorities.

The appeal herein, as we view it, centers around the public notice of May 3, 1972, issued by the Superintendent of the Yakima Indian Agency, Toppenish, Washington.

The notice restricted the use of Bureau of Indian Affairs roads in the so-called closed area of the Yakima Indian Reservation. The closure notice provided as follows:

> Roads within the forested area of the Yakima Indian Reservation shown on a map on file at the Yakima Indian Agency, except for U.S. Highway 97, are closed to public travel. This action is taken to confirm long standing closures in accordance with Article II of the Treaty with the Yakimas of June 9, 1855 and Tribal Council Resolution T-43-57, February 6, 1957.

> The closure is necessary to carry out the provisions of the Treaty which set aside the Reservation for the exclusive use and benefit of the Yakima Nation; and to protect the public safety, prevent and suppress fires, protect tribal fish and game, and other resources, and protect unstable road beds, pursuant to 25 CFR 162.6.
>
> The closure does not apply to enrolled members of the Yakima Tribe and does not invalidate existing access agreements. Upon the issuance of a permit by the Tribal Council with respect to tribal lands, roads and resources, the Superintendent of the Yakima Agency will issue permits for travel on roads in the closed area only to present owners of record of lands within the closed area; to persons or firms doing business with the Yakima Nation or the Bureau of Indian Affairs; employees of the Yakima Nation and the Bureau of Indian Affairs, and to others who are engaged in activities of direct benefit to the Yakima Nation.

It is pursuant to the foregoing notice that the appellant, as lessee of the fee lands in the closed area, applied for the permit now subject of this appeal.

Only one issue requires consideration by this Board and that is whether or not the appellant is entitled to a permit under the provisions of the public notice of May 3, 1972.

There appears to be no question that the Superintendent as the representative of the Secretary as trustee of the Yakima tribe was authorized under the regulations, 25 CFR 162.6 (now 162.8), to issue the order restricting the use of Bureau of Indian Affairs' roads within the closed area of the Yakima Indian Reservation. Clearly, the appellant from the record as presently constituted does not fall within any of the categories specified in the public notice of May 3, 1972, as being eligible for a permit to enter the closed area.

The appellant in his memorandum of authorities dated May 18, 1978, goes to great lengths attempting to show that an implied easement or an easement by necessity over the Bureau of Indian Affairs' roads involved herein ran to Philip Brendale, owner of the leased premises, and that the appellant in his capacity of lessee is entitled to the same access to the leased premises as the owner. In effect, the appellant is contending that the closure notice of May 3, 1972, is not applicable to him in view of the alleged implied easement or easement by necessity.

We are not unmindful of the common law doctrines of implied easements and easements by necessity and their applicability to non-Indian lands. We, however, do not consider the doctrine or the authorities cited in support thereof, applicable to Indian trust lands. Since implied easements or easement by necessity are not in issue in this appeal, no further consideration need be given thereto.

In a similar situation involving the notice of May 3, 1972, Philip Brendale, owner of the premises involved herein, the U.S. District Court for the Eastern District of Washington in U.S. v. Philip Brendale and Jane Doe Brendale, C-74-197, on October 11, 1977, entered a permanent injunction against the Brendales enjoining them from utilizing the Bureau of Indian Affairs' system roads within the closed area of the Yakima Indian Reservation other than in accordance with provision of a duly issued permit from the Superintendent, Yakima Indian Agency.

Surely, if Philip Brendale, the owner of the lands involved herein was required to obtain a permit to use the Bureau of Indian Affairs' roads to get to and from his property in compliance with the closure notice of May 3, 1972, how could one justify the argument that the appellant, as a lessee, is not amenable to the same requirements.

[1] The Yakima Indian Reservation having been set aside for the sole and exclusive use of the Yakima tribe under the provisions of the treaty of June 9, 1855, the tribe may properly impose restrictions or limitations as to who would be permitted to travel within the closed area of the reservation.

The Yakima tribe in the exercise of such rights through its governing body, the Yakima Tribal Council, by resolution No. T-43-57 dated February 6, 1957, limited the issuing of permits by the Superintendent for travel on the roads in the closed area only to certain classes, among which are present owners of record of lands within the closed area. Since the appellant is not an owner of record of lands involved as specified in the closure notice, the Area Director's decision of September 16, 1976, upholding the Superintendent's action of July 16, 1972, denying appellant a permit to use the Bureau of Indian Affairs' roads within the closed area must be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the Area Director's decision of September 16, 1976, upholding the Superintendent's action of July 16, 1976, is hereby affirmed and the appeal herein dismissed.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Alexander H. Wilson
Chief Administrative Judge

I concur:

//original signed
Mitchell J. Sabagh
Administrative Judge