INTERIOR BOARD OF INDIAN APPEALS

Pine Bar Ranch, LLC and Owen Torrey v. Acting Pacific Regional Director, Bureau of Indian Affairs

52 IBIA 63 (08/26/2010)

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

PINE BAR RANCH LLC AND OWEN TORREY, Appellants,	)	Order Dismissing Appeal
v.	)	Docket No. IBIA 08-137-A
ACTING ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	August 26, 2010

Pine Bar Ranch LLC and Owen Torrey (Appellants) have appealed the August 8, 2008, decision of the Acting Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), upholding the February 11, 2008, decision of the Wind River Agency Superintendent, BIA, that declined to find that the unpaved portion of Surrell Creek Road is a public road open to public use. The Regional Director affirmed the Superintendent's determination that the unpaved portion of Surrell Creek Road located on the Wind River Reservation was not a public road because, although BIA had been granted a right-of-way for the use of the paved portion of the road as a public road and the paved portion had been included on the inventory of Indian Reservation Roads (IRR) for the Eastern Shoshone and Northern Arapaho Tribes' (Tribes) Wind River Reservation, the unpaved portion of the road was not included in the right-of-way grant or listed on the IRR inventory nor had the Tribes made any assertion that the unpaved portion of the road crossing their trust land is open for public use.

Appellants object to the Regional Director's conclusion, arguing that, since the road was built as part of the Civilian Conservation Corps (CCC) program, one of the goals of which was to provide employment through the construction of works of public interest or utility, and was financed with public funds, it must necessarily be considered to be a public road. Appellants also contend that the Tribes' decision to approve the construction of the road despite their concerns that the road would be used by outsiders to access remote regions of the Reservation not only demonstrates that they knew that the road would be used by the public but also indicates that the Tribes consented to such public use.

Appellants further assert that BIA does not need tribal consent to allow public access; that the lack of a right-of-way for the unpaved portion of the road is not determinative; and that roads do not have to be listed on the IRR inventory in order to be public roads.

Appellants, however, have not identified any concrete action taken or proposed to be taken by BIA based on its conclusion that the unpaved portion of Surrell Creek Road is not a public road, much less any BIA action adversely affecting them. Nor does the record reveal any such action. Rather, Appellants apparently requested BIA's opinion on an issue related to a private matter without the existence of an actual case or controversy involving BIA action. Although BIA's responses rejected Appellants' position that the unpaved portion of Surrell Creek Road is a public road, those responses did not constitute a cognizable "action" or "decision" that adversely affected Appellants within the meaning of the appeal regulations because the responses were unaccompanied by any actual action or implementation by BIA against Appellants. The Board of Indian Appeals (Board) has consistently held that it lacks the authority to issue advisory opinions, which includes the issuance of a decision in the absence of or in advance of an actual case or controversy. Since Appellants were not adversely affected by any BIA action, and effectively request that we issue just such an advisory opinion, we dismiss Appellants' appeal for lack of jurisdiction.

Background

Appellants, a family-owned business and its owner, own lands lying on both sides of the southern boundary of the Wind River Reservation in North Fork Canyon northwest of Lander, Wyoming. Surrell Creek Road is one of the access routes to North Fork Canyon. The route extends across the Reservation from U.S. Highway 287 to the southern boundary of the Reservation in sec. 20, T. 2 S., R. 1 W., Wind River Meridian (WRM), Fremont County, Wyoming. The road crosses a corner of Appellants' lands and the southwest end of the road connects to those lands.

Beginning in late 2003 or early 2004 a conflict arose between Appellants and Homer and Helen Luther, the owners of another ranch in North Fork Canyon. The Luthers, having concluded that the unpaved portion of Surrell Creek Road was not a public road (thus making their ranch landlocked), sought permission from Fremont County to establish a private road. *See Pine Bar Ranch LLC v. Luther*, 152 P.3d 1062, 1064-65 (Wyo. 2007).[1] Appellants objected, arguing that Surrell Creek Road, including the unpaved portion, was a

[1] Under Wyoming State law, a party seeking permission to establish a private road must show that the party has no legally enforceable means to gain access from his or her property to a public road. *Id*. at 1066.

public road.[2] The County sided with Appellants, but the courts reversed the County and decided the controversy in favor of the Luthers. The litigation concluded when the Wyoming Supreme Court explicitly rejected Appellants' argument that Surrell Creek Road is a public road. *Id*. at 1067, 1069.

By letter dated November 8, 2007, and without mentioning the Wyoming Supreme Court's decision, Appellants requested that BIA help resolve a controversy "[that] has arisen" over whether Surrell Creek Road is a public road. Administrative Record (AR), Tab 16. Appellants explained their interest in the matter as follows:

> First, we're interested in knowing the status of the road because it crosses a corner of the Pine Bar Ranch and has a bearing on the Torreys' property rights. We're concerned that an attempt is being made to close the road to public access and that a taking would occur without due process or compensation. Second, we believe confusion and anxiety over public access on the reservation has a chilling effect on commerce to the detriment of the [Tribes] as well as the Torrey family. Finally, we view the status of the road as a pivotal issue in a Fremont County proceeding in which nearby land owners, Helen and Homer Luther, seek to establish a new road up North Fork Canyon under the Wyoming Private Road Statute.[[3]]
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> . . . .
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> The Luthers argue that they are in need of a new road because Surrell Creek Road is not open to public use. We believe that Surrell Creek Road is a public road as a matter of law. In the interests of clarifying the public record, protecting the public's right to commerce, and preserving archaeological sites of interest to Native Americans, we respectfully request that you issue an affirmation that Surrell Creek Road is a public road which is open to general public use.

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[2] Appellants' dispute with the Luthers apparently was based on Appellants' objection to the proposed location of the private road.

[3] Appellants averred that the proposed location of the private road would impact significant Indian archaeological sites, which the Tribes have requested be preserved under the American Indian Religious Freedom Act.

AR, Tab 16, Letter from Appellants to Wind River Agency Superintendent, Nov. 8, 2007, at 1-2. Appellants also set out the historical and legal basis for their position that the road is a public road, alleging that the road was built as part of the CCC program which necessarily makes it a public road; that the Tribes were aware that CCC roads are public roads; that a recent BIA decision confirmed that CCC roads are public roads, regardless of whether a specific right-of-way or easement has been granted for the road; and that a road may be a public road even if it is not included on an IRR inventory.

By decision dated February 11, 2008, the Superintendent declined to affirm that the unpaved portion of Surrell Creek Road is a public road. AR, Tab 11. He noted that an easement for a public road right-of-way had been granted for the paved portion of the road encompassing the S½S½SW¼, S½SW¼SE¼, sec. 6, and the W½SW¼NE¼, E½E½NW¼, NE¼SW¼, NW¼NW¼SE¼, sec. 7, T. 2 S., R. 1 E., WRM, and that this portion of the road was listed in the IRR inventory for the Reservation. He therefore concluded that the paved portion of Surrell Creek Road is a public road. In contrast, the Superintendent found that there were no recorded easements for the unpaved portion of the road, and that the Tribes had not made any assertion that the unpaved portion of the road crossing their trust land is open for public use nor had they included the unpaved portion on the IRR inventory. He therefore declined to find that the unpaved portion of the road is a public road open to public use.

Appellants appealed the Superintendent's decision to the Regional Director, repeating and amplifying the arguments set out in their request for the affirmation.

In his August 8, 2008, decision (AR, Tab 2), the Regional Director affirmed the Superintendent's determination that the unpaved portion of Surrell Creek Road is not a public road, essentially reiterating and adopting the Superintendent's rationale for that conclusion.

This appealed followed.

Discussion

Appellants argue that, since the road was built as part of the CCC program, one of the goals of which was to provide employment through the construction of works of public interest or utility, and was financed with public funds, the road must necessarily be

considered to be a public road.[4] Appellants also assert that the Tribes' decision to approve the construction of the road despite their concerns that the road would be used by outsiders to access remote regions of the reservation not only demonstrates that the Tribes were aware that the road would be used by the public but also signifies that they consented to such public use. Appellants further contend that BIA does not need tribal consent to allow public access; that the lack of a right-of-way or easement for the unpaved portion of the road is not determinative; and that roads do not have to be listed on the IRR inventory in order to be public roads. Appellants have not, however, identified any concrete action taken or proposed to be taken by BIA against them based on its conclusion that the unpaved portion of Surrell Creek Road is not a public road. In fact, Appellants have not alleged that BIA has taken or plans to take any action at all based on that conclusion.[5] Instead, it appears that Appellants' request for an opinion from BIA regarding the status of Surrell Creek Road may have been little more than an attempt to obtain an advisory opinion from BIA that Appellants might then use for their private purposes.

The Board is not a court of general jurisdiction but has only those authorities which have been delegated to it by the Secretary. *See e.g., Iron Eyes v. Acting Great Plains Regional Director*, 49 IBIA 64, 70 n.6 (2009); *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Director*, 32 IBIA 309, 323 (1998). The Board has not been delegated the authority to issue advisory opinions. *See, e.g., Mckenzie v. Senior Awarding Official, Southern Plains Regional Office*, 39 IBIA 242, 244 (2004), and cases cited therein. The lack of authority to issue advisory opinions includes the lack of authority to issue a decision in the absence of, or in advance of, an actual case or controversy. *See Jackson v. Muskogee Area Director*, 32 IBIA 45, 47 (1998); *Billy Evans Horse v. Anardako Area Director*, 29 IBIA 175, 176 (1996); *Grand Traverse Band of Ottowa and Chippewa Indians v. Acting Deputy to the Assistant Secretary-Indian Affairs (Tribal Services)*, 18 IBIA 450, 453 (1996).

In this case, Appellants have not identified, nor does the record reveal, any BIA action taken or proposed to be taken against Appellants, or anyone else, based on its conclusion that the unpaved portion of Surrell Creek Road is not a public road. The Regional Director's decision, like the Superintendent's, simply responds to Appellants'

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[4] Although not discussed in Appellants' appeal to the Board, the Wyoming Supreme Court rejected Appellants' arguments that CCC funding for the road provided an evidentiary basis to find that it is a public road.

[5] In their Notice of Appeal, Appellants merely allege that the unknown status of Surrell Creek Road affects the interest of the public to freely travel over what they consider to be a public road. Notice of Appeal at 2.

request for BIA's opinion on the matter. In order to have a right of appeal to the Board, a party must have been adversely affected by a BIA action or decision, *see* 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested Party"), 43 C.F.R. § 4.331 (interested party affected by final BIA action or decision may appeal), i.e., the case or controversy must be between the appellant and BIA. In the present case, the fact that BIA rejected Appellants' position regarding the status of Surrell Creek Road, and did so in a letter to Appellants, did not constitute either "action" or a "decision" within the meaning of the regulations, and Appellants cannot claim to have been "adversely affected" by BIA's rejection of their position. *See Billy Evans Horse*, 29 IBIA at 176 (dismissing appeal; no evidence that BIA had taken any action against the appellant based upon an opinion issued by BIA in response to a request from the appellant). To hold otherwise would allow a party to use BIA as a personal forum from which to solicit an advisory opinion, and then invoke the Board's jurisdiction to review an unfavorable opinion received from BIA. We do not construe the regulations as allowing such use of the Board under the guise of an appeal from a purportedly adverse action or decision by BIA. Since Appellants' appeal constitutes a request that we issue an advisory opinion on the status of Surrell Creek Road, which we have no jurisdiction to do, we dismiss the appeal for lack of jurisdiction.

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 dismisses the appeal for lack of jurisdiction.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.