



INTERIOR BOARD OF INDIAN APPEALS

Pala Band of Mission Indians  
v. Acting Pacific Regional Director, Bureau of Indian Affairs

39 IBIA 125 (09/10/2003)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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SUITE 300  
ARLINGTON, VA 22203

PALA BAND OF MISSION INDIANS,	:	Order Vacating and Remanding Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 02-103-A
ACTING PACIFIC REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee	:	September 10, 2003

Appellant Pala Band of Mission Indians (Tribe) sought review of a March 22, 2002, decision of the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning an alleged right of access across its Reservation to the Tourmaline Queen Mine (mine) by the mine owner's lessee, San Diego Mining Company (SDMC). For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands the matter to the Regional Director for further consideration.

When the mine was originally patented in 1955, it was located on public lands. In 1988, Congress transferred certain public lands to various southern California Indian tribes. Southern California Indian Land Transfer Act of 1988, Pub. L. 100-581, 102 Stat. 2938-46 (Transfer Act). Section 702(b)(2)(H) of the Transfer Act transferred public lands, including those surrounding the mine, to the Tribe, but specifically excepted from the transfer several patented tracts, including MS 6458, which SDMC has identified in this proceeding as the Tourmaline Queen mine. Section 703 of the Act, which related to all of the public lands and tribes involved in the land transfer, provided in pertinent part:

(a) EXISTING RIGHTS PRESERVED. -- The declarations contained in section 702 shall not affect --

(1) any right or interest of any person in any land described in such section under any legal right-of-way, mining claim, or grazing permit in effect on the day before the date of the enactment of this Act, or

(2) any other right, title, or interest which such person may have in such land on such day.

\* \* \* \* \*

(d) ADDITIONS TO RESERVATIONS SUBJECT TO LAWS GOVERNING EXISTING RESERVATIONS. -- Any lands which are held in trust for the benefit of any band or group of Indians pursuant to this title shall be subject to the laws of the United States relating to Indian land in the same manner and to the same extent as the lands comprising the reservation of such group or band on the day before the date of the enactment of this Act.

According to the Tribe, on July 13, 2001, its Chairman wrote to the Superintendent, Southern California Agency, BIA (Superintendent), alleging that SDMC was trespassing on its Reservation. The record contains documentation of an inspection conducted by representatives of BIA, the Bureau of Land Management (BLM), and the Pala Fire Department. <sup>1/</sup> Although no representative of SDMC was listed on the documentation form, the accompanying notes indicate that the matter was discussed with SDMC.

On August 17, 2001, the Superintendent notified SDMC that the investigation had resulted in a determination that SDMC had trespassed on the Tribe's Reservation, noting that when the land was transferred to the Tribe, "BLM did not authorize use of rights-of-way or future rights-of-way because they did not exist" and that "[n]either the BIA nor the Tribe has authorized any rights-of-way to date." Aug. 17, 2001, Letter at 2. The Superintendent ordered SDMC to cease and desist crossing the Reservation; gave SDMC 10 days in which to provide BIA with "any existing rights-of-way that allow you to traverse Indian land, and any documentation that would authorize you to disturb the above-mentioned areas that are Federal Indian Trust lands" (Id.); and stated that if SDMC could not provide such documentation, it would be required to pay damages to reclaim the affected areas and BIA would refer the matter for criminal prosecution. The Superintendent did not include any appeal information in his letter, and there is no evidence that SDMC attempted to appeal the decision at that time.

SDMC contacted BIA on August 27, 2001, and apparently indicated that it would apply for a right-of-way across the Reservation. In an August 28, 2001, letter to the Tribe, the Superintendent informed the Tribe that SDMC would be filing a right-of-way application and discussed the Tribe's options, including not granting a right-of-way.

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<sup>1/</sup> The record contains contradictory statements as to when this inspection was conducted. Some documents indicate that it was conducted on July 19, 2001. It appears most likely that BIA received the Chairman's letter on July 19, 2001, and that the inspection was conducted on Aug. 2, 2001.

SDMC submitted an application on a BLM form entitled “Application for Transportation and Utility Systems and Facilities on Federal Lands.” On September 27, 2001, the Superintendent sent SDMC the BIA right-of-way form and pointed out that SDMC would need to submit additional documentation, including a tribal resolution authorizing BIA to consider the application. On the same day, the Superintendent notified the Tribe that it had received the application, but that it was not on the correct BIA form.

The Tribe responded that it chose not to grant a right-of-way, but instead wanted damages and restoration of the land. The Superintendent notified SDMC on October 18, 2001, that its application had been denied and ordered SDMC to cease and desist crossing the Tribe’s Reservation. The Superintendent included appeal information in this letter.

SDMC appealed to the Regional Director. On appeal, SDMC argued that, prior to the 1988 land transfer to the Tribe, there was access to the mine from both the south and the north. It indicated that there were several access roads from the south, which were graded and developed upon the purchase of the mine in 1968. It stated, however, that these access roads had become impassable by 1990 and that, at that time, the northern access road became the only access route used. SDMC stated its belief that the northern access road had been developed in 1971 by the California Department of Forestry in response to a forest fire in the area. It admitted that it had performed some construction activity on the northern road. SDMC cited the Transfer Act and several other Federal laws as authorizing its use of the northern road. The Tribe did not participate in this appeal.

On March 22, 2002, the Regional Director issued a decision in which she concluded that SDMC had “a legal right to access the mine” under the Transfer Act. She continued:

A mining claimant has a consistently recognized right of access across public lands to his mining claims, *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328 (D. Nev. 1963), *Rights of Mining Claimants to Access Over Public Lands to Their Claims*, 66 L.D. 361; and *Alfred Koenig*, 78 L.D. 305 (1971). While the exercise of this right is subject to reasonable regulations, it stems from the statutory mining laws and cannot be denied, *Rights of Mining Claimants, supra*, 66 L.D. at 367.

Prior to 1988, the mine was surrounded by public lands and the owner could invoke a nonexclusive right of access across such lands for the purpose of maintaining his claim and removing minerals. Furthermore, it has been the policy of Congress to encourage mineral exploration and development on public lands open to entry. *United States v. Iron Silver Mining Co.*, 128 U.S. 673 (1888).

\* \* \* \* \*

\* \* \* [T]he decision of the Superintendent \* \* \* denying your application to a right-a-way [sic] is affirmed. The Cease and Desist Order is reversed. It is our opinion that SDMC has the legal right of access; however, it must be undertaken in conjunction with the Tribe's right as a property owner. Likewise, SDMC's right of access must be limited to only what is reasonably necessary to conduct its business.

The Tribe appealed this decision to the Board. With its notice of appeal, the Tribe filed documents indicating that there was no northern access to the mine prior to 1988. In its May 1, 2002, pre-docketing notice and order, the Board stated that it was possible that this case would turn on the factual question of the historic location of roads accessing the mine and whether the northern road now being used predated the transfer of lands to the Tribe. The Board advised:

In cases which raise a genuine issue of material fact, the Board has two choices: (1) refer the matter to an Administrative Law Judge in the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision or (2) remand the matter to the Regional Director for further fact-finding and consideration.

May 1, 2002, Pre-docketing Notice and Order for Statement from Regional Director at 1. The Board gave the Regional Director an opportunity to respond to the Tribe's contention that there was no northern access road predating the land transfer and, if she agreed with that assertion, to reconsider her decision.

The Regional Director responded when she submitted the administrative record on May 20, 2002. She stated that she had based her March 22, 2002, decision on a declaration from the mine owner that he accessed the mine prior to the land transfer via a northern road. The Regional Director stated that the Tribe had provided no opposing evidence and that her "decision was based upon pre-1988 use of the road, which was then on 'public' land." May 20, 2002, Memorandum at 2. She added that she believed the evidence in the record supported her decision.

There are several legal and factual questions raised in this appeal, none of which have been adequately addressed by BIA. Because the Board has determined that this matter must be remanded to the Regional Director for further consideration, and because the present administrative record is not adequate in any case for reaching a decision, the Board points out these issues in a summary manner. On remand, the Regional Director must address each of these issues, as well as any other issues that become apparent during the course of the remand

proceeding. The Board strongly recommends that the Regional Director seek assistance from the Office of the Solicitor on remand.

The first question is the legal one of whether there is a right-of-access to the mine. Although the Transfer Act appears to contemplate that existing rights-of-access would be preserved after the former public lands became Indian lands, information in the record from BLM suggests the possibility that something was to be done to memorialize those existing rights-of-access. If further action was required, it is not clear whether that action was to be commenced by the person asserting an existing right-of-access or by BLM and BIA. If BLM and BIA were responsible for taking some action which was not taken in regard to the Tourmaline Queen Mine, then there is a question of whether that action can and/or should be taken now. If the person asserting the right-of-access was the responsible party and failed to take any necessary action, then the question is whether that failure can legally be remedied at this time.

If it is found that no action was required to preserve an existing right-of-access, that action was required but the failure to take that action can still be remedied, or that action was required and was taken, then SDMC has a right-of-access to the mine. The question then becomes a factual one: Where was the existing right-of-access? <sup>2/</sup> The information in the record is totally inadequate to support the Regional Director's conclusion that there was a northern road used to access the mine prior to the 1988 transfer of public lands to the Tribe. The fact that the Regional Director did not adequately research the facts is demonstrated by the amount of material presented by both sides on this question during this appeal, and by the Regional Director's admission that she relied solely on a statement made by the mine owner, thus ignoring the limited, but contradictory, materials that were before the Superintendent. On remand, the Regional Director must collect all of the information reasonably available before making a

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<sup>2/</sup> A question has been raised as to whether the Tribe can argue at this time that there was no right-of-access, or no northern right-of-access, because it did not participate in the proceedings before the Regional Director. The information in the materials supplied to the Regional Director by the Superintendent indicated that there was no right-of-access. Rather than addressing that information, the Regional Director ignored it and relied only on a statement made by the mine owner that was presented during the course of the proceedings on appeal to the Regional Director. The Tribe had made its position clear prior to the proceedings before the Regional Director and was entitled to believe that the Regional Director would fairly analyze all of the information before her, including the information already in the record. There is no requirement that a party must file a brief before the Regional Director. Once the Regional Director issued a decision contrary to the Tribe's position, the Tribe had the right to appeal that decision to the Board. On appeal, the Board allowed both the Tribe and SDMC to submit additional evidence when it became obvious that all of the information in existence prior to the Regional Director's decision had not been obtained and considered.

determination as to whether or not there was a northern right-of-access to the mine prior to 1988.

If the Regional Director determines that there was no northern right-of-access, then SDMC is in trespass on the Tribe's reservation by using a northern road to access the mine. In this regard, SDMC misses the mark when it apparently argues that it can obtain a right-of-access across the Tribe's reservation under the General Mining Law, 30 U.S.C. § 22; Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, et seq.; Lode Law of 1866, 43 U.S.C. § 932 (repealed in 1976); or the Alaskan National Interest Lands Conservation Act, 16 U.S.C. § 3101, et seq. These statutes all deal with public lands. The reservation lands which SDMC has used are not public lands, they are Indian lands. See Friends of the Wild Swan v. Portland Area Director, 27 IBIA 8, 20 (1994); Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 94 I.D. 353, recon. denied, 15 IBIA 271 (1987), aff'd in part, dismissed as to NEPA issue, Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990), aff'd, 925 F.2d 490 (D.C. Cir. 1991). If there were any question that public land laws do not apply on the transferred lands, which there is not, that question would be resolved by section 703(d) of the Transfer Act which specifically states that the transferred lands are "subject to the laws of the United States relating to Indian land." If SDMC's predecessors-in-interest did not have an existing right-of-access to the mine that was preserved by the Transfer Act, then SDMC can only obtain a right-of-access at this time under the laws governing rights-of-way across Indian lands. 3/

If the Regional Director determines that there was a northern right-of-access, then he must further determine whether that right-of-access included the right to make improvements to the existing road. If the Regional Director determines that there was no right to improve the existing road, then SDMC has admitted to trespass in its statements that it improved the road in order to make it more passable and to allow the movement of heavy equipment to the mine.

If the Regional Director finds that SDMC trespassed on the Tribe's reservation by either illegally using a northern road or illegally improving an existing road, then he must assess trespass damages.

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3/ To the extent these public land laws apply at all in this case, they apply only to the period before the 1988 transfer of public lands to the Tribe. It would appear that, with this argument, SDMC may be implicitly acknowledging that there is a lack of proof as to the existence of a legal right-of-access at the time of the land transfer.

