



INTERIOR BOARD OF INDIAN APPEALS

Tri-County Water Association, Inc. v. Aberdeen Area Director,
Bureau of Indian Affairs

23 IBIA 273 (03/29/1993)

Director stated: "Your request has been considered and is herein denied. This decision is based on the facts that the [Tribe] is opposed to this project and the prime beneficiaries are not residents of the reservation."

Appellant appealed to the Board and filed an opening brief. Appellant argued that the Area Director abused his discretion in refusing to grant the easement solely on the grounds of the Tribe's political opposition, that it had previously been granted easements in the same quarter-section, and that it had a valid easement already in place. The last argument was based upon an alleged lease agreement between appellant and the Tribe. Appellant did not raise this argument before the Area Director.

The Area Director did not file a brief. Despite the fact that appellant had not addressed the agreement in its appeal to the Area Director, the Board believed that, if the agreement was legally valid, it might have some impact in this case. Therefore, in a January 8, 1992, order the Board ordered the Area Director to file a brief, discussing what, if any, effect the agreement might have. The Area Director did not respond to the Board's briefing order.

The Board has reviewed the extremely limited information provided to it by the parties. The administrative record contains only five documents: a November 22, 1991, memorandum to the Superintendent from the Tribe; appellant's January 8, 1992, request for an easement; the Superintendent's January 23, 1992, denial letter; appellant's February 6, 1992, notice of appeal to the Area Director; and the Area Director's March 18, 1992, decision.

The only additional document provided by appellant is the copy of the lease agreement. Except for a notary date of September 7, 1978, that copy is undated. It is signed by the Tribal Chairman and appellant's Chairman, even though it has several blank spaces. The copy does not show that it was approved by the Secretary or his delegate, although the agreement appears to be one that would normally require approval. Appellant does not even cite the portion of the agreement upon which it relies.

Because the Area Director failed to respond to the Board's briefing order, the Board has no way to determine the legal status of the agreement. Assuming arguendo, that the agreement has some legal force and effect, the Board also has no way to determine the position of the Area Director and/or the Tribe with respect to appellant's argument that the requested easement was already granted by the agreement.

Furthermore, the only indication in the record as to the ownership of the land in question is a statement that the land is tribally owned in the Tribe's November 11, 1991, memorandum to the Superintendent. Regulations governing easements on trust or restricted lands are found in 25 CFR Part 169. Assuming that the land is tribally owned, under 25 CFR 169.3, BIA lacks authority to grant an easement across tribal lands without the prior written consent of the tribe. Despite the possible applicability of this regulation, neither the Superintendent nor the Area Director cited it as the reason for their denial.

In light of these numerous problems, which are attributable to both BIA and appellant, the Board concludes that this matter can best be addressed by vacating the Area Director's decision and remanding this matter to him for further consideration. During this remand, appellant can present to the Area Director its arguments concerning the application of the agreement.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the secretary of the Interior, 43 CFR 4.1, the March 18, 1992, decision of the Aberdeen Area Director is vacated, and this matter is remanded to him for further consideration in accordance with this order.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge