



INTERIOR BOARD OF INDIAN APPEALS

Benjamin Carrywater v. Rocky Mountain Regional Director, Bureau of Indian Affairs

38 IBIA 116 (09/13/2002)

Related Board case:
39 IBIA 165



United States Department of the Interior

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

BENJAMIN CARRYWATER, Appellant	:	Order Affirming Decision
	:	
	:	
v.	:	
	:	Docket No. IBIA 01-186-A
ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	
	:	September 13, 2002

Appellant Benjamin Carrywater seeks review of an August 10, 2001, decision issued by the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning a right-of-way across Fort Belknap Allotment 941. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

This controversy stems from the construction in 1972 of a Mutual Help Housing Project home for Hazel Cutstherope Doney and her family. Doney's home was constructed on her Allotment 1006-A with assistance from the Department of Housing and Urban Development (HUD). Under the HUD program, land is leased to a tribal housing authority, which subleases the land to the homeowner. Lease (0) 805, between the Fort Belknap Housing Authority and Doney, was entered into on December 30, 1972. However, the lease was not actually approved by BIA until May 24, 1984, when it was transferred to BIA by the Fort Belknap Housing Authority. ^{1/} The lease was recorded as Document 204 8994. The lease includes a diagram of both the homesite and an access road. Although the diagram shows that the access road is outside Doney's homesite, the Board was unable to find anything on the diagram which specifically stated what land the access road crossed. However, there does not appear to be any dispute here that the access road is, in whole or in part, on Allotment 941, which is owned by Appellant. There also appears to be no dispute that Appellant uses part of the same road for access to his own homesite.

The administrative record contains an undated document entitled "Statement of Owners of Allotted Indian Lands to Accompany Application for Right-of-Way." The statement, which

^{1/} The record suggests that Appellant's home was constructed at about the same time under the same HUD program.

is signed by Appellant, explicitly consents to the survey of a 60-foot road right-of-way over Allotment 941, "as contemplated by the application of Fort Belknap Housing Authority," and grants that right-of-way. The statement further indicates that no damages would be paid for the right-of-way. It does not appear that BIA actually recorded this right-of-way grant on the title report for Allotment 941 until some time later, perhaps in 2000 or 2001.

In August 1978, the Acting Superintendent, Fort Belknap Agency, BIA (Superintendent), wrote to both Appellant and Doney's husband requesting permission to construct an access road. Both individuals signed and returned the forms as requested. 2/

On June 8, 1980, Appellant and Doney wrote a joint letter to the Fort Belknap Community Council, requesting that their road be completed. They indicated that they had been waiting five years for this road work, and that other homesites that were occupied later than theirs had access roads. On August 6, 1980, Doney, stating that she was writing for herself and Appellant, 3/ wrote a letter addressed "To Whom it May Concern." The letter stated:

I, Hazel M. Doney and Ben Carrywater, already have complied to these requirements for public right-of-ways etc. and were on the B.I.A. road system. We met with the Council to be on the B.I.A. road system and was granted this about 2 or 3 years ago.

By Resolution 2-95, dated January 9, 1995, the Fort Belknap Community Council proposed that BIA Rt. 217, Carrywater Ridge Road, length 2.1 miles, be added to the official BIA roads system.

In 2000, Appellant filed suit against Doney in Tribal court concerning the right-of-way. The record does not include information as to the disposition of this case. However, by letter dated December 13, 2000, the Superintendent provided information to the Tribal court judge. The Superintendent stated:

It is the position of the [BIA] that the above described access road is a public road. Federal funds have been utilized to develop and maintain the road during the above described time period. The Fort Belknap Community Council formally adopted and approved the above described road as an addition to the BIA road system at the request of Hazel Cuts The Rope Doney and [Appellant].

Superintendent's Dec. 13, 2000, Letter at 2.

2/ The record suggests that Doney's husband is non-Indian and not actually an owner of Allotment 1006-A.

3/ The letter contains a blank space for Appellant's signature.

Problems persisted. By memorandum dated May 16, 2001, the Superintendent requested further assistance from the Regional Office in regard to the question of whether there was a legal right-of-way. The Regional Director responded that Appellant should be advised that the Superintendent's December 13, 2000, letter to the Tribal court set out the BIA position.

The Superintendent notified Appellant that the December 13, 2000, letter was the BIA's position and informed him of his right to appeal to the Regional Director. Appellant appealed to the Regional Director, who issued the decision presently under review on August 10, 2001. The Regional Director stated:

[Appellant] has challenged the validity of the right-of-way even though the consent form was signed by him in 1972. Further, the road has served the Doney and Carrywater families for the past 29 years. However, as a result of a family dispute, [Appellant] now wants the Doney family barred from crossing Allotment No. 941.

The BIA does not dispute the fact that a Grant of Right-of-Way Easement instrument in accordance with Title 25 CFR Part 169 was ever [sic, probably should be "never"] prepared to support the consent documentation. The records for these homesite leases and consents, surveys, etc., were not recorded until May 24, 1984, when the BIA received the records from the Fort Belknap Tribal Housing Authority.

The consent has not been objected to all these years. The BIA has maintained the road system with Federal funds, blading the road and providing snow removal in the winter months for the continual benefit of the Fort Belknap Tribes, [Appellant], Hazel Doney and their families. The road is located in mountainous terrain and is the only access available to both families. The Doney family has no other viable access route.

Regional Director's Aug. 10, 2001, Decision at 2-3.

Appellant appealed to the Board. He filed several statements in support of his appeal. Doney filed a response. The Regional Director did not file a brief.

On appeal, Appellant bears the burden of proving the error in the Regional Director's decision. See, e.g., Johnson v. Rocky Mountain Regional Director, 38 IBIA 64 (2002); Dick v. Northwest Regional Director, 37 IBIA 279 (2002). In none of his filings on appeal has Appellant challenged the Regional Director's conclusion that he consented to the right-of-way in 1972 or that the right-of-way is now a public road as part of the BIA road system.

25 C.F.R. § 170.8(a), which concerns use of roads within the BIA road system, provides: “Free public use is required on roads eligible for construction and maintenance with Federal funds under this part.” The subsection then states that public access to BIA roads may be restricted or denied “[w]hen required for public safety, fire protection or suppression, or fish or game protection, or to prevent damage to unstable roadbed.” Appellant has not alleged that any of the conditions exist for restricting or denying use of this road.

Appellant has not disputed signing the consent form or requesting that the access road be made part of the BIA road system. Furthermore, he has not disputed that the access road is now a public road. Under these circumstances, Appellant has failed to carry his burden of proving error in the Regional Director’s decision.

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 Regional Director’s August 10, 2001, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge