



INTERIOR BOARD OF INDIAN APPEALS

Thomas Mullins and Cynthia Mullins v. Northwest Regional Director,
Bureau of Indian Affairs

56 IBIA 96 (12/26/2012)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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THOMAS MULLINS AND)	Order Affirming Decision
CYNTHIA MULLINS,)	
Appellants,)	
)	
v.)	
)	Docket No. IBIA 11-034
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	December 26, 2012

Thomas and Cynthia Mullins (Appellants) seek review from the Board of Indian Appeals (Board) of a September 29, 2010, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which the Regional Director declined to accept Appellants' assertion that their right-of-way (ROW) across 3 allotments on the Flathead Indian Reservation was perpetual in duration rather than for a fixed period of 50 years. We affirm the Regional Director's Decision. With his answer brief, the Regional Director produced substantial evidence in support of the Decision. Appellants submitted no response to the Regional Director's brief and evidence. Instead, they rest solely on a document that purports to grant a perpetual easement, which the Regional Director concluded was not the ROW document approved and recorded by BIA. Appellants have failed to meet their burden of showing error in the Decision.

Background

This appeal is a tale of three ROW documents for the same road easement that benefits a parcel of land known as the Glory B Ranch.

It is undisputed that BIA approved a road ROW on July 1, 1996, to benefit the Glory B Ranch. The ROW lies across three trust allotments (233, 235, and 245-C) on the Flathead Reservation in Montana. On July 16, 1996, BIA recorded the ROW in its Land

Records Information System (LRIS) as Document No. 203 28891.¹ At issue is whether the ROW was granted and approved for a term of 50 years or for an unlimited duration and, relevant to this appeal, whether the Regional Director's refusal to agree that Appellants hold a perpetual ROW is supported by the record.²

The certified ROW file produced by the Regional Director contains two ROW documents. *See* Declaration of George DuCharme at ¶ 3 and Attach. A (submitted in support of the Regional Director's answer brief). One ROW document, which the Regional Director characterizes as a fraudulent alteration of the original, purports to grant the road easement in perpetuity; the other ROW document, which the Regional Director maintains is the ROW approved by BIA, grants the same road easement for a term of 50 years. The two documents are, in significant respects, mirror images of one another: For example, the dates and signatures on the two ROW documents appear to be identical. But in other respects, they differ, and one of these differences gives rise to the present dispute. *Compare* 50-year ROW document (Administrative Record (AR) Tab 12) *with* perpetual ROW document (Hensel Decl., Attach. A at 12-15).

On the 50-year ROW document, the duration of the easement is identified in three places as 50 years (handwritten as "*FIFTY*" or "50" on the lines provided for this purpose followed by the pre-printed word, "years"), and the pre-printed text for perpetual easements, "without limitation," is crossed out in three places, each one following

¹ At that time, land title and records functions for the Flathead Reservation were administered by BIA; subsequently, those functions were contracted to the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribe). The LRIS recordation program later became the Trust Asset and Accounting Management System (TAAMS), which is an electronic information system that "maintains and tracks land title documents." *See* http://www.doi.gov/ost/Trust_IT/taams.cfm (a copy of this webpage has been added to the record).

BIA's recordation number, 203 28891, includes the reservation code. In this instance, lands on the Tribe's Flathead Reservation include the prefix 203, which is the Tribe's reservation code. *See, e.g.*, Declaration of Michele Hensel, Attach. A at 9 (submitted with the Regional Director's answer brief). The recordation number, 28891, was assigned by BIA's LTRO when it received "the file" (containing the executed and approved grant of easement) from BIA's Flathead Agency. Hensel Decl. at ¶ 5.

² Appellants do not contend that the ROW was modified or amended to alter the duration from 50 years to perpetuity; rather, Appellants maintain that the original ROW, as approved by BIA, was an easement in perpetuity.

immediately after the space where “*FIFTY*” or “50” (years) is written.³ On the perpetual ROW document, the words “WITHOUT LIMITATIONS” are typed on the lines where “*FIFTY*” or “50” is written on the 50-year ROW document. On the perpetual ROW document, the pre-printed text, “without limitation,” is also crossed out.⁴ The legal description of the property on the 50-year ROW document identifies the ROW as located in Range “20” West, which is the range recited in the ROW applications.⁵ The legal description of the property on the perpetual ROW document locates the ROW in Range “19” West, which apparently is the correct location.⁶

In July 2009, an attorney wrote to the Office of the Solicitor for the Department of the Interior (Department) on Appellants’ behalf concerning the ROW, including its duration.⁷ The Department’s attorney responded by explaining the history of the ROW and stating that BIA approved the ROW for a term of 50 years. Letter from Marlene Zichlinsky, Esq., to William T. Wagner, Esq., July 30, 2009 (AR Tab 3). One year later, on August 25, 2010, another attorney wrote on Appellants’ behalf to the Regional Director, to the Superintendent of BIA’s Flathead Agency (Superintendent), and to the Tribe. He proffered Document No. 416906, as certified by the County, and requested that BIA confirm it to be the same document filed with BIA as Document No. 203 28891 and confirm that the ROW is for an unlimited duration.

³ E.g., “. . . (for a period of *FIFTY* years) or (~~without limitation~~) from the date of approval” AR Tab 12.

⁴ E.g., “. . . (for a period of WITHOUT LIMITATIONS years) or (~~without limitations~~) from the date of approval” See perpetual ROW document (Hensel Decl., Attach. A, at 12).

⁵ The record contains two ROW applications, which also mirror each other, except for the term of the ROW—one recites 50 years, the other is blank for the duration of the ROW—and the width of the ROW. Both applications recite the location as Range “20” West.

⁶ See, e.g., Letter from Kathleen O’Rourke-Mullins to Tribe, Oct. 23, 1996, at 1 -2 (Hensel Decl., Attach. A); Appellants’ purchase contract, June 1, 2007 (AR Tab 8); Letter from Tribe to Appellants, June 25, 2007 (AR Tab 11).

The ROW documents also differ in certain other respects. Jim Wrobel appears as a grantee on the 50-year ROW application and not the other; the space where his name appears on the 50-year ROW application is blank on the perpetual ROW application. In addition, the 50-year ROW document recites the width of the ROW, whereas this same space on the perpetual ROW document is blank. The Regional Director attributes these blank spaces on the perpetual ROW document to the use of a “white-out” product to alter the 50-year ROW document.

⁷ The administrative record does not contain a copy of this letter.

In support of their request to BIA to “confirm” that they hold a perpetual ROW, Appellants proffered to BIA a copy of a third ROW document that apparently was certified by Lake County, Montana, and which had been recorded with the county on June 29, 2001, as Document No. 416906. This ROW document appears to be almost an exact copy of the perpetual ROW document that is found in the Tribe’s files, with a few exceptions. First, the top of Document No. 416906 shows a certification, dated June 27, 2001, from George DuCharme, the certifying official for the Tribe’s Land Titles and Records Office (LTRO), that states that the document being certified is a reproduction of the official record on file in the Tribe’s office.⁸ Second, on the first page of Document No. 416906, the line on which to put the duration of the easement is blank. In contrast, this same line is filled in—either with the word *FIFTY* or the words “WITHOUT LIMITATION”—on the two ROW documents in the official ROW file maintained by the Tribe.⁹ Third, there is a notation on Document No. 416906 that “[t]his document [is] recorded to correct the legal description contained in document recorded under Microfile No. 391118, records of Lake County, Montana.”¹⁰

In his one-page Decision responding to Appellants’ inquiries, the Regional Director declined Appellants’ request. He stated that the “original” grant of ROW was for a term of 50 years. He provided Appellants with a copy of the July 30, 2009, letter sent to their previous attorney. Finally, the Regional Director declined Appellants’ request to compare the County-certified ROW document provided by Appellants with BIA’s approved ROW document.

Appellants appealed from the Regional Director’s Decision to the Board and filed an opening brief. The Regional Director responded with an answer brief accompanied by the Hensel and DuCharme declarations with exhibits that included the ROW file and a copy of

⁸ Appellants represent that the document bearing the original certification of Lake County was sent to the Superintendent. The record provided to the Board contains a photocopy. We presume, since Appellants do not otherwise state, that the certification by the Tribe’s certifying official is *not* an original certification on any of the copies produced in this matter by Appellants.

⁹ On the second page of Document No. 416906, the same “WITHOUT LIMITATIONS” language appears as it does on the perpetual ROW document in the Tribe’s files.

¹⁰ The other differences between Document No. 416906 and the perpetual ROW document in the Tribe’s file are that Document No. 416906 bears the Lake County recording information and a handwritten note to return the document, presumably after recording, to “Lake Co. Abstract,” and providing the address.

BIA's recorded entry in TAAMS, which reflects the duration of the easement to be 50 years. Both declarants aver that the original ROW, as recorded by BIA in 1996 (when BIA administered the LTRO functions), was for 50 years. DuCharme acknowledges that one version of the perpetual ROW document is *in* the Tribe's files (and thus apparently considered part of the official file), but he states that it was not *recorded*. DuCharme explains his apparent certification of a copy of the perpetual ROW document as based upon his belief that it may have been presented to him as an already recorded document, and thus he may have certified the copy without reviewing it for completeness and accuracy.

Appellants did not file a reply to the Regional Director's answer brief or produce any evidence to dispute the assertions of the Regional Director's declarants.

Discussion

Appellants argue on appeal that the Regional Director erred because he failed to "confirm" that Appellant's ROW is a perpetual ROW rather than an ROW for a term of 50 years. In particular, Appellants argue that the Regional Director erred by not attributing significance to the fact that the county-certified document they produced had a copy of a certification on it from the Tribe's LTRO official. According to Appellants, the Tribe has sovereign authority to recognize title to trust lands within its reservation boundaries, and thus certification of a copy by a tribal official is entitled to deference in determining a document's underlying validity.

As explained in greater detail below, we affirm the Regional Director's Decision. The Regional Director submitted two declarations in support of his Decision along with a copy of the "official file" for the ROW and a copy of the electronic recorded information concerning the ROW. Both declarants testify that BIA approved the ROW for a 50-year term. This testimony also is supported by the exhibits produced by BIA. Because Appellants have not submitted anything in rebuttal, this evidence stands uncontroverted.

I. Standard of Review

We review the Regional Director's Decision to determine whether it comports with the law, is supported by substantial evidence, or is otherwise arbitrary or capricious. *See Nemont Telephone Cooperative, Inc. v. Acting Rocky Mountain Regional Director*, 55 IBIA 75, 79 (2012). We review *de novo* any legal determinations as well as the sufficiency of the evidence. *Id.* The burden rests with appellants to show error in BIA's decisions. *Id.*

II. 50-Year Easement Versus Perpetual Easement

The Regional Director has amply supported his Decision that Appellants' ROW is not perpetual but is for a term of 50 years, expiring on June 30, 2046, and therefore we affirm his Decision. He produced a well-reasoned opinion letter from the Department's Solicitor's Office (AR Tab 3) along with a copy of the recorded ROW (AR Tab 12) and a copy of the electronic recordation (TAAMS) of the ROW (AR Tab 13).

In their opening brief, Appellants argue that the Regional Director erred in ignoring their copy of a permanent grant of easement allegedly certified by the Tribe's LTRO officer as evidence of Appellants' perpetual right to use a road to access their land and asserted that "the Regional Director has failed to offer any competent evidence in support of his refusal to recognize the certified ROW . . . obtained from the [Tribe's LTRO official,] and the *only* certified ROW . . . in the record provides for a term of years "WITHOUT LIMITATIONS." Opening Br. at 3-4. In response, the Regional Director produced two declarations and a certified copy of the official file consisting of BIA's and the Tribe's documents concerning the ROW. Both declarations as well as the exhibits thereto substantially support the Regional Director's conclusion that Appellants have an ROW for a term of 50 years, and not a perpetual easement. Appellants did not respond to the Regional Director's proffer of evidence.

Appellants attach far more significance than warranted to the apparent certification by the Tribal LTRO official of a *copy* of one document in the Tribe's files—the one that purports to represent a perpetual easement.¹¹ Certification of a *copy* of a document, even if it is located within an official file, does nothing in the present case to resolve the discrepancy between the two conflicting documents. Section 150.10 of 25 C.F.R. provides that an official seal was created for use "in authenticating and certifying *copies* of Bureau records. . . . When a *copy or reproduction* of a title document is *authenticated* by the official seal and certified by a Manager, [LTRO], the *copy or reproduction* shall be admitted into evidence the same as the original from which it was made." (Emphasis added.) In the present case, of course, as noted earlier, a complete copy of the official file has now effectively been "certified" to the Board by DuCharme, and it is apparent that the file contains copies of both the 50-year ROW document and a perpetual ROW document.

¹¹ We accept, for purposes of our decision, that DuCharme *did*, in fact, certify the very ROW document subsequently certified by Lake County. We note, however, that there is no document in the ROW file that mirrors the document certified by DuCharme, even if we extract the certification by Lake County. *See supra* at 98-99 & n.10 (identifying differences between the perpetual ROW produced by Appellants and the perpetual ROW document in the ROW file).

DuCharme disavows any significance to his apparent certification insofar as it may bear on the present dispute over the duration of the ROW. In addition, DuCharme's certification of a copy of the perpetual ROW document does not render it substantively "valid" if it was not, in fact, a copy of the original ROW approved by the Superintendent in 1996. When the official file for an easement includes copies of two ROW documents, both of which contain the same recordation number and both of which purport to reflect the same approval by the BIA Superintendent on July 1, 1996, but only one of which apparently can be a copy of the actual original grant of ROW as signed by the Superintendent, the presentation of a "certified copy" of one of the two does not resolve the underlying issue of which of the two purportedly "original" grants is true and correct.¹²

Both the Tribe's Certifying Officer (DuCharme) as well as a legal instruments examiner for BIA (Hensel) aver that the only *recorded* easement with the Tribe's LTRO is the 50-year ROW. Hensel testifies that BIA recorded the easement into its Land Records Information System (LRIS) as a 50-year instrument. Hensel Decl. at ¶ 8. She explains that the current land titles program, TAAMS, reflects that Document No. 203 28891 is a recorded, 50-year easement, that was approved on July 1, 1996, and is due to expire on June 30, 2046.¹³ See Hensel Decl., Attach. B.¹⁴

We are satisfied that the Regional Director has explained and supported his Decision. He has produced two declarations, one by a BIA employee and one by the Certifying Officer for the Tribe's LTRO, that unequivocally confirm that the only ROW approved and recorded with BIA and the Tribe is a road easement for a 50-year term

¹² By "authenticating and certifying" as a true and correct *copy* of a document that somehow came to be part of the official record maintained by the Tribal LTRO, DuCharme explains that he was not purporting to "authenticate" the underlying validity of a perpetual easement, the accuracy and correctness of which he did not review in providing the requested certified copy. And even if the certifying official had purported to represent that the easement was perpetual, such a representation could not transform a 50-year easement into a perpetual easement, because no tribal official has authority to approve an easement. That duty is BIA's alone.

¹³ BIA does not explain the difference between "recording" a title document and simply "filing" a document, but it appears that a document is "recorded" by BIA when the document receives a document number from BIA and is entered in BIA's electronic land titles system. See *id.* and ¶ 8.

¹⁴ TAAMS also reflects that the easement was recorded on November 19, 2004. We presume that that date reflects the date on which the easement data may have been migrated from LRIS into TAAMS.

expiring on June 30, 2046. Appellants declined to submit a reply brief or respond in any way to the Regional Director's evidence, for which reason it stands uncontroverted.¹⁵

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 affirms the Regional Director's September 29, 2010, Decision.¹⁶

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁵ In addition, Appellants did not address the stated purpose for recording Document No. 416906 (to correct the legal description in the document recorded under Microfile No. 391118 in Lake County's records) nor have they produced the document found under Microfile No. 391118. Appellants also do not address the differences between the perpetual ROW document in the ROW file (which has, e.g., the words, "WITHOUT LIMITATIONS," inserted in three places in the document) and Document No. 416906 (which has the words, "WITHOUT LIMITATIONS," only inserted twice, both on page two). Thus, not only have Appellants failed to controvert the Regional Director's evidence, they have not addressed these basic discrepancies posed by the document they produced.

¹⁶ We deny Appellants' request to refer this matter for an evidentiary hearing because we conclude that there are no material disputed facts. Appellants have not controverted or disputed the evidence produced by the Regional Director in support of his answer brief.