



INTERIOR BOARD OF INDIAN APPEALS

Brown County, Wisconsin

2 IBIA 320 (06/27/74)



United States Department of the Interior

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

ADMINISTRATIVE APPEAL OF BROWN COUNTY, WISCONSIN

IBIA 74-32-A

Decided June 27, 1974

Appeal from the decision and order of the Area Director, Bureau of Indian Affairs, Minneapolis, Minnesota, terminating an easement for a right-of-way for highway purposes, over, across, in and upon certain Indian lands located in Brown County, Wisconsin.

Affirmed.

APPEARANCES: Robert Rahr Flatley, Esq., Brown County Corporation Counsel, for appellant; Mariana R. Shulstad, Esq., Office of Field Solicitor, Twin Cities, Minnesota, for appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from the decision and order of the Area Director, Bureau of Indian Affairs, Minneapolis, Minnesota, issued November 29, 1973, canceling an easement for a right-of-way for highway purposes over, across, in and upon certain Indian lands, located in Brown County, Wisconsin, described as follows:

Government Lot 3, Section 6, Township 23 North, Range 20 East, 4th Principal Meridian, Wisconsin;

Government Lot 5, Section 6, Township 23 North, Range 20 East, 4th Principal Meridian, Wisconsin.

It appears from the record that Brown County, intending to expand preexisting Trunk Highway "GG" filed an application with the Superintendent, Bureau of Indian Affairs, Great Lakes Agency, "for rights-of-way for highway purposes affecting restricted allotted lands of the Oneida Indian Reservation," described supra, pursuant to the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323 (1970)) and Departmental regulations pertaining thereto. (25 CFR Part 161.)

Lot 3, referred to supra, in the Levi Doxtator allotment, containing 6.58 acres, was appraised at \$15,660, and Lot 5, referred to supra, in the Lewis (also John) Doxtator allotment, containing 0.94 acres was appraised at \$1,410, for a total of \$17,070 which amount was paid to the Bureau of Indian Affairs in consideration of which, Brown County received a Grant of Easement for Right-Of-Way, approved September 22, 1969. No construction was begun on the parcel nor was it in any way utilized for highway purposes since the approval of the Grant.

By letter of October 12, 1973, the Area Director, Bureau of Indian Affairs, notified the Brown County Highway Commission, of its intention to terminate the easement across lots 3 and 5, Section 6, T 23 N, R 20 E. in accordance with a provision in the Grant, namely nonuse for a consecutive 2-year period for the purpose for which it was granted, unless other suitable information to correct the basis for the termination was received within 30 days of receipt of the October 12, 1973 letter. Brown County responded that the right-of-way had not been abandoned but was in use as a part of County Trunk Highway "GG". By letter dated November 29, 1973, the easement was terminated for nonuse.

Brown County filed an appeal on December 17, 1973.

The appellant contends:

- 1) That the property described in the easement is a part of the right of way for County Trunk Highway "GG" and that there has not been an abandonment or nonuse of said right-of-way for highway purposes.
- 2) That there has been no violation of the terms of the easement so as to constitute a basis for termination.
- 3) That Brown County has acquired fee simple title to that portion of the property included in said easement which is located in Government Lot 3 by virtue of Awards of Damages issued in accordance with the condemnation procedures contained in Chapter 32 of the Wisconsin Statutes.

The issue here simply stated is, was the easement terminable on November 29, 1973 because of nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted.

The easement is a grant from the Federal Government and is governed by Federal law and applicable regulations.

The Act of February 5, 1948 provides that:

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 . . . (Emphasis supplied). 62 Stat. 17, 25 U.S.C. 323 (1970).

The Secretary of the Interior and his subordinates were given the responsibility of discharging the obligations of the United States to the Indian wards and have wide discretionary powers in such matters. United States v. Anglin & Stevenson, 145 F.2d 622 (10th Cir. 1944). Cert. den. 65 S. Ct. 678, 324 U.S. 844 (1945).

General power is given by 25 U.S.C. § 2 (1970), to the President, acting through the Secretary of the Interior to make regulations for the management of all Indian affairs and of all matters arising out of Indian relations. United States v. Clapox, 35 F. 575 (D.C. Oreg. 1888).

Regulations made under 25 U.S.C. § 9 (1970) for the purpose of carrying into effect the statutes relating to Indian affairs, have the force of statutory enactments. United States v. Thurston County, 143 F. 287 (8th Cir. 1906).

The regulations promulgated by the Secretary of the Interior concerning rights-of-way over Indian Lands are set out in 25 CFR § 161. Pertinent provisions follow:

Section 161.18 provides in part that -

All rights-of-way granted under the regulations in Part 161 shall be in the nature of easements for the period stated in the conveyance instrument . . .

Section 161.20 provides that -

All rights-of-way granted under the regulations in this part shall be terminable in whole or

in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address . . . for any of the following causes:

- (a) Failure to comply with any term or condition of the grant or the applicable regulations;
- (b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;
- (c) An abandonment of the right-of-way.

If within the 30-day notice period the grantee fails to correct the basis for termination the Secretary shall issue an appropriate instrument terminating the right-of-way. (Underscoring supplied.)

The above limitations contained in the regulations are clearly and expressly set forth in the grant and consequently not subject to interpretation because of ambiguity. The appellant accepted the Grant and by so doing becomes bound by all its restrictions, reservations, and exceptions.

In forwarding a copy of the approved Grant to the Brown County Highway Commission on November 28, 1969, the Acting-Superintendent, Bureau of Indian Affairs, Great Lakes Agency, advised that "An approved copy of the Grant of Easement for Right-of-Way also is enclosed, thereby providing for the commencement of construction at your discretion." (Underscoring supplied.)

The appellant argues that the words "at your discretion" included within the November 28, 1969 letter to the appellant negates the 2-year period of nonuse set forth in the Grant. We cannot agree. We find that the words "at your discretion" are merely advisory, alerting Brown County that it may begin construction since the Grant was now approved.

The appellant argues that the lots in question were being used as part of an existing right-of-way for highway purposes citing Wisconsin Revised Statute 80.01 (3), which provides that:

No lands abutting on any highway, and acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as they abut on any highway . . .

We do not agree that this provision is applicable here since it is in no way incorporated into the Grant nor was such intended by the Grantor. Assuming arguendo that section 80.01(3) was applicable, the lots covered by the easement to Brown County do not abut on the highway itself, but at most are adjacent to the outer edge of the buffer zone of the previously acquired right-of-way within which highway "GG" was originally constructed. We conclude that the provision in question was intended to apply to the buffer zone and not to the subsequently acquired land adjacent thereto covered by the easement.

The appellant contends that Brown County has acquired fee simple title to that portion of the property included in said easement which is located in Government Lot 3 by virtue of Awards of Damages issued in accordance with the condemnation procedures contained in Chapter 32 of the Wisconsin Statute. The record before the Board does not support the allegation.

Wisconsin Stat. Ann. § 32.05(7)(a) provides that, "It shall name all persons having an interest of record in the property taken . . ."

We find that the United States, record title owner of the land in question, is an indispensable party, has not been served, nor has any approval or concurrence been given to the purported acceptance of the offer by certain of the Levi Doxtator heirs.

We find that the appellant did not use the right-of-way for a consecutive 2-year period for the purpose for which it was granted. Having not used the right-of-way for a consecutive 2-year period for the purpose for which it was granted, the easement terminated on November 29, 1973.

We find no merit in any of the contentions raised against the decision of the Area Director terminating the easement.

NOW, THEREFORE, by virtue of the special authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the decision and order of the Area Director, Bureau of Indian Affairs, Minneapolis Office, terminating the easement as to Lots 3 and 5, Section 6, Township 23 North, Range 20 East, 4th Principal Meridian, Wisconsin, is HEREBY AFFIRMED.

This decision is final for the Department.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
David J. McKee
Chief Administrative Judge