



INTERIOR BOARD OF INDIAN APPEALS

Pueblo of Tesuque v. Acting Southwest Regional Director, Bureau of Indian Affairs

40 IBIA 273 (03/07/2005)



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

PUEBLO OF TESUQUE,	:	Order Vacating Regional Director's
Appellant,	:	Decision and Dismissing Case
	:	as Moot
v.	:	
	:	
ACTING SOUTHWEST REGIONAL	:	Docket No. IBIA 01-144-A
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	March 7, 2005

The Pueblo of Tesuque (Pueblo) sought review of a May 14, 2001, decision of the Acting Southwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), declining to terminate or declare void a right-of-way granted to the Public Service Company of New Mexico (PNM), for construction of a 115kV overhead transmission line across Pueblo lands. The Board concludes that this case is now moot because PNM completed construction of an alternate transmission line along another route and PNM does not intend to use the right-of-way on the Pueblo's lands.

Background

PNM and the Pueblo entered into the right-of-way agreement on December 27, 1984, "for the sole purpose of [PNM] constructing a 115kV electric transmission line, substation and related distribution line and facilities." Dec. 27, 1984, Right-of-Way Agreement at 1. After preparing an environmental impact statement (EIS) under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (2000), BIA issued a record of decision (ROD) approving the right-of-way on August 27, 1985. The formal "Grant of Easement for Right-of-Way" (ROW) to PNM was executed on December 17, 1985. The ROW states that it is for "construction, operation, and maintenance of a 115kV electric transmission line, a substation, underground distribution lines, and related facilities and for no other purpose." Dec. 17, 1985, ROW (emphasis added). BIA retained the authority to terminate the ROW for failure to comply with its terms, abandonment, or non-use, subject to providing PNM with notice and an opportunity to cure deficiencies. The ROW was amended twice. The second amendment provided that "if PNM does not start construction of the Project Facilities by January 1, 1999,

for whatever cause, then the [ROW] shall terminate as of said date.” Oct. 26, 1995, Amendment 2 to ROW at 2.

On October 19, 2000, the Pueblo requested that the Northern Pueblo Agency Superintendent, BIA, “rescind the ROD and disallow any further progress on [project] construction until a Supplemental EIS is prepared.” Oct. 19, 2000, Pueblo Letter at 2. The Superintendent denied the Pueblo’s request, and the Pueblo appealed to the Regional Director. On May 14, 2001, the Regional Director upheld the Superintendent’s decision and declined to rescind or declare void the ROW, or to supplement the EIS. The Pueblo appealed that decision to the Board.

While this appeal was pending, PNM decided to construct the electric transmission line along another route not involving the Pueblo’s lands or the ROW. On February 18, 2004, PNM informed the Board that it had completed construction of the alternate electric distribution line, and requested that the Board dismiss this appeal as moot. In a subsequent brief in support of its motion to dismiss, PNM stated that completion of the alternate line rendered its use of the ROW across Pueblo lands unnecessary, and that “PNM no longer intends to use the ROW for construction of a 115 kV electric transmission line.” Mar. 29, 2004, PNM Br. in Support of Motion to Dismiss at 1. While supporting dismissal of this appeal as moot, however, PNM reiterated its support for the Regional Director’s decision and suggested the Board should not vacate that decision as part of a dismissal.

In response to PNM’s motion and brief, the Pueblo reiterates its arguments on the merits. The Pueblo does not, however, dispute PNM’s contention that PNM no longer intends to use the ROW. Nor does the Pueblo dispute PNM’s contention that this appeal is moot. In fact, the Pueblo expressly acknowledges that the Regional Director’s decision “no longer has any practical effect.” Apr. 30, 2004, Pueblo Reply at 4. The Pueblo does, however, object to the Board dismissing this appeal without vacating the Regional Director’s decision.

Discussion

The doctrine of mootness in Federal courts is based on the case-or-controversy requirement set forth in the U.S. Constitution, art. III, § 2. Estate of Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24, 32-33 (1986). Although the Board, as an executive branch forum, is not bound by the same constitutional constraints, it has consistently followed the same principles of declining to consider moot cases, in the interest of administrative economy. Id. (citations omitted). Mootness may arise in various contexts, but each is based on the requirement that an active case or controversy be present at all stages of litigation. See id. (citing Marchand v. Director, U.S. Probation Office, 421 F.2d, 331, 332 (1st Cir 1970)). Of particular relevance here, a case can become moot when “nothing turns on its outcome.” Schering Corp. v. Shalala, 995 F.2d 1103, 1105 (D.C. Cir. 1993).

In the present case, the active controversy arose when PNM intended to use the ROW across Pueblo lands to construct a transmission line, and the Pueblo sought to stop PNM by asking BIA to terminate the ROW, declare it terminated under its own terms, or prepare a Supplemental EIS before allowing PNM to proceed on the Pueblo's lands. As long as PNM still intended to use the ROW, a decision from the Board would have had practical consequences for the parties.

Now that PNM has completed an alternate transmission line, nothing turns on the outcome of a decision on the merits by the Board. It is undisputed that PNM does not intend to use the ROW on the Pueblo's lands. Even though the Pueblo continues to disagree with the Regional Director's decision, it acknowledges that the decision no longer has any practical effect. Whether or not the ROW remains in effect, and whether or not the Regional Director's decision was correct or incorrect, the active case or controversy over PNM's use of Pueblo lands no longer exists.

In a somewhat analogous case, the court in Village of Elk Grove Village v. Evans, 997 F.2d 328 (7th Cir. 1993) dismissed a case as moot when a proposal to build a radio tower was abandoned, even though the landowner, having obtained a Corps of Engineers' permit to build in a floodplain, wanted to go ahead with developing the property, and the Village sought to obtain the relief it had initially sought before the tower proposal was abandoned. The Corps' permit was project-specific, and the court found that when the project was abandoned, the possibility that the original controversy would be reopened was too remote to preclude dismissal of the case as moot. In the present case, the ROW is project-specific, and none of the parties has suggested that the original controversy over PNM's use of the Pueblo's lands is likely to be reopened. The parties may still disagree whether the ROW remains in effect, and if so, whether BIA should take steps to terminate it, but none has identified any continuing consequences sufficient to keep this case alive. See Schering, 995 F.2d at 1105.

The parties do, however, appear to attach great importance to whether or not the Board should vacate the Regional Director's decision as part of dismissing the case, although none articulates why that has any practical significance. An order vacating the decision is not necessary, because the Pueblo's appeal precluded the Regional Director's decision from taking effect, 25 C.F.R. § 2.6, and the Board's dismissal of the case as moot, under the circumstances present here, should suffice, without the parties believing that the Regional Director's decision has any independent effect. Nevertheless, in the interest of clarity, the Board will vacate the Regional Director's decision. Cf. United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950) (when a civil case has become moot pending a decision on the merits, the established practice is to reverse or vacate the judgment and remand with instructions to dismiss); Village of Elk Grove, 997 F.2d at 332 (vacating district court decision). By vacating the Regional Director's decision in this case, the Board clarifies that the situation is returned to the status quo as it existed prior to the controversy that has now become moot. In the event that a new

controversy emerges concerning the ROW, BIA must start with a clean slate in considering that situation.

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 May 14, 2001, decision and dismisses this case as moot.

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Steven K. Linscheid
Chief Administrative Judge

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Anita Vogt
Senior Administrative Judge