



INTERIOR BOARD OF INDIAN APPEALS

New Mexico Highway and Transportation Department
v. Albuquerque Area Director, Bureau of Indian Affairs

18 IBIA 165 (02/23/1990)

Reconsideration denied:
18 IBIA 232

Related Board case:
17 IBIA 136



United States Department of the Interior

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

NEW MEXICO HIGHWAY AND TRANSPORTATION DEPARTMENT
v.
ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

90-14-A

Decided February 23, 1990

Appeal from a decision reducing the width of a right-of-way for a state road across the Pueblo of Sandia.

Dismissed.

1. Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

2. Generally--Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

Under the circumstances of this case, the time for filing a notice of appeal was tolled during the time the Bureau of Indian Affairs Superintendent and the party adversely affected by the Superintendent's decision were engaged in discussions pursuant to a request to rescind the decision.

APPEARANCES: Hugh W. Parry, Esq., Special Assistant Attorney General, Santa Fe, New Mexico, for appellant; Barry K. Berkson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for appellee; L. Lamar Parrish, Esq., Albuquerque, New Mexico, for the Pueblo of Sandia.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant New Mexico Highway and Transportation Department seeks review of a September 13, 1989, decision of the Albuquerque Area Director, Bureau of Indian Affairs (BIA; appellee), concerning the reduction of the width of the right-of-way for New Mexico State Road #556 (Tramway Road) across the Pueblo of Sandia (Pueblo). For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal as being untimely filed.

Background

In November 1960, a planning consultant hired to prepare a general plan for the future use of the Pueblo lands advised the Pueblo and the Superintendent of the United Pueblos Agency (Superintendent), BIA, that an access road across the Pueblo would allow those lands to be opened for utilization. Acting upon this recommendation, on June 17, 1963, the Pueblo adopted a resolution authorizing the granting of

a right of way to the Bureau of Indian Affairs or other authorized public agency for the access road subject to the following considerations and understandings:

(1) The road shall be located a sufficient distance north of the south boundary of the Sandia Pueblo Grant, approximately 300 feet, to provide for leasing of Indian land on both sides of the road. Prior to surveying for final location, consultations with the Pueblo Council shall be held to determine the exact location of the right of way.

(2) Prior to final authorization being granted for the proposed right of way, the Pueblo Council shall, be consulted regarding their desires on the following points, and the desires of the Pueblo shall be fully respected:

(a) Fencing of the right of way,

(b) Provision for livestock crossing, as necessary, to properly utilize range lands.

(c) Signs to assist in controlling trespass and protect Indian property.

(3) In the event the right of way is granted to the Bureau of Indian Affairs, it shall contain a clause subjecting the right of way to assignment to the State of New Mexico or other public agency.

By resolution of May 18, 1964, the Pueblo

authorize[d] and request[ed] the General Superintendent of the United Pueblos Agency to grant a right of way without charge to the Bureau of Indian Affairs and/or the New Mexico State Highway Commission, identified as Route No. 71, Project UP71(1), 5.035 miles in length, more or less, for a term without limitation as to years, * * * subject to the following conditions and understandings:

(a) Width of the right of way shall not exceed 300 ft.

By resolution of August 26, 1964, the Pueblo further conditioned its consent to the grant of right-of-way "on the understanding that access to any existing or future business, industrial, residential, recreational or other type of use sites will not be restricted in the sense that the Interstate Highway Access Control Highways are so restricted."

On July 23, 1964, the Pueblo, BIA, and appellant entered into a Memorandum of Understanding relating to the grant of right-of-way across Pueblo lands and the construction of a road. Under this memorandum, BIA agreed to survey and locate the road, with review by appellant, and to construct the road as a segment of the BIA road system. Construction would include grading, installation of drainage, fencing the right-of-way along the northern side, and installation of cattleguards. Upon completion of this work, the right-of-way would be assigned to appellant without cost. At that time, the road would be removed from the BIA road system and designated part of the New Mexico Highway System. Appellant would complete the construction of the road and be responsible for future maintenance and construction. The Pueblo agreed to the grant of right-of-way, not to exceed 300 feet, to BIA without cost, and consented to the assignment of this right-of-way to appellant, also without cost.

The Superintendent approved the right-of-way to BIA on September 24, 1964,

without limitation as to term pursuant to the provisions of the Act of February 5, 1948 (62 Stat. 17) [25 U.S.C. §§ 323-328 1/] and the Departmental regulations 25 CFR 161 (1964 Cum. Pocket Supp.) [now, 25 CFR Part 169] subject to any prior valid existing right or adverse claim and subject to the provision of the attached Resolutions adopted on June 17, 1963, May 18 & Aug. 26, 1964, by the Council of the Pueblo of Sandia.

The intent of the tribal resolutions and the Memorandum of Understanding was apparently carried out without incident. The road was constructed by BIA. The right-of-way was assigned to appellant on August 25, 1965. The assignment again indicated that the right-of-way was granted pursuant to 25 U.S.C. §§ 323-328 (1982). The road is presently designated State Road #556, Tramway Road. The evidence in the administrative record indicates that this road is a two-lane, 24-foot wide surfaced rural road.

1/ 25 U.S.C. § 323 (1982) states:

"The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including lands belonging to the Pueblo Indians in New Mexico, and any other lands hereafter acquired or set aside for the use and benefit of the Indians."

In Resolution 87-10, March 4, 1987, the Pueblo determined that 150 feet of the 300-foot right-of-way were not being used for roadway purposes, and that the unused 150 feet of the current right-of-way should be restored to the Pueblo. By letter dated March 9, 1987, the Superintendent, Southern Pueblos Agency, BIA, sent a copy of this resolution to appellant. The letter stated at page 1:

The Pueblo has determined, and this office agrees, that the 300 feet width is excessive. We feel that a width of 150 feet * * * is adequate.

There appears to be a basis for termination of a portion of the right-of-way. Therefore, pursuant to regulations contained in Part 25, Code of Federal Regulations, Paragraph 169.20, this office hereby gives you thirty (30) days notice to correct the basis for termination. If you do not respond with[in] the 30-day limit, this office will issue an appropriate instrument terminating a portion of the right-of-way not presently used for highway purposes.

By letter of April 2, 1987, appellant informed the Superintendent that "[i]t does appear that the width of right of way for Tramway Road is somewhat excessive. A width of 200 feet would be more appropriate for present and future needs." In response to this letter, the Superintendent suggested a meeting between representatives of BIA, the Pueblo, and appellant. A meeting was held on April 9, 1987. A memorandum of this meeting prepared by appellant indicates that appellant wished to preserve a 200-foot corridor within the 300-foot right-of-way. This corridor would not necessarily follow the centerline of the road because appellant believed the road should be straightened if it were to be improved or reconstructed in the future. Appellant asked for additional time in which to prepare a conceptual alignment of the road that would correct the perceived deficiencies. Appellant's memorandum further indicates that the Governor of the Pueblo stated that such a request would have to be approved by the Tribal Council, which might seek compensation for the additional 50 feet over what they believed to be adequate for the road.

By letter dated May 6, 1987, the Superintendent informed appellant that because there were no actual plans for reconstruction of the road to take place in the immediate future or within the next 5 to 10 years,

we do not feel there was adequate justification presented to maintain the right-of-way for State Road 556 at 200 feet as requested in your letter of April 2, 1987.

As stated in our letter of March 9, 1987 we feel that a right-of-way width of 150 feet is adequate for the present needs of the New Mexico State Highway Department. We also feel that the 150 feet width is adequate to meet your needs for any future reconstruction that may be necessary to address highway traffic or safety requirements.

We have determined that there was no evidence submitted or shown by the New Mexico State Highway Department that would correct the basis for termination of a portion of the existing right-of-way for State Road 556. Therefore, pursuant to the regulations contained in Part 25, Code of Federal Regulations, Paragraph 169.20(B), [2/] this office hereby gives you notice that the width of the current right-of-way has been reduced from 300 feet to 150 feet with 75 feet on either side of the centerline description of existing State Road 556. Enclosed is an Amended Grant of Easement executed on May 5, 1987. You are directed to undertake action to relocate the right-of-way fence to the adjusted easement and boundaries within 90 days from the receipt of this letter.

(Letter at 1-2).

Appellant responded to this notice of cancellation by letter dated May 27, 1987, in which it expressed surprise over the action taken and requested that the cancellation be rescinded so that it could complete its alignment study. Appellant stated it had not understood that the April 9, 1987, meeting had been a hearing at which it was to present evidence, but rather believed the meeting was simply a discussion. It further stated it was returning the Amended Grant of Easement because it could not accept the reduced right-of-way under the circumstances. By letter of June 9, 1987, the Superintendent informed appellant that its letter was being furnished to the Governor of the Pueblo and indicated that once he had heard from the Governor, he would be in touch with appellant.

By letter dated July 24, 1987, appellant forwarded to the Superintendent its completed right-of-way and alignment study. The study indicated that a principal arterial road could be built within 200 feet of right-of-way and, therefore, 100 feet of the existing right-of-way could be returned to the Pueblo.

The Pueblo adopted two resolutions on March 9, 1988, concerning the right-of-way issue. Resolution 88-09 stated the desire of the Pueblo "that State Road 556 remain a two-lane highway within the existing 150 foot right-of-way, from the intersection of Interstate 25 east to the southern boundary of the Sandia Indian Reservation." The resolution opposed the widening of the road and indicated that the express written consent of the Tribal

2/ 25 CFR 169.20(b) provides:

"All rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary mailed to the grantee for any of the following causes:

* * * * *

"(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted."

See Star Lake Railroad Co. v. Navajo Area Director & Navajo Tribe of Indians, 15 IBIA 220, 94 I.D. 353, recon. denied, 15 IBIA 271 (1987).

Council, through tribal resolution, would be needed to widen the road. Resolution 88-10 stated that a proposed bicycle path, separated from the highway, was not a normal highway use and that the Pueblo did not consent to the construction of such a separated bicycle path. The Superintendent forwarded the tribal resolutions to appellant by letter dated April 1, 1988, in which he indicated that BIA fully concurred with the resolutions.

By letter dated May 20, 1988, appellant objected that the Superintendent's April 1, 1988, letter appeared to consider the reduction of the right-of-way to 150 feet to be "a forgone conclusion." Appellant concluded at page 2 of its letter:

The Department reiterates its willingness to amend the existing easement from 300 feet to 200 feet, as recommended by our study. However, should the Pueblo insist on unilaterally modifying our right of way easement to reduce it to 150 feet, the Department will have no options left but to pursue a reverse [sic] of this decision at a higher level.

Appellant again requested that the "actions taken by letters of May 6, 1987 and April 1, 1988" be rescinded.

The Superintendent responded by letter dated June 29, 1988, stating at page 1:

This is to confirm our position regarding the reduction of the width of the right-of-way to 150 feet. After considerable discussion with my staff and the Pueblo of Sandia, it has been determined that the right-of-way shall remain at 150 feet in width. I am, therefore, returning the Department's copy of the Amended Grant of Easement dated May 5, 1987. This Agency feels that the 150' width is adequate for present and future highway needs. In addition, we are requesting that you initiate action to relocate the right-of-way fence to conform to the 150 feet width as described in the amended grant of easement.

By letter of August 11, 1988, appellant again returned the amended right-of-way grant, and requested information concerning appeal procedures. The Superintendent did not respond to the request for appeals information, but, by letter dated January 5, 1989, gave appellant 45 days to relocate the north right-of-way fence.

On January 18, 1989, appellant informed appellee that it had been corresponding with the Superintendent for the last year concerning the reduction of the right-of-way, and requested appeal information from appellee. Appellee responded on February 3, 1989, stating that it appeared the Superintendent had not replied to the request for appeal information because appellant had already been referred to the regulations in 25 CFR. Appellee provided appellant with a copy of the appeals regulations in 25 CFR Part 2.

By letter dated March 6, 1989, appellant, for the first time represented by counsel, filed a notice of appeal with appellee. This notice of appeal was written in such a way that it appeared appellant was appealing a decision made by appellee rather than the Superintendent. Appellee's April 6, 1989, response stated that he had not made a decision in this matter, but had merely informed appellant of the appeal provisions. However, in the event appellant believed he had issued a decision, appellee informed appellant of further appeal procedures. 3/

Appellant wrote the Superintendent on April 26, 1989, stating:

There has been some confusion concerning whether your office had made a decision that we were entitled to appeal since we have had some difficulty in obtaining the appropriate regulations and no letter of your office has given us any notice of our rights to appeal the decision. It has been [our] hope that this matter could have been successfully resolved by good faith negotiations with your office. Since your decision is clearly adverse to [our] interest: * * *, we respectfully request that this appeal be processed and heard.

Following the Board's dismissal of New Mexico State Highway & Transportation Department, supra at note 3, the Superintendent accepted appellant's appeal on July 24, 1989, and informed it that a statement of reasons was due in appellee's office within 30 days. Appellant filed a statement of reasons which was supplemented on August 22, 1989, with the submission of an August 1989 right-of-way analysis.

By decision dated September 13, 1989, appellee affirmed the Superintendent's decision to reduce the right-of-way.

The Board received appellant's notice of appeal from this decision on October 16, 1989. The case was docketed on November 7, 1989, after receipt of the administrative record. Briefs were filed on appeal by appellant, appellee, and the Pueblo. 4/

Discussion and Conclusions

Both appellee and the Pueblo argue that appellant failed to file a timely notice of appeal from the Superintendent's decision. They contend

3/ A copy of this letter was furnished to the Board. See New Mexico State Highway and Transportation Department v. Albuquerque Area Director, 17 IBIA 136 (1989), for additional procedural background.

4/ The Pueblo filed a motion requesting that appellant be required to post an appeal bond in the amount of \$1,000,000. Appellee joined in this request. By order dated Jan. 18, 1990, the Board declined to order such a bond, but expedited its consideration of the appeal in order that a final Departmental decision might be issued as soon as possible.

that under 25 CFR 2.4 (1988), ^{5/} notice of the reduction of the right-of-way was properly given to appellant on May 6, 1987. Furthermore, they argue 25 CFR 2.10(a) (1988) provided that appeals must be received in the office of the official who made the decision being appealed "within 30 days after the notice of the decision complained of is received by the appellant," and 2.10(b) (1988) provided that "[n]o extension of time will be granted for filing the notice of appeal. Notices of appeal which are not timely filed will not be considered, and the case will be closed." ^{6/}

Appellee and the Pueblo further argue that appellant's May 20, 1988, letter is the first communication that can even arguably be considered a notice of appeal. Based upon the regulations quoted above, they contend that a May 20, 1988, notice of appeal was not timely.

[1] The Board has consistently held that notices of appeal not timely filed must be dismissed. See, e.g., Arviso v. Acting Navajo Area Director, 18 IBIA 118 (1990), and cases cited therein. In this case, however, after receiving the Superintendent's May 6, 1987, notice that the right-of-way in excess of 150 feet had been cancelled, appellant wrote the Superintendent within the time period for filing a notice of appeal, and asked that the decision be rescinded. The Superintendent agreed to discuss the matter with the Pueblo. In essence, appellant asked the Superintendent to reconsider his decision, and the Superintendent agreed. After reaching that agreement, appellant, the Superintendent, and the Pueblo engaged in what can only be construed as settlement negotiations.

[2] Although there are no formal regulatory provisions for reconsideration of a decision issued by a BIA official, there is also nothing that precludes reconsideration, if initiated prior to the notice of appeal and within the appeal period. Ideally, a BIA official considering a request for reconsideration should rescind his decision to prevent the

^{5/} Section 2.4 (1988) provided:

"Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth."

The regulations in 25 CFR Part 2 were substantially revised by notice published at 54 FR 6478 (Feb. 10, 1989).

^{6/} In his Sept. 13, 1989, decision appellee held that the appeal was timely filed based upon new regulations in 25 CFR 2.7(b) and (c). These regulations, which took effect on Mar. 13, 1989, provide that the time for filing a notice of appeal does not begin to run until persons adversely affected by the decision have been properly informed of the right to appeal the decision. Under these new regulations, appellee attempted to waive the failure of appellant to appeal prior to May 20, 1988.

running of the appeal period. In this case, the Superintendent did not rescind his decision but, through his course of conduct, reasonably led appellant to believe he was reconsidering it. In the circumstances of this case, the Board finds that the time for filing a notice of appeal was tolled during the time the parties were engaged in discussions pursuant to appellant's request for rescission of the May 6, 1987, decision. Cf. United States v. Acting Aberdeen Area Director & Mossette, 9 IBIA 151, 89 I.D. 49 (1982).

However, the Superintendent's June 29, 1988, letter clearly constitutes confirmation that settlement negotiations were not successful and that the decision to reduce the right-of-way would not be changed. Appellant obviously also understood this letter to constitute an end of the discussions and an appealable decision because, by letter dated August 11, 1988, it requested appeal information. The question thus presented is whether a timely appeal was taken from the Superintendent's June 29, 1988, decision.

Appellant argues that it was not informed of the applicable appeal procedures. However, it was on notice throughout this proceeding that the matter was governed by 25 CFR Part 169. Under 25 CFR 169.2(b), "Appeals from actions taken under the regulations in this Part 169 shall be made in accordance with Part 2 of this chapter." Appellant had constructive notice of the appeal provisions, which included the requirement set forth in 25 CFR 2.10(a) (1988) that the notice of appeal must be received in the office of the official making the decision within 30 days of the date of receipt of the decision. See Estate of Eugene Patrick Dupuis, 11 IBIA 11, 13 (1982). Even if the Board interprets appellant's August 11, 1988, request for information on appeal procedures to be a notice of appeal, that notice was not timely under the regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Albuquerque Area Director's September 13, 1989, decision is dismissed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge