INTERIOR BOARD OF INDIAN APPEALS

City of Elko, Nevada v. Acting Phoenix Area Director, Bureau of Indian Affairs

18 IBIA 54 (11/14/1989)

United States Department of the Interior

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

CITY OF ELKO, NEVADA
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-32-A Decided November 14, 1989

Appeal from a decision of the Acting Phoenix Area Director, Bureau of Indian Affairs, cancelling a portion of a right-of-way over tribal land.

Reversed.

1. Indians: Lands: Rights-of-Way--Indians: Lands: Tribal Lands--Rights-of-Way: Cancellation

When an easement deed for a right-of-way over tribal land authorizes the grantee to assign its interest to another party, and the assignee is using the right-of-way in accordance with the terms of the easement deed, the right-of-way may not be cancelled for non-use or abandonment.

APPEARANCES: James M. Copenhaver, Esq., Elko, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant City of Elko, Nevada (City), seeks review of a June 26, 1987, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the partial cancellation of a deed of easement by the Superintendent, Eastern Nevada Agency (Superintendent; agency). The deed of easement, dated June 24, 1970, granted a right-of-way to the Nevada Department of Highways over two parcels of tribal land belonging to the Te-Moak Bands of Western Shoshone Indians (Elko Indian Colony) and located within the SW¼, SW¼, SW¼, NE ¼, sec. 10, T. 34 N., R. 55 E., Mount Diablo Base and Meridian.

For the reasons discussed below, the Board reverses that decision.

Background

The Elko Indian Colony (tribe) is a constituent band of the Te-Moak Bands of Western Shoshone Indians. It occupies a reservation in Elko County, Nevada. By Resolution No. 70-EC-1, enacted on March 10, 1970,

and modified on April 22, 1970, the Elko Band Council sought endorsement by the Te-Moak Tribal Council and approval by the Superintendent for a grant of right-of-way across its reservation to the Nevada Department of Highways in connection with the construction of Interstate 80. Resolution 70-EC-1 (as modified on April 22, 1970), provides in full:

> WHEREAS the governing body of the Elko Indian Colony has negotiated with the Nevada State Highway Department for a cash payment and other considerations for a road right of way more particularly defined and described in the State of Nevada Highway Department's maps of location for parcels No. 875-A and 875-B, Project No. 1-080-4(11)277, prepared as a property schedule in April 1967, across two tracts of tribal land described as a portion of the SW¼ SW¼ Sec. 10 (metes and bounds) known as the "Colony tract", and W½ NE¼, N½ NW¼ Sec. 10, all in T. 34 N., R. 55 E., Mount Diablo Meridian, Nevada, and
>
> WHEREAS, we have been assured that plans for the freeway (Interstate 80) through the Indian property hereinabove described provides for access to the remainder of both Indian tracts, and further, that extension of utilities to the 160-acre Indian tract can be provided within rights of way for the planned access roads, and
>
> WHEREAS, the extension of utilities to the severed tract in the 33-acre Colony parcel has been assured by the U.S. Public Health Service,
>
> NOW, THEREFORE, BE IT RESOLVED that we request endorsement of the Te-Moak Tribal Council and recommend that the Superintendent grant a right of way to the State of Nevada Highway Department for Interstate 80 and that it be subject to the following covenants for compliance by the grantee:
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> 1. Receipt of payment in the amount of $46,640, payable to the Bureau of Indian Affairs for credit to the Elko Colony of the Te-Moak Bands of Western Shoshone Indians.
>
> 2. The furnishing of 150 Lombardy Poplar trees, to be planted by the Indians.
>
> 3. Replacement of three individual Indian homes located within the easement alignment to be taken by the State. The replacement homes to be furnished by the State are to be located on designated lots within the Colony.
>
> 4. Installation of pedestrian walkways in the proposed Fifth and Ninth Street underpasses.
>
> 5. Installation of a safety fence on both sides of the right of way through the colony tract before road construction.

> 6. Endorsement support from the Nevada State Highway Department for the transfer to and acceptance of Bureau of Indian Affairs constructed roads in the SW¼ SW¼ Sec. 10 T. 34 N., R. 55 E., Mount Diablo Meridian, Nevada, (Colony) by the City of Elko for maintenance purposes, as consideration for the State's transfer to the City of Elko the frontage road in the SW¼ NE¼ SW¼ SW¼ Sec. 10 (portion of State easement taking) providing access to the Ruby View Heights Subdivision. [Emphasis in original.]

By Resolution No. TM-5-70, dated April 22, 1970, the Te-Moak Western Shoshone Tribal Council approved the action of the Elko Community Council and authorized the Chairman of the Te-Moak Council to execute a Public Highway Agreement with the State. The Public Highway Agreement was executed on April 22, 1970, and approved by the Superintendent on May 1, 1970.

The Nevada Department of Highways submitted a right-of-way application to BIA on April 7, 1970, pursuant to the Act of February 5, 1948, 25 U.S.C. §§ 323-328 (1982). By easement deed dated June 24, 1970, the Superintendent granted a right-of-way over two parcels of land: Parcel 875 A, containing approximately 9.83 acres; and Parcel 875 B, containing approximately 4.93 acres. 1/ The grant was made to "the State of Nevada, Department of Highways, its successors and assigns, hereinafter referred to as 'Grantee,'" and provided for

> an easement for a right of way for the following purposes, namely: The right to enter upon the hereinafter described land and grade, level, fill, drain, pave, build, maintain, repair, a public road, together with any and all abutter's rights, including access rights appurtenant to the adjacent remaining property of Grantor in and to Interstate Route 80, and including incidental purposes consistent therewith, together with such bridges, culverts, ramps, and cuts as may be necessary, on, over, under and across the ground embraced within the right of way.
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> * * * * * *
>
> To HAVE AND TO HOLD the said easement and right of way unto the Grantee and unto its successors and assigns, together with the right to authorize, permit and license the use thereof for utility lines, including water and sewer lines, when these are not inconsistent with the use of the property for a public road.
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> * * * * * *
>
> This easement is subject to any prior valid existing right or adverse claim and is without limitation as to tenure, so long as said easement shall be actually used for the purpose above specified; PROVIDED, that this right of way shall be terminable in

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1/ Only Parcel 875 B is involved in this appeal.

whole or in part by the Grantor for any of the following causes upon 30 days' written notice and failure of the Grantee within said notice period to correct the basis for termination (25 CFR 161.20 [1970]) [2/]:

A. Failure to comply with any term or condition of the grant or the applicable regulations; authorizing tribal resolutions; or Highway agreement 151-70-075 of April 22, 1970.

B. A nonuse of the right of way for a consecutive two-year period a fter 7-1-73 for the purpose for which it was granted.

C. An abandonment of the right of way.

D. Failure of the Grantee, upon the completion of construction, to file with the Grantor an affidavit of completion pursuant to 25 CFR 161.16 [1970].

The condition of this easement shall extend to and be binding upon and shall inure to the benefit of the successors and assigns of the Grantee.

This easement is expressly subject to the stipulations required by 25 CFR 161.5 [1970] except those required by subsections (b) and (c) thereof which are hereby waived.

On April 15, 1971, the State and the City entered into an agreement whereby the City agreed to accept a portion of the easement designated as the "F5" Street as a part of the City's street system.

Only a small portion of the original right-of-way over Parcel 875 B (about 0.34 acre) was used by the State for Interstate 80. By resolution dated November 9, 1982, the City agreed to accept relinquishment by the State of the remainder of the right-of-way over Parcel 875 B (about 4.59 acres); on January 4, 1983, the State relinquished that portion, stating that "said right-of-way is of no further contemplated use by the State of Nevada, Department of Transportation due to that portion of the designated "F5" Street being in excess of the Department's needs." 3/ The State apparently did not inform BIA or the tribe of the relinquishment at the time it was made.

2/ 25 CFR Part 161 was redesignated as 25 CFR Part 169 at 47 FR 13327 (Mar. 30, 1982).

3/ The relinquishment document describes the relinquished portion thus:
"Situate, lying and being in the County of Elko, State of Nevada, and more particularly described as being that portion of the designated "F5" Street (Project I-080-4(11)277), as it traverses across the S½ of the SW¼ of the NE¼ of Section 10, T. 34 N., R. 55 E., M.D.M., extending from the north-south quarter section line to the 1/16 line of said Section 10."

By letter of September 23, 1985, the tribe sought assistance from the Superintendent in having Parcel 875 B returned to the tribe, stating that it believed the land should have reverted to the tribe but instead had been transferred to the City. The agency contacted the State, which confirmed that the right-of-way had been relinquished to the City.

The tribe and BIA apparently discussed the matter with the City Manager and/or other City employees. On May 27, 1986, tribal and BIA representatives attended a City Board of Supervisors' meeting, at which the tribe requested the City to quitclaim the unused portion of the right-of-way to the State, so the State could convey it to the tribe. The tribe stated that it was not requesting that appellant give up land actually in use but that it wished to use a portion of the property for a commercial venture. The minutes of the May 27 meeting indicate there was some uncertainty as to how much of the land was actually in use, but that the City believed it would have to retain at least a 60- to 80-foot right-of-way for purposes of maintaining the frontage road. Board members expressed concern that, if the tribe established a commercial venture on land returned to it, the City would lack regulatory jurisdiction over that venture. They also expressed doubt as to whether the City had any title to the property. Eventually, the Board voted unanimously to deny the tribe's request to quitclaim the property because of doubt that the City had any claim to it.

By letters of August 4, 1986, the Superintendent notified the City and the State that he intended to cancel the right-of-way 30 days from their receipt of the notice. The notice stated as grounds for cancellation that "[t]he State of Nevada, Department of Transportation and its assigns have failed to make use of the entire right-of-way granted for a consecutive two year period after July 1, 1973, for the purpose for which it was granted and has abandoned such nonused portion" (Aug. 4, 1986, letters at 2). The proposed cancellation contained an exception:

> EXCEPTING HEREFROM a public road right-of-way, commonly identified as Ruby View Drive, being 28 feet in width and running, more or less, east and west, being north of Interstate 80; and also excepting herefrom a public road right-of-way, commonly identified as Golf Course Road, being 52 feet in width, and running more or less, southeast from Ruby View Drive to Interstate 80.

By letter of August 15, 1986, an attorney for the City wrote to the Superintendent, stating:

> The City does oppose the cancellation of the Deed of Easement as set forth in your letter insofar as it would result in a cancellation of the easement to a footage of less than sixty feet (60!) in width. Alternatively phrased, the City wishes to retain a sixty foot easement and has no objection to the remainder of the lands being returned to the Elko Indian Colony either in the manner described in your letter or by some other appropriate documentation.

> Please discuss this matter with representatives of the Elko Indian Colony and advise us if this proposal would be an acceptable compromise solution.

The State also wrote, requesting that the small parcel of land still in use for Interstate 80 be excepted from the cancellation.

The Superintendent sent the City's letter to the tribe, which rejected the City's proposal. By letter of October 17, 1986, the Superintendent notified the City that the right-of-way had been cancelled. 4/ The letter stated that the cancellation included "certain portions of this easement actually being used for road purposes."

The City appealed the cancellation to the Area Director, challenging the Superintendent's conclusion that the right-of-way, but for the 28- and 52-foot easements for the two roads, had either been abandoned or had not been used for a two year period. The City stated that it had graded, leveled, built, maintained and repaired a right-of-way for Ruby View Drive, varying in width from 52' to 95', and that it had authorized utility lines, including water and sewer, natural gas, telephone, and electricity, in an area varying from 95' to 120'. The City stated, "This area is actually required to maintain the road and the utilities and always has been used in such manner since the acquisition of the easement" (Nov. 19, 1986, Appeal at 3.)

The Area Director affirmed the cancellation by decision dated June 26, 1987. He concluded that the easement deed had not authorized the State to relinquish the right-of-way to the City. He stated:

> The intent of the language, "successors and assigns" [in the easement deed], provides that the grantee, [Nevada Department of Transportation], a department within the administration of the State of Nevada, may pass or assign the interests conveyed by virtue of the above deed to such entities who possess the same rights as the original owner <u>without change in ownership</u>. This provision provides for the succession of rights granted and not for a conveyance of those rights to a third party. [Emphasis in original.]

(June 26, 1987, Decision at 2). He also stated that neither the tribal resolution authorizing the grant of right-of-way nor the relevant regulations at 25 CFR Part 161 (1970) authorized conveyance of the right-of-way to a third party.

The Area Director further concluded that the State had admitted to nonuse and abandonment of the right-of-way when it relinquished it to the City,

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4/ The cancellation document, dated Oct. 6, 1986, noted the same exception for Ruby View Drive and Golf Course Road as had appeared in the proposed cancellation. It included a second exception, as had been requested by the State, covering the parcel still in use for Interstate 80.

because it had stated that the right-of-way was "of no further contemplated use by the State."

Finally, the Area Director concluded that the licensing of utilities within the right-of-way tract was authorized only to the extent necessary to provide utilities to the Elko Indian Colony, because this was the only utility use authorized in the tribal resolution.

By letter dated July 27, 1987, the City appealed the Area Director's decision to the Assistant Secretary - Indian Affairs. The appeal was still pending on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. See 54 FR 6478 and 6483 (Feb. 10, 1989). It was transferred to the Board for consideration under the new procedures on May 1, 1989. The appeal was docketed on May 9, 1989, and a briefing schedule established. Only appellant filed a brief.

Upon initial review of the record, the Board believed there might be some possibility that the parties could reach a compromise in this matter. It therefore stayed proceedings to allow the parties to discuss that possibility. By letter of September 28, 1989, the Superintendent informed the Board that settlement negotiations had been attempted but had failed. The Board lifted the stay on October 4, 1989, and returned the case to its active docket. On October 23, 1989, the Board received separate letters from the Mayor of the City and the City's attorney, both disputing the Superintendent' s statement that negotiations had been attempted.

Discussion and Conclusions

The Board first considers whether its review of this case should be delayed in order to allow further time for settlement negotiations. Upon examination of the Mayor's October 18, 1989, letter and the minutes of the City Board of Supervisors' meeting of September 26, 1989, the Board concludes that such a delay at this time would be fruitless.

On appeal to the Board, the City argues that, contrary to the Area Director's conclusion, the easement deed authorized the State to transfer the right-of-way to the City. It contends that the grant was made to the State and its "successors and assigns," that the deed contained no restrictions on assignment, and that the term "assigns" includes the City. The City also argues that the tribe's Resolution No. 70-EC-1, at numbered paragraph 6 (quoted supra), recognized and endorsed the State's right to transfer the right-of-way to the City.

The City argues further that the easement deed granted the State, and the City as the State's successor and assign, the right to authorize, license and permit the use of the property for utility lines; that the property has been so used; and that the cancellation for non-use or abandonment was therefore erroneous.

[1] As noted above, the easement deed granted the right

> TO HAVE AND TO HOLD the said easement and right of way unto the Grantee and unto its successors and assigns, together with the right to authorize, permit and license the use thereof for utility lines, including water and sewer lines, when these are not inconsistent with the use of the property for a public road.

The term "assigns," as defined in Black's Law Dictionary, "generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law." Black's Law Dictionary 154 (Rev. 4th ed. 1968). Accord 6A C.J.S. Assignments §§ 2, 3 (1975); 6 Am. Jur. 2d Assignments §§ 1, 10 (1963). The Area Director's interpretation of the term, as excluding one who takes by conveyance, is clearly contrary to the term's generally accepted meaning.

Nothing in the easement deed or in 25 CFR Part 169 (or former Part 161) precluded the State from assigning the right-of-day to the City. Moreover, as the City notes, the tribal resolution authorizing the right-of-way clearly contemplated that the frontage road in Parcel 875 B would be transferred by the State to the City. See Resolution EC-70-1, numbered paragraph 6, quoted supra.

The Board concludes that the easement deed authorized the State to transfer the right-of-way over Parcel 875 B to the City.

It is also apparent that the easement deed authorized the City, as the assign of the State, to "authorize, permit and license" utility lines on the property as long as they are not inconsistent with the use of the property for a public road. The Area Director concluded that the tribal resolution authorized installation of utility lines only to the extent they would provide service to tribal lands. However, he made no finding as to whether or not the utility lines presently in place provide service to tribal lands.

In any event, the easement deed contains no such limitation concerning utility lines. Further, contrary to the Area Director's conclusion, the tribal resolution, while it mentions the tribe's expectation that utilities will be provided to tribal lands, does not limit its consent to the right-of-way upon a condition that only utilities serving tribal lands were to be permitted. 5/

The Board concludes that the City had the right to license utilities within the right-of-way provided they complied with the terms of the easement deed, i.e., they were not inconsistent with the use of the property for a public road. 6/

5/ References to utilities appear only in the second and third "Whereas" clauses of Resolution 70-EC-1.

6/ The Area Director made no findings as to whether the existing utility lines were consistent with the use of the property for a public road.

It is clear from the maps included in the record of this appeal that utility lines are located in the portion of the right-of-way which was cancelled by the Superintendent. Further, the Superintendent's October 17, 1986, letter acknowledged that the cancellation included portions of the right-of-way "actually being used for road purposes." The Board holds, therefore, that the Superintendent's cancellation of the right-of-way was in error, because at least part of the cancelled portion of the right-of-way was in use by the City, in accordance with the terms of the easement deed, and had not been abandoned.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 26, 1987, decision of the Acting Phoenix Area Director is reversed. 7/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

7/ This disposition does not preclude further study of the use of the right-of-way to identify portions which might not be in use by the City; nor does it preclude further attempts to arrive at a mutually agreeable means by which a portion of the right-of-way might be returned to the tribe. The Board notes the statement at page 3 of the Mayor's Oct. 18, 1989, letter, which appears to offer further negotiations: "When that issue [the question of title] has been decided, we are prepared to negotiate the mitigation of any negative impacts, regardless of the direction of the decision."