



INTERIOR BOARD OF INDIAN APPEALS

Colleen Simpson v. Rocky Mountain Regional Director, Bureau of Indian Affairs

37 IBIA 182 (03/27/2002)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

COLLEEN SIMPSON

v.

ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 01-18-A

Decided March 27, 2002

Appeal from a decision concerning a telephone right-of-way over Crow Allotment 689-B.

Vacated. Substitute decision issued.

1. Indians: Lands: Rights-of-Way--Indians: Roads

Where a public road has been opened within the Crow Reservation under the Act of March 4, 1915, ch. 161, 38 Stat. 1188, and pursuant to approval given by the Department of the Interior in 1934, a telephone company may place a buried telephone cable in the road right-of-way in accordance with Montana law, without obtaining the approval of any Departmental official or the consent of the owners of trust land crossed by the right-of-way.

APPEARANCES: Colleen Simpson, *pro se*; John C. Chaffin, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Billings, Montana, for the Regional Director; Harold G. Stanton, Esq., Hardin, Montana, for Project Telephone Company.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

This is an appeal from a September 21, 2000, decision of the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning a telephone right-of-way over Crow Allotment 689-B. <sup>1/</sup> For the reasons discussed below, the Board vacates the Regional Director's decision and substitutes this decision.

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<sup>1/</sup> The allotment at issue in this appeal is shown on some documents as Allotment 689 and on others as Allotment 689-B. It is apparent, however, that both numbers refer to the same allotment, which is described as the NE 1/4 SW 1/4, sec. 31, T. 5 S., R. 32 E., Principal Meridian, Big Horn County, Montana. In this decision, the Board refers to it as Allotment 689-B.

### Background

On July 13, 1934, the Superintendent, Crow Agency, BIA, approved a road right-of-way over several allotments on the Crow Reservation, including Allotment 689-B. He approved the right-of-way by signing a map on which the right-of-way was depicted, under a statement which reads: "Crow Agency, Mont., July 13, 1934, approved as shown hereon subject to the provisions of the act of March 4, 1915 (38 Stat. L. 1188); Departmental regulations thereunder; and subject also to any prior valid existing rights and adverse claims." Although the map does not show to whom the right-of-way was granted, other documents in the record indicate that it was granted to Big Horn County, Montana, for the purpose of constructing a road known as Big Horn County Road 46-D.

On October 25, 1985, the Superintendent granted Right-of-Way No. 14640 to Mountain States Telephone and Telegraph Company (Mountain States) for a buried telephone cable. The right-of-way has a 50-year term and passes through 55 allotments, including Allotment 689-B. At the time this right-of-way was granted, Allotment 689-B was held in trust for Appellant's mother, Ruby Sun Goes Slow Simpson.

On September 18, 1991, the Superintendent signed another right-of-way document relating to Right-of-Way No. 14640. An annotation on the document states: "MODIFICATION OF GRANT OF EASEMENT ISSUED OCTOBER 5 [sic], 1985 TO DELETE ALLOTMENT NO. 689[-B]." <sup>2/</sup> The Realty Officer, Crow Agency, informed Ruby Simpson of the deletion by letter dated February 16, 1994. Evidently, Mountain States was not informed of the deletion.

On April 15, 1994, the 1985 right-of-way was apparently assigned to Project Telephone Company (Project Telephone). According to the statement of reasons Project Telephone filed with the Regional Director in this matter, BIA recognized the assignment by transmitting it on August 15, 1995, to the Billings Land Titles and Records Office for recordation. <sup>3/</sup>

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<sup>2/</sup> The document bears a stamp showing that it was recorded in BIA's Billings Land Titles and Records Office on Oct. 1, 1991. In addition to the Sept. 18, 1991, document, the administrative record includes another right-of-way document signed by an Acting Superintendent on Sept. 19, 1991. The second document is similar to the first one but omits the annotation quoted above and lacks a stamp showing recordation in the Land Titles and Records Office.

<sup>3/</sup> No assignment or recordation documents were included in the administrative record received by the Board.

In an April 13, 1999, letter to the Superintendent, Appellant stated that she had inherited Allotment 689-B. She contended that BIA had erroneously granted the right-of-way to Mountain States in 1985 and requested that BIA assist in removing U.S. West Communications, Inc. (U.S. West) from her property. <sup>4/</sup>

After reviewing Agency records, the Superintendent concluded that notice of the 1991 right-of-way modification had never been given to U.S. West. On August 31, 1999, he wrote to U.S. West, stating that it did not have an approved right-of-way over Allotment 689-B and was therefore in trespass. His letter continued: "You have Ten (10) days to obtain an approved right-of-way easement. After such time that your firm is still not in compliance, we may begin legal actions against you." On October 4, 1999, the Superintendent again wrote to U.S. West about the matter, this time including appeal information.

In response to the October 4, 1999, letter, U.S. West wrote to the Superintendent, stating that it no longer served the area and that BIA should contact Project Telephone. On December 10, 1999, the Superintendent wrote to Project Telephone, stating in part:

Your company is in trespass on [Allotment 689-B] and the present landowner wants the service line removed from her property immediately.

Since you were not aware of this situation, its only fair that you should be given ten days to resolve the problem. After such time that your firm is not in compliance, legal action may be taken against you.

On December 30, 1999, Agency staff and a representative of Project Telephone visited Allotment 689-B to locate the buried telephone line. They determined that the line was under a hard surface road. Although the report of this visit indicates that the BIA employees were uncertain at the time whether the road was a county road or a BIA road, other documents in the record establish that the road concerned was Big Horn County Road 46-D.

On January 7, 2000, Project Telephone appealed to the Regional Director from the Superintendent's December 10, 1999, letter. The Regional Director consolidated Project Telephone's appeal with a November 22, 1999, appeal filed by Appellant under 25 C.F.R. § 2.8, in which Appellant alleged that the Superintendent had failed to act on her request to have the telephone line removed from Allotment 689-B.

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<sup>4/</sup> U.S. West was apparently the successor to Mountain States. As indicated above, however, Project Telephone states that it received an assignment of the right-of-way in 1994.

In a decision issued on September 21, 2000, the Regional Director held that the 1991 modification of the 1985 right-of-way was invalid because it failed to comply with 25 C.F.R. § 169.20, concerning termination of rights-of-way. Accordingly, he reversed the Superintendent's December 10, 1999, decision.

Appellant then appealed to the Board. Appellant, the Regional Director, and Project Telephone filed briefs.

### Discussion and Conclusions

Appellant's principal argument is that the 1985 right-of-way is invalid as to Allotment 689-B. She contends that her mother never consented to the right-of-way and that landowner consent was required under 25 C.F.R. § 169.3. <sup>5/</sup> She also raises several objections to the manner in which BIA handled her request for removal of the telephone line.

In his answer brief, the Regional Director contends that, although BIA made an effort in 1985 to comply with 25 U.S.C. § 324 <sup>6/</sup> and 25 C.F.R. § 169.3, in fact those efforts were not required because Mountain States had the right under Montana law to place its telephone line within the right-of-way for Big Horn County Road 46-D without obtaining a further right-of-way from BIA. For this argument, the Regional Director relies on United States v. Mountain States Tel. & Tel. Co., 434 F. Supp. 625 (D. Mont. 1977), and United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943).

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<sup>5/</sup> 25 C.F.R. § 169.3 provides:

“(b) Except as provided in paragraph (c) of this section [not relevant here], no right-of-way shall be granted over and across any individually owned lands \* \* \* without the prior written consent of the owner or owners of such lands and the approval of the Secretary.”

<sup>6/</sup> 25 U.S.C. § 324 provides in relevant part:

“Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.”

The Regional Director's theory, if correct, will control the outcome of this appeal. Therefore, the Board turns first to his argument.

In Mountain States, it was held that, where a road right-of-way over tribal land on the Flathead Reservation had been granted under section 4 of the Act of Mar. 3, 1901, ch. 832, 31 Stat. 1084, 25 U.S.C. § 311, Mountain States had the right to place a buried telephone line in the road right-of-way under Montana law without obtaining the consent of the Secretary of the Interior or the tribal landowner. The district court based its decision on the Supreme Court's decision in Oklahoma Gas & Electric Co., which concerned a right-of-way granted under 25 U.S.C. § 311 over off-reservation allotted land. In that case, the Supreme Court held that electrical lines could be erected and maintained in the right-of-way without the consent of the Secretary, because such a highway use was authorized under Oklahoma law.

25 U.S.C. § 311 provides:

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

As indicated above, the road right-of-way at issue here was approved under the Act of Mar. 4, 1915, ch. 161, 38 Stat. 1188 (1915 Act). Section 2 of the 1915 Act provides:

[T]he legal authorities charged with the duty of laying out and opening public roads and highways under the laws of the State of Montana, having jurisdiction over any territory embraced within any Indian reservation in Montana, are hereby authorized and empowered to lay out and open public roads within any of the said Indian reservations in conformity to and in accordance with the laws of the State of Montana relating to the laying out and opening of public roads, and that any public road when so laid out and opened shall be deemed a legal road: *Provided*, That such road authorities shall, in addition to notifying the landowners as provided in the State laws, likewise serve notice upon the superintendent in charge of the restricted Indian lands upon which it is proposed to lay out a public road, and shall also furnish him with a map drawn on tracing linen showing the definite location and width of such proposed road, and no such road shall be laid out until it has received the approval of such superintendent.

The Regional Director recognizes that the relevant language of these two provisions is somewhat different. He contends, however, “that the provisions relating to the adoption of State law are substantially equivalent and the public roads under either act are available for use by public utilities under Montana law.” Regional Director’s Brief at 6. He does not expand upon this contention.

While there is clearly a similarity in the language of the two provisions, as it concerns the application of State law, the language of the 1915 Act seems, at least at first glance, to be somewhat narrower than the language of 25 U.S.C. § 311. 25 U.S.C. § 311 authorizes the opening and establishment of public highways “in accordance with the laws of the State or Territory in which the lands are situated,” whereas the 1915 Act authorizes the laying out and opening of public roads “in conformity to and in accordance with the laws of the State of Montana relating to the laying out and opening of public roads.” The underscored phrase, present in the 1915 Act, is absent from 25 U.S.C. § 311. There are also some other differences in the language of the two statutes. Thus, before Oklahoma Gas & Electric Co. and Mountain States, can be considered controlling here, consideration must be given to the significance, if any, of differences in language, and/or possible differences in the purposes of the two statutes.

Toward this end, the Board first reviews the legislative history of the 1915 Act. As indicated above, 25 U.S.C. § 311 derived from a statute enacted in 1901. Thus, in 1915, there had been a statute on the books for 14 years which appeared to serve the same purpose as would be served by the new law.

As introduced, the bill that was to become the 1915 Act applied only to certain reservations in Nebraska. <sup>7/</sup> Further, as introduced, the bill lacked any requirement that an Interior Department official approve the opening of roads which crossed Indian lands.

The subject of Departmental approval arose in debates on the House floor. When asked whether he would agree to including a requirement for approval by a Superintendent, Representative Stephens of Nebraska replied:

I think that would practically destroy the effect of the bill. The present laws provide that the Secretary of the Interior shall approve the opening of the roads, and the rule of the Interior Department is that no roads may be opened unless all the landowners approve; and there being sometimes as many as 8 or 10 heirs to a single piece of land, it makes it impossible for the people there to get roads established, and the superintendent might be induced to disapprove of the

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<sup>7/</sup> As enacted, section 1 of the 1915 Act applies to the Winnebago, Omaha, Ponca, and Santee Sioux Reservations in Nebraska.

opening of a road, and therefore destroy the object of this bill. It is too much authority to put in the hands of one man.

51 Cong. Rec. 6927 (1914). Representative Stephens later agreed to a requirement for approval by a Superintendent and, in fact, introduced an amendment adding that requirement to the bill. 51 Cong. Rec. 8788 (1914). The Senate then added the present section 2, concerning Montana, with language virtually identical to that concerning the Nebraska reservations. S. Rep. No. 63-919 (1915).

Perhaps not surprisingly, nothing in the legislative history focuses upon the language of the bill concerning application of state law. It is apparent from the floor debate in the House that the purpose of the bill was to lessen the control of the Interior Department over the opening of roads through Indian reservations. Once the bill was amended to require the approval of a Superintendent, that purpose was frustrated in part. However, differences in the language of 25 U.S.C. § 311 and the 1915 Act reflect a shift away from Departmental control. In particular, whereas 25 U.S.C. § 311 gave the Secretary authority to demand “compliance with such requirements as he may deem necessary” before he granted permission to State and local authorities to open roads through Indian reservations, the 1915 Act granted primary authority to the States and gave a more limited approval role to lower-level Departmental employees, *i.e.*, the Superintendents.

Regulations issued by the Department of the Interior reflected these differences. The Secretary’s “Regulations concerning rights-of-way over Indian lands,” adopted on May 22, 1928, addressed the two statutes in separate provisions—25 U.S.C. § 311 in sections 49-52 (later 25 C.F.R. §§ 256.50-256.53 (1938)) and the 1915 Act in sections 53-55 (later 25 C.F.R. §§ 256.55-256.57 (1938)). <sup>8/</sup>

As they appeared in the 1938 edition of 25 C.F.R., these latter sections provided:

**256.55 Approval by Secretary of the Interior not necessary.**

The opening of public highways over Indian lands in Montana and Nebraska in accordance with the respective State laws, is authorized by the Act of March 4, 1915. No action by the Secretary of the Interior is required, but the Act provides that notice of any such proposed road must be given to the Superintendent or other officer in charge of the lands, and that before the road is laid

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<sup>8/</sup> The 1938 edition of 25 C.F.R. indicates that all these sections derived, unamended, from the 1928 regulations. Thus these regulations were the ones in effect when the road right-of-way at issue here was approved.

out a map, drawn on tracing linen, showing its definite location and width must be filed with, and approved by, the Superintendent. (38 Stat. 1188) [Sec. 53]

**256.56 Superintendent may approve map.** When a map is filed under the provisions of § 256.55 the Superintendent or other officer in charge has full authority to approve same in his discretion, but such officer will be expected before approving any map so filed to view the road location or otherwise satisfy himself that the road is a public necessity and is laid out where it will do the least damage to the property of the Indians, provided such a course is feasible and practicable from a construction viewpoint. No map showing a highway location detrimental to the best interests of the Indians or which will damage them beyond compensation should be approved. (38 Stat. 1188) [Sec. 54]

**256.57 Maps.** The original part of maps approved under the preceding section shall be filed in the superintendent's office; and the other parts, if any, with approval noted thereon, returned to the applicants. (38 Stat. 1188) [Sec. 55] [Footnote omitted; bracketed section numbers in original.]

By contrast, the provisions adopted under 25 U.S.C. § 311 impose more detailed and specific requirements upon right-of-way applicants, reflecting the broader authority vested in the Secretary by the earlier statute. <sup>9/</sup>

In the 1924 Solicitor's Opinion cited in footnote 9, the Solicitor found the two statutes equivalent on the question of how damages to Indian landowners were to be determined. In both cases, he concluded, such determinations were to be made under State law. I Op. Sol. on Indian Affairs at 122.

While the precise question at issue in this appeal was not addressed in the legislative history of the 1915 Act or in the Department's regulations under that Act, it is fair to say that both Congress and the Department viewed the 1915 Act as equivalent to 25 U.S.C. § 311 in some respects but also as vesting more control in the States and less control in the Department than had the earlier statute.

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<sup>9/</sup> The instructions originally issued to Superintendents under the 1915 Act had evidently included more specific requirements, similar to those under 25 U.S.C. § 311. However, those instructions were rescinded because of doubts that the Department had the authority to limit the discretion of Superintendents under the 1915 Act. See Solicitor's Opinion M-13394 (Oct. 9, 1924), I Op. Sol. on Indian Affairs 120, 121. Even so, the regulations quoted above indicate that the Secretary undertook to offer the Superintendents some guidance.

With this history in mind, the Board returns to the cases cited by the Regional Director in this appeal. As noted above, those cases concern 25 U.S.C. § 311.

In Oklahoma Gas & Electric Co., the Supreme Court stated:

[T]he Government denies that [25 U.S.C. § 311] submits the scope of the highway use to state law. Its interpretation gives the Act a very limited meaning and substantially confines state law to governing procedures for “opening and establishment” of the highway. It offers as examples of what is permitted to state determination, whether a state or county agency builds the road, whether funds shall be raised by bond issue or otherwise, and the terms and specifications of the construction contract. The issue is between this narrow view of the State’s authority and the broader one which recognizes its laws as determining the various uses which go to make up the “public highway,” opening and establishment of which are authorized.

We see no reason to believe that Congress intended to grant to local authorities a power so limited in a matter so commonly subject to complete local control.

It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies. Presumably Congress intended that this case be decided by reference to some law, but the Government has cited and we know of no federal statutory or common-law rule for determining whether the running of the electric service lines here involved was a highway use. These considerations, as well as the explicit reference in the Act to state law in the matter of “establishment” as well as of “opening” the highway, indicate that the question in this case is to be answered by reference to that law, in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary. We find none of these. [Footnote omitted.]

318 U.S. at 209-210.

Among other things, this passage demonstrates that the Supreme Court construed the phrase “laws of the State” in 25 U.S.C. § 311 to mean laws of the State in the matter of opening and establishment of public highways. As so construed, the phrase is essentially equivalent to the corresponding phrase in the 1915 Act, “the laws of the State of Montana relating to the laying out and opening of public roads”—the only remaining question being whether there is

any significant distinction between “opening and establishment” of public highways, in the words of 25 U.S.C. § 311, and “laying out and opening” of public roads, in the words of the 1915 Act.

The word “establishment” was used in 25 U.S.C. § 311 but not in the 1915 Act. The next-to-last sentence in the above-quoted passage from Oklahoma Gas & Electric Co. suggests the possibility that the Supreme Court may have given somewhat greater significance to the word “establishment” than to the word “opening.” However, the Court’s words convey only a suggestion in this regard—and one which is plainly of minor significance in comparison to the unequivocal statements made in the preceding discussion, the clear import of which is that, once a public highway has been opened under State law, State law determines the various uses which can be made of the highway. The Board concludes that use of the word “establishment” in 25 U.S.C. § 311 was not critical to the Court’s holding in Oklahoma Gas & Electric Co.

In all other respects, the Supreme Court’s analysis of 25 U.S.C. § 311 applies equally to the 1915 Act. Given that the legislative history and administrative interpretation of the 1915 Act reflect an intent to vest more control in the State and less in the Department of the Interior than did 25 U.S.C. § 311, there is little doubt that the Court would have reached the same result had the 1915 Act, rather than 25 U.S.C. § 311, been before it.

The Board concludes that the Supreme Court’s analysis in Oklahoma Gas & Electric Co. is applicable to the 1915 Act.

As noted above, Appellant’s principal argument here is based upon the consent requirement in 25 C.F.R. § 169.3. The consent requirement in the regulation is derived from the Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323-328 (1948 Act), in particular, section 2, 25 U.S.C. § 324, quoted in footnote 6, above.

In Mountain States, it was argued that the 1948 Act required that landowner consent be obtained for the buried telephone cable at issue there. The court rejected that argument, stating:

The grant of the right-of-way for the highway was made in 1916. The nature and extent of the title owned by the county is that intended by Congress at the time of the grant. \* \* \* If the state and its subdivisions were granted a right to make incidental uses of highway rights-of-way in 1916, then the grant is diminished if, by an act passed in 1948, they may not now do so. It is unnecessary

to reach the problem of whether Congress could, after a highway was built in reliance upon a grant, constitutionally change the terms of the grant, because it is clear that Congress did not intend to do so.

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Section 4 of the [1948 Act], 25 U.S.C. § 326, negates the thought that vested rights were to be affected.

Mountain [States] does have a right to maintain its buried telephone cable in the highway right-of-way and is not trespassing. [Footnotes omitted.]

434 F. Supp. at 628-29.

The road right-of-way in this case was also granted before 1948 and is subject to the same analysis.

Montana law continues to authorize the use of public roads and highways for utility lines. The present provision appears in Mont. Code Ann. § 69-4-101 (2001) and is virtually identical to the prior codified version, Mont. Rev. Code § 70-301 (1947). <sup>10/</sup> It is clear that, at the time the telephone right-of-way at issue here was granted in 1985, Montana law allowed for the location of telephone lines in public roads.

[1] For the reasons discussed, the Board concludes that Mountain States had the right in 1985 to place its buried telephone cable in the right-of-way for Big Horn County Road 46-D, as it crosses Allotment 689-B, without obtaining a right-of-way from BIA and without obtaining the consent of Appellant’s mother under 25 C.F.R. § 169.3. Accordingly, the Board

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<sup>10/</sup> Mont. Code Ann. § 69-4-101 (2001) provides:

“A telegraph, telephone, electric light, or electric power line corporation or public body or any other person owning or operating such is hereby authorized to install its respective plants and appliances necessary for service and to supply and distribute electricity for lighting, heating, power, and other purposes and to that end, to construct such telegraph, telephone, electric light, or electric power lines, from point to point, along and upon any of the public roads, streets, and highways in the state, by the erection of necessary fixtures, including posts, piers, and abutments necessary for the wires. The same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets, or highways, and nothing herein shall be so construed as to restrict the powers of city or town councils.”

Mont. Rev. Code § 70-301 (1947) is quoted in Mountain States, 434 F. Supp. at 626 n.1.

further concludes that Project Telephone is not in trespass on Allotment 689-B and need not remove its telephone line.

It is apparent from the administrative record that BIA believed, until this appeal was filed, that a right-of-way was required for the telephone line, even where it was placed in the right-of-way for Big Horn County Road 46-D, as it was on Allotment 689-B. <sup>11/</sup> The fact that BIA has acted in the belief that a right-of-way was required, however, does not alter the result here because the rights of Project Telephone and its predecessors are based on a Federal statute, *i.e.*, the 1915 Act. For the same reason, the manner in which BIA handled Appellant's request for removal of the telephone line, about which Appellant complains, does not affect the legal conclusion here.

Although it rejects Appellant's principal contention, the Board briefly addresses some of her other arguments. In her reply brief, Appellant contends that State law concerning the road right-of-way does not apply on the Crow Reservation because the State does not have jurisdiction there under Public Law 280. <sup>12/</sup> As discussed above, however, Congress authorized a limited application of State law when it enacted the 1915 Act. That authority is entirely separate from the authority granted in Public Law 280. Pursuant to the 1915 Act, State law concerning the uses that may be made of public roads applies to roads opened under that Act.

Appellant also argues that the cases cited by the Regional Director are not relevant to this appeal. Rather, she contends, this appeal should be controlled by a March 21, 1994, order issued by the Crow Tribal Court in Ruby Simpson v. U.S. West, CV-91-52. In that order, the tribal court found that U.S. West acted wrongfully in placing the telephone line without Ruby Simpson's permission and that U.S. West was responsible for paying Simpson the fair market value of a right-of-way.

The March 21, 1994, order specifically stated that it was not a final order in the case, and Appellant has not shown that a final order was ever entered. Even if the tribal court had entered a final order along the lines of the March 21, 1994, order, it would not control this appeal. BIA was not a party to the tribal court case, as that court recognized. Further, the

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<sup>11/</sup> A comparison of the telephone right-of-way with the approved map for Big Horn County Road 46-D suggests that a good portion of the telephone right-of-way lies outside the road right-of-way.

<sup>12/</sup> Public Law 280 was a 1953 statute which authorized certain states to exercise criminal and civil jurisdiction over cases involving Indians in Indian country. 18 U.S.C. § 1162; 28 U.S.C. § 1360. As amended in 1968, Public Law 280 requires the consent of the tribe affected before a state can assume jurisdiction. 25 U.S.C. § 1321.

tribal court did not consider the 1915 Act or either of the Federal court decisions discussed above. Finally, this matter is controlled by Federal law, not tribal law.

In a supplemental filing authorized by the Board, Appellant objects to the Board's consideration of documents concerning the right-of-way for Big Horn County Road 46-D because the right-of-way did not appear on the title status report for Allotment 689-B until June 2001. <sup>13/</sup> Appellant seems to be contending that the road right-of-way is not valid because it did not appear on earlier title status reports. Further, she alleges that BIA has violated the requirements of 25 C.F.R. Part 150, "Land records and title documents." She argues: "For 67 years [BIA] did not comply with 25 C.F.R. § 150.6 to **record immediately** the road on the land title." <sup>14/</sup> Appellant's Response to Supplemental Record at 2.

In his memorandum transmitting the road right-of-way documents, the Regional Director stated: "At the time the right-of-way was approved the superintendent approved the document by signing and dating the map. The map was recorded as Document No. 202 5000." The map submitted by the Regional Director bears, in addition to the approval notation quoted above, the stamped number 202 5000.

The approval methodology employed by the Superintendent in 1934 was the one authorized by the regulations that were in effect at the time. See 25 C.F.R. §§ 256.55-256.57 (1938), quoted above. It is not clear why the road right-of-way did not appear on the 1986 title status report for Allotment 689-B. The fact that it did not appear on the report, however, does not mean that the right-of-way is invalid. To the extent the 1986 report (or any other title

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<sup>13/</sup> The administrative record submitted by the Regional Director did not include documentation concerning the right-of-way for Big Horn County Road 46-D. The Board therefore ordered supplementation of the record and gave Appellant an opportunity to respond to the additional documents.

The record as originally submitted included a title status report for Allotment 689-B which did not show the right-of-way for Big Horn County Road 46-D. That report indicated that title had last been examined on Nov. 24, 1986. The supplemental record includes a title status report which shows the road right-of-way and has a certification date of June 21, 2001.

<sup>14/</sup> The regulations which now comprise 25 C.F.R. Part 150 were promulgated in 1981. An earlier version of Part 150 (then Part 120) was promulgated in 1965 and remained in effect until 1981. That version was simply a statement concerning the establishment of BIA's land titles and records offices.

As far as the Board is aware, in 1934, BIA had no regulations governing land records and title documents.

status report issued prior to June 2001) reflects an error, it is an error in recording, rather than an error in approval of the right-of-way.

Appellant has not shown that the right-of-way for Big Horn County Road 46-D is invalid, and the Board can see no reason to doubt its validity.

The Regional Director's September 21, 2000, decision was based upon a presumption that a right-of-way was required for the telephone line as it crosses Allotment 689-B. For the reasons discussed above, the Board finds that presumption to be erroneous.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Regional Director's September 21, 2000, decision and substitutes this decision. 15/

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//original signed

Anita Vogt  
Administrative Judge

I concur:

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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15/ All pending motions and objections are denied. Arguments made by Appellant but not discussed in this decision have been considered and rejected.