

Using 25 CFR Part 169 in Trust Litigation—Ak-Chin’s Experience

November 4, 2016

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I. INTRODUCTION.

The Ak-Chin Indian Community is a federally recognized tribe located approximately 30 miles south of Phoenix, AZ. Ak-Chin has more than one thousand enrolled members and occupies a Reservation consisting of 22,140 acres. More than 16,000 of those acres are devoted to agriculture.

Ten years ago, the Community’s way of life was under attack. Tremendous population growth in the vicinity threatened to encroach upon Ak-Chin and the Tribe’s agrarian-based existence. The neighboring municipality of Maricopa had a population of less than 1,000 in the year 2000. But by 2003, it was one of the fastest growing cities in the country with a projected increase in population to 100,000 by the year 2010.

Indicative of the area’s hyper-growth, a 7,500 home residential neighborhood was slated for development directly across the street from Ak-Chin’s administrative headquarters, replacing the farmland which for generations had bordered the Community with 25,000 additional residents and supporting infrastructure.

Moreover, plans were in place to convert a number of the two-lane roads that had traversed the Reservation for decades into high-speed four and six-lane divided highways—all without seeking the Community’s input or consent.

The roadway rights-of-ways (“ROW’s”) that state and local government officials relied upon for their planning purposes had been granted by the Bureau of Indian Affairs to itself decades earlier, and without Ak-Chin’s receiving any monetary compensation.

BIA then had assigned its interests in the ROW's to the adjoining Pinal County, which in turn had maintained control over the majority of the ROW's but assigned a few of them to the AZ Department of Transportation. And while the Community had consented to BIA's creation of the roadway ROW's years earlier, it had no say in any of the third-party transfers that thereafter occurred.

Indeed, a decade ago it was unclear what—if any—rights Ak-Chin might have under 25 CFR Part 169 to challenge what was being planned in the way of encumbering the Reservation with a revamped roadway system designed to convenience morning and afternoon commuters rather than Community residents.

And the Community's efforts to obtain even the most rudimentary information regarding the subject ROW's from BIA had been fruitless. Repeated requests for such information had elicited the response "we'll have to look into it and get back to you." And yet, no one ever did.

II. The Trust Litigation Filed in December 2006.

From the beginning, Ak-Chin's primary objective in filing suit was to obtain the ROW information needed to determine whether it had legal grounds to challenge the planned conversion of its roadways into something the Community did not need or want.

Actions were filed in two different courts—in US District Court for the District of Columbia (Ak-Chin Indian Community v. Kempthorne et al., Civil Action No. 06-2245) and in the US Court of Federal Claims (Ak-Chin Indian Community v. United States, No. 06-932L).

The federal district court case was assigned to the Hon. James Robertson, along with several dozen other tribes' trust actions requesting an accounting and other equitable relief. The Community's CFC suit in turn was assigned to the Hon Emily Hewitt.

An early status conference in the district court case provided the Community with an opportunity to describe the situation it was facing. Five "priority" roadways were identified as the targets of proposed roadway expansion and, hence, the ROW's for which information was most urgently needed.

The significance of each of the five roads for Ak-Chin was explained to the Court. For example, Peters & Nall Road ran by the Community's administrative offices where, directly across the street, the 7,500 home residential developments was planned to be added. Farrell Road in turn was the 25 mph road which ran past the Community's pre-school, its elders' center,

gymnasium, the ball fields and more. Other “priorities” included a couple of the Community’s less traveled two-lane roadways utilized primarily by tractors and other farm vehicles.

III. Using 25 CFR Part 169 to Frame Ak-Chin’s Informational Requests.

The provisions of Part 169 provided the framework for requesting ROW information for each of the Community’s “priority” roadways. What the Court was advised was that “we’re asking for documents that BIA should have in its possession and should be able to produce, since the Bureau had been responsible for administering the requirements of Part 169 (and before it, Part 161) as the Community’s trustee for decades.”

Using Part 169, the following items were requested with respect to each of the ROW’s:

- Documents showing that tribal consent had been conferred (25 CFR 169.3)—“No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.”
- Documents reflecting specific ROW provisions required by law (25 CFR 169.5)—for example, the stipulation that upon termination of the ROW, the ROW holder would “restore the land to its original condition so far as is reasonably possible.”
- Documents reflecting the ROW’s valuation (25 CFR 169.12)—Except when “waived in writing,” the consideration to be paid for any ROW granted or renewed under Part 169 “shall not be less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate.”
- Documents reflecting any ROW terms specified by the Tribal landowner (25 CFR 169.15)—Section 169.15 required that in granting a ROW, BIA “incorporate all conditions or restrictions set out in the consent obtained pursuant to section 169.3.”
- Documents reflecting the ROW holder’s filing of an Affidavit of Completion “promptly” upon the completion of the ROW’s construction (25 CFR 169.16)—Notably, moreover, section 169.16 further provided that: “Failure to file an affidavit of completion in accordance with this section shall subject the right-of-way to cancellation in accordance with section 169.20.”
- Documents suggesting any change in ROW location (25 CFR 169.17)—Per this provision, any “change from the conveyance instrument” was to be “subject to consent, approval, the ascertainment of damages, and the payment thereof.”

- Documents showing the ROW's specified duration (25 CFR 169.18)—“All rights-of-way granted under the regulations in this Part 169 shall be in the nature of easements for the periods stated in the conveyance instrument.”
- Documents reflecting any ROW renewals (25 CFR 169.19)—this section of Part 169 required that a renewal application for any ROW set to expire by its terms was to be submitted “[o]n or before the expiration date of any right-of-way heretofore or hereinafter granted for a limited term of years”).
- Information regarding any administrative proceedings undertaken by BIA to terminate a ROW that had been granted (25 CFR 169.20)—This section of Part 169 outlined the administrative process for BIA's terminating a ROW upon giving “30 days written notice.” Recognized “causes” for terminating a ROW under section 169.20 included—
 - (a) The ROW holder's failure to comply with a term or condition of BIA's grant of easement or the applicable regulations;
 - (b) Nonuse of a ROW for a consecutive 2-year period; or
 - (c) Abandonment of the ROW.

Notably, if within the 30-day notice period the ROW holder failed to correct the basis for termination, section 169.20 made clear: “[T]he Secretary shall issue an appropriate instrument terminating the right-of-way.”

In effect, the provisions of Part 169 served as Ak-Chin's checklist of ROW documents to be searched for and compiled.

And from the first district court proceeding on the subject— a status conference that took place in February 2008 —Judge Robertson made clear that the Court expected BIA, as Ak-Chin's fiduciary, to produce such materials.

In fact, His Honor proceeded to schedule six additional Court conferences over the next fourteen months in which government attorneys were encouraged, prodded and cajoled into working with BIA to provide the requested ROW information on an expedited basis. In the end, all of the ROW information produced in the district court case was provided without Judge Robertson's issuing a single written order.

IV. Discovery Proceedings in the Court of Federal Claims.

The process for getting discovery information in the CFC case followed a markedly different course.

In response to the Community's interrogatories and production requests, the United States initially took the position that much of the information Ak-Chin was seeking was to be found in thousands of boxes of trust records stored at the American Indian Records Repository ("AIRR") in Lenexa, Kansas.

When the parties were able to resolve their differences regarding that issue by agreement, Judge Hewitt directed the Community to file a motion to compel which was briefed and argued during the same time period that the status conferences before Judge Robertson were going on in the district court.

The Community's discovery motion was granted in January 2009. See Ak-Chin Indian Community v. United States, 85 Fed. Cl. 397 (2009). In holding that it was defendant's obligation going forward to "specify the documents" at the AIRR that were responsive to plaintiff's requests, Judge Hewitt observed that: "[A]lthough the defendant has indexed the documents according to the BISS, queries on the BISS database effectively result in...[a] 'document dump.' The court agrees with plaintiff that defendant's indexing system is unreliable and therefore precludes plaintiff from identifying and reviewing responsive documents." Id. at 403.

The United States was therefore ordered to make the necessary review of AIRR-stored materials and produce documents responsive to the Community's requests. When the parties agreed two years later to suspend formal discovery while settlement discussions were taking place, the production process at the AIRR was still far from complete.

V. Success in Obtaining Key ROW Information in the District Court.

By the fall of 2008 (after the fourth of the seven status conferences conducted by Judge Robertson to check on the defendants' progress in compiling requested ROW materials), it had become clear that:

- (1) Notwithstanding the requirement of 25 CFR 169.16 that an Affidavit of Completion be filed "promptly" upon the ROW's completion of construction, no such Affidavits had been located for any of the Community's five "priority" roadways. And it had been admitted "on the record" during one of the conferences that the fact no Affidavits of Completion had been found was due to the fact that no such documents had ever existed.
- (2) With respect to one of the "priority" roadways--a mile-long stretch of Highway 238 East which crossed the southeastern corner of the Reservation where Ak-Chin's industrial park was located--no right-of-way documents of any sort had been discovered, raising a serious question as to whether Pinal County had ever been granted a valid ROW for that portion of its road traversing Tribal property.

These developments led to Ak-Chin's request that BIA initiate proceedings to cancel each of the four roadway ROW's for which Affidavits of Completion had not been "promptly" filed when the roads were built decades earlier, relying on the sentence in section 169.16 which provided that the "[f]ailure to file an affidavit of completion in accordance with this section shall subject the right-of-way to cancellation in accordance with section 169.20."

With respect to Highway 238 East, the Community's position was as follows: The failure to turn up ROW documents meant the County's road was in trespass; and the United States, as Ak-Chin's fiduciary, was obliged to take legal action on behalf of the Community against Pinal County to address and resolve the trespass.

The failure to produce Affidavits of Completion for any of the Community's five "priority" roadways (and the complete lack of documentation suggesting the existence of a valid ROW for one of the five) dramatically changed the picture for Ak-Chin. It gave the Community a legal basis for demanding the cancellation of the very ROW's that State and County officials had assumed allowed them to proceed to convert the sleepy two-lane roads traversing the Reservation into high-speed divided highways without even bothering to consult with tribal leadership. It also called into question Pinal County's plans to expand Highway 238 East without offering to compensate the Community monetarily for the additional encumbrance or to obtain Ak-Chin's consent before so acting.

But as further developments in the district court litigation (outlined below) served to demonstrate, the more daunting challenge proved to be the Community's getting BIA to take the "next steps" regarding cancellation of the roadway ROW's in accordance with 25 CFR 169.16 and 169.20. And with respect Highway 238 East, it wound up taking nearly three more years before the United States finally asserted that if the County did not immediately commit to applying for a ROW from BIA for the one-mile stretch traversing the Ak-Chin Reservation, a legal action for trespass would be initiated.

VI. Delay in BIA's Initiating ROW Cancellation Proceedings.

In the fall of 2008, senior BIA officials met with Ak-Chin representatives in Phoenix to discuss the "next steps" to be taken in light of the fact that Affidavits of Completion had not been filed for any of the "priority" roadways on the Reservation.

Several weeks then passed without anything happening. And when the Community's legal counsel inquired as to why BIA had not issued notices to the ROW holders advising them of the section 169.16 non-compliance issues, the response was that Ak-Chin's Tribal Council needed to

request by formal resolution that such action be taken with respect to each of the roads of concern.

Those resolutions were promptly supplied, but still no cancellation proceedings were initiated by BIA.

A motion was filed in the district court, requesting that Judge Robertson exercise the Court's case management authority by setting a deadline for defendants to advise whether the ROW cancellation proceedings would be initiated. That motion was fully briefed, but never formally addressed by the Court.

Instead, Judge Robertson scheduled additional status conferences in March and April 2009.

In the March 2009 conference, Judge Robertson inquired about whether any progress had been made and then announced: "The Court expects to hear from the government how you're going to deal with the right-of-way situation. This really has gone on long enough" (Tr. at 5).

A month later, however, His Honor was advised by plaintiff's counsel that: "We still have no answer...We don't know how or even whether the government intends to proceed....That is why we urge that the Court consider imposing a deadline." (4/9/09 Tr. at 5-6 and 14).

His Honor's response: "Mr. Austin...let's be as open as we can....The government seems to me to be hell bent to mess over the tribe on this and declare that those rights-of-way are still in effect and that the roads were properly completed. That's what—I mean it's time for us to talk plainly about what's happening here." (Tr. at 17).

Plaintiff's counsel: "If that's where the government is, require that they say so. Require that in writing, on the record, the position so stated so that there clearly is final agency action that has occurred." (Tr. at 18).

The Court: "That's what I hoped I was going to get today"(Tr. at 18).

[His Honor addressing defendants' counsel] "So what have you got to tell me? What is the government's position here? Are you going to do what I think you're going to do?" (Tr. at 18).

Defendants' counsel: "BIA has not made a final decision...." (Tr. at 19).

[The Court interrupts] "Oh, come on, Mr. _____. [H]ow many more chances are you going to give them to get it right?"(Tr. at 19)

The Court: "It's time to bring this matter to a close. If BIA has not issued one or more 169.20 notices by April 30th, then I declare that the agency will have taken final agency action declining or refusing to do so. And the plaintiffs can make whatever they want to out of that refusal, but

it is unreasonable—as a matter of law, unreasonable to wait any longer for final agency action “(Tr. at page 23).

The Court concluded the April 2009 Conference with the following prediction: “I’m afraid I see where this is going. I’m afraid I see that the [Interior] department is going to give Pinal County as many chances as it needs to get it right, and that the net result after April 30th is going to be the denial of the action that the Ak-Chin requested here. And then they’re going to take an APA motion, the outcome of which I have to say is uncertain...But we’ve had enough of these status conferences” (Tr. at page 23).

VII. The Impact of the Court-imposed Deadline and the “Mixed Bag” Administrative Results.

Did Judge Robertson’s April 30, 2009 deadline for BIA to initiate cancellation proceedings with respect to at least one of the “priority” roadway ROW’s make for a “happy ending” and a quick end to the matter?

No. But it did result in the Bureau’s issuing section 169.20 notices to Pinal County and the AZ Department of Transportation (ADOT) regarding the failure to file Affidavits of Completion for their ROW’s and inviting them to take steps to cure the non-compliance (Of note--our position was that the submission of Affidavits of Completion decades after the ROW’s had issued could not possibly remedy the legal defect since section 169.16 required by its terms that such Affidavits were to be filed “promptly”).

BIA’s written notices issued on April 28, 2009. As they’d been invited to do, both the County and ADOT thereafter made submissions they styled as “Affidavits of Completion” and argued that BIA in its discretion could accept as constituting substantial compliance with what 25 CFR 169.16 required.

For two of the four “priority” roadways, that argument proved to be successful. BIA declined to cancel either roadway for non-compliance with section 169.16.

The Community appealed both decisions to the Interior Board of Indian Appeals (IBIA), and both administrative appeals were still pending when the Community’s trust litigation was resolved by entry of a consent order in the District Court case in January 2013.

However, for another of the Community’s “priority” roadways—Peters & Nall Road, where Ak-Chin’s administrative offices were located—BIA found the County’s after-the-fact submissions to be so patently deficient as to fail to rectify the non-compliance with section 169.16. Accordingly, the ROW for that roadway was directed to be cancelled—an administrative determination that the County chose not to appeal.

VIII. The Negotiated Settlement resulting in Ak-Chin's Gaining Control over its Roadways.

BIA's cancellation of the ROW for Peters & Nall Road was a significant development. It meant that with respect to this key roadway, Ak-Chin no longer faced the threat that its two-lane road would be converted into a high-speed divided highway that the Community did not need or want.

It also proved to be a catalyst for bringing the interested parties (including Ak-Chin, BIA and the County) to the table to discuss ROW issues and how they might be amicably resolved.

The outcome? After more than two years of negotiation, settlements were reached separately with the United States and Pinal County including the following provisions:

- In addition to Ak-Chin's retaining control over Peters & Nall Road as a result of BIA's cancellation of the ROW that had previously been held by Pinal County, all third-party interests in the ROW's for each of two other "priority" roadways (including Farrell Road, the roadway which led past the Community's preschool and elder center, etc.) were conveyed to Ak-Chin. As a result, none of those roads is any longer at risk of being converted into something the Community considers to be contrary to its best interest.
- Rather than risk being sued for trespass for having located Highway 238 East on tribal land without obtaining a right-of-way from BIA, the County agreed to apply for and obtain a ROW from BIA. That ROW issued in 2014, and it incorporated a series of terms and conditions which the Community required that the County accept in exchange for Ak-Chin's consenting to the ROW. The mile-long stretch of Tribal land was subject to competing appraisals, which resulted in the County's agreeing to pay a substantial six-figure amount to Ak-Chin as compensation for the encumbrance.

IX. Suggested Take-Aways.

When it comes to ROW's, the old adage is true—knowledge is power. As an information-gathering tool, the provisions of 25 CFR Part 169 offer a means of focusing on what it is that should be looked for when attempting to develop a reasonably complete picture of an easement interest that BIA created and conveyed to a third-party ROW holder in the distant past. And the sources of ROW information needed to compile such a picture may include--in addition BIA-- the grantee or assignee of the ROW and, of course, the Tribe itself.

In Ak-Chin's case, it took the Community's willingness to file suit in two different courts 2,500 miles away to obtain ROW information it wouldn't otherwise have obtained. And then it required Ak-Chin's pressing BIA to initiate cancellation proceedings that its trustee was clearly reluctant to undertake. Without committing to see the matter through, the Community conceivably would have had little or no say in regard to the profound changes that state and local officials were planning to impose on its roadway system. It did so, and its reward is the control Ak-Chin now possesses over key roadways traversing the Reservation.

One final note: the Affidavit of Completion filing requirement has been deleted from the revised 25 CFR Part 169 which took effect in April of this year. However, in announcing the elimination of former section 169.16 (notwithstanding Ak-Chin's comment in the rule-making process objecting to the change), BIA noted that "tribes are free to negotiate with applicants to require filing notice of completion of construction work for any particular grant and tribal inspection of the completed right-of-way."