



INTERIOR BOARD OF INDIAN APPEALS

Northern Natural Gas v. Minneapolis Area Director, Bureau of Indian Affairs

15 IBIA 124 (03/02/1987)

Related judicial case:

Fond du Lac Band of Lake Superior Chippewa v. Northern Natural Gas,
Civ. No. 5-85-277 (D. Minn.)



United States Department of the Interior

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

NORTHERN NATURAL GAS

v.

AREA DIRECTOR, MINNEAPOLIS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 86-41-A

Decided March 2, 1987

Appeal from a decision of the Minneapolis Area Director, Bureau of Indian Affairs, requiring tribal consent as a prerequisite to the approval of a right-of-way across tribal lands.

Affirmed.

1. Indians: Lands: Rights-of-Way--Rights-of-Way: Conditions and Limitations

In regulations set forth at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land.

2. Board of Indian Appeals: Jurisdiction--Regulations: Validity

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

3. Indians: lands: Rights-of-Way--Rights-of-Way: Conditions and Limitations

Under 25 CFR 169.19, prior written tribal consent is required for the renewal of a right-of-way across tribal lands.

APPEARANCES: Rockford G. Meyer, Esq., Omaha, Nebraska, for appellant; Henry M. Buffalo, Jr., Esq., Cloquet, Minnesota, for the Fond du Lac Band of Lake Superior Chippewa.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On June 3, 1986, the Board of Indian Appeals (Board) received a motion to assume jurisdiction over the above case from appellant Northern Natural Gas. Appellant sought review of a decision of the Minneapolis Area Director, Bureau of Indian Affairs (BIA; appellee), denying its application for renewal of pipeline rights-of-way across lands held in Indian trust status for the Fond du Lac Band of Lake Superior Chippewa Indians (tribe). The applications

were denied because appellant had not obtained tribal consent for the rights-of-way. For the reasons discussed below, the Board affirms that decision. ^{1/}

Background

Appellant, a division of Enron Corporation, is a natural gas company subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982). It holds certificates of public convenience and necessity issued by FERC and its predecessor, the Federal Power Commission (FPC), authorizing the operation of a pipeline, and the transportation, sale, and delivery of natural gas for resale and distribution. The pipeline supplies natural gas to northeastern Minnesota and portions of Canada.

Appellant was initially authorized to construct the present pipeline and commence service by FPC Opinion No. 324, issued on July 31, 1959. Appellant sought rights-of-way across tribal lands under the Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. § 321 (1982), and the General Rights-of-Way Act of 1948, Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328 (1982). Rights-of-way were approved by the Department after appellant obtained tribal consent. The initial rights-of-way were granted for 20 years, with expiration dates of August 29, 1976, and February 26, 1977. The pipeline was completed and placed in service in 1959.

Prior to expiration of the rights-of-way permits, applications for renewal were filed with the Minnesota Agency, BIA (agency), and discussions were held between appellant and at least one tribal representative. Appellant states that an oral agreement to extend the permits for \$8,000 was reached with the tribal representative, but the agreement was not reduced to writing. Although appellant continued to operate its pipeline over tribal lands after the expiration of its permits, it admits that no compensation was paid to the tribe.

Appellant states that in 1983 it was formally notified by the agency that the permits had expired. Apparently discussions were held with the Reservation Business Committee, which refused to recognize the alleged oral agreement and initially requested \$2,310,000 for 20-year easements. Although negotiations continued, no agreement was reached.

On November 5, 1985, appellant again filed with the agency applications for pipeline rights-of-way or for renewal of pipeline rights-of-way. The applications were denied by letter dated November 14, 1985. Appellant filed an appeal with appellee, who affirmed the agency's decision on January 31, 1986.

^{1/} Certain issues of this case are already before the United States District Court for the District of Minnesota in Fond du Lac Band of Lake Superior Chippewa v. Northern Natural Gas, Civ. No. 5-85-277. The Board proceeds with consideration of this administrative appeal because there is no indication that to do so will impinge upon the authority of the court. Estate of Max Door, 13 IBIA 180 (1985).

A notice of appeal from appellee's decision was filed with the Deputy Assistant Secretary--Indian Affairs (Operations). When the Deputy Assistant Secretary did not issue a decision within 30 days from the time the appeal was ripe for decision, appellant filed a motion for the Board to assume jurisdiction over the appeal under the provisions of 25 CFR 2.19. ^{2/} By order dated June 5, 1986, the Board made a preliminary determination that it had jurisdiction over the matter. A request was subsequently filed with the Board by the Deputy to the Assistant Secretary--Indian Affairs (Trust and Economic Development) asking it to deny appellant's motion. The preliminary finding of jurisdiction was affirmed by order dated August 21, 1986. Briefs on appeal have been filed by appellant and the tribe.

Discussion and Conclusions

Appellant argues that the regulatory requirement of tribal consent is invalid because it exceeds the statutory grant of authority; application of the requirement is contrary to law because it conflicts with the Natural Gas Act; the tribe has already consented to renewal either in the original granting of the easements or in 1976; and the tribe cannot unreasonably withhold consent.

[1, 2] Tribal consent for the rights-of-way was required on the basis of 25 CFR 169.3(a), which states in pertinent part: "No right-of-way shall be granted over and across any tribal land * * * without the prior written consent of the tribe." This regulation was the subject of extensive consideration in Transwestern Pipeline Co. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 49, 90 I.D. 474 (1983). The Board there held that the regulations in 25 CFR Part 169 clearly and unambiguously require tribal consent for the granting or renewal of rights-of-way across tribal land, including pipeline rights-of-way. The Board concluded that it had no authority to declare these duly promulgated Departmental regulations invalid. ^{3/}

In Transwestern, the Board further reviewed the holding in Southern Pacific Transportation Co. v. Watt, 700 F.2d 550 (9th Cir. 1983), cert. denied, 464 U.S. 960 (1983). Although Southern Pacific involved a railroad right-of-way granted under the Act of March 2, 1899, ch. 374, 30 Stat. 990,

^{2/} Section 2.19 provides in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the [BIA official exercising the administrative review authority of the] Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the [BIA official] within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

^{3/} On other occasions as well, the Board has held that it lacks the authority to declare duly promulgated regulations invalid. E.g., Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983); Tarabochia v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 269, 91 I.D. 243 (1984).

25 U.S.C. §§ 312-318 (1982), the Board found that the decision "confirm[ed] the general principle of law that the Secretary may, by regulation, require tribal consent for rights-of-way" even when tribal consent is not mandated by the statute. 12 IBIA at 58, 90 I.D. at 479. In the present case, as in Southern Pacific, the tribe is organized under the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1982), ^{4/} and therefore is subject to the consent provision in the General Rights-of-Way Act, 25 U.S.C. § 324 (1982), which states: "No grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act] shall be made without the consent of the proper tribal officials."

The Board thus finds that appellant's first argument has been previously addressed both in Transwestern and Southern Pacific. Appellant has presented no argument sufficient to cause the Board to reverse its holding in Transwestern.

Appellant next argues that the regulation is contrary to law in its application to pipeline rights-of-way because it conflicts with the congressionally mandated national goal of the Natural Gas Act, to ensure the efficient and economical delivery of natural gas to all parts of the nation. The regulation furthers another congressional policy, *i.e.*, to protect the rights of Indian tribes to control the use of their own lands. *E.g.*, 25 U.S.C. §§ 324, 476 (1982). Assuming *arguendo*, that these two Federal policies are in conflict, the Secretary, in promulgating the regulation at issue here, has balanced them in favor of the right of the tribes to control use of their lands. As discussed above, the Board has no authority to declare this regulation invalid.

Appellant suggests that tribal consent to the extension of the rights-of-way was given when the original rights-of-way were granted. Thus appellant argues that, in building the pipeline, it relied upon the implicit condition that the rights-of-way would be extended when they expired.

[3] Renewals of rights-of-way are governed by 25 CFR 169.19, which states in pertinent part:

On or before the expiration date of any right-of-way heretofore or hereafter granted for a limited term of years, an application may be submitted for a renewal of the grant. If the renewal involves no change in the location or status of the original right-of-way grant, the applicant may file with his application a certificate under oath setting forth this fact, and the Secretary, with the consent required by § 169.3, may thereupon extend the grant for a like number of years, upon the payment of consideration as set forth in § 169.12.

^{4/} The Fond du Lac Band is a constituent band of the Minnesota Chippewa Tribe, which voted to accept and subsequently organized under the Indian Reorganization Act. Haas, Ten Years of Tribal Government under I.R.A., United States Indian Service, 1947.

This regulation clearly contemplates that tribal consent must be obtained when a renewal application is filed. Therefore, consent given when the right-of-way was originally granted is not sufficient for a renewal of that right-of-way.

Appellant alternatively argues that the 1976 oral agreement to extend the rights-of-way for \$8,000 is binding upon the tribe. The tribe disputes the authority of the tribal representative to enter into a binding agreement on behalf of the tribe, disagrees with appellant over whether or not consent was ever given, and contends that 25 U.S.C. § 81 (1982) renders any oral agreement null and void.

Assuming arguendo that an oral agreement was reached, 25 CFR 169.3(a) specifically requires that tribal consent to the granting or extension of a right-of-way be in writing. Appellant admits that the 1976 agreement was not reduced to writing. Any oral agreement that might have been reached in this case is, therefore, insufficient and unenforceable under the regulation.

Finally, appellant contends that 25 CFR 169.3(a) cannot be used to deny an extension of a right-of-way when the tribe is unreasonably withholding consent. The United States House of Representatives considered 25 CFR 169.3 in a report by the House Committee on Government Operations, Disposal of Rights in Indian Tribal Lands Without Tribal Consent, H.R. Rep. No. 78, 91st Cong., 1st Sess. 4 (1969). The committee there recommended that "[t]he Secretary of the Interior should obey 25 CFR 161.3 [now 169.3] and not grant rights-of-way in disregard of it on any pretext, even when he feels the Indians are withholding consent contrary to their own best interest." In essence, the committee recommended that Indian tribes, in the exercise of their sovereignty, be allowed to be unreasonable. Although a committee report does not necessarily reflect the intent of Congress as a whole, Congress was clearly aware of the Department's regulation and its application and made no attempt to alter either. The Board does not have authority to order the extension of these rights-of-way on any grounds, including unreasonableness, in disregard of the wishes of the tribe.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 31, 1986, decision of the Minneapolis Area Director is affirmed.

//original signed
Kathryn A. Lynn
Administrative Judge

I concur:

//original signed
Anita Vogt
Acting Chief Administrative Judge