

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - James G. Watt

Office of Hearings and Appeals - - - James Limb, Director

Office of the Solicitor - - - William H. Coldiron, Solicitor

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

EDITED BY

BETTY H. PERRY

RACHAEL CUBBAGE



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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1982 to December 31, 1982. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable James G. Watt, served as Secretary of the Interior during the period covered by this volume; Mr. Donald P. Hodel served as Under Secretary; Messrs. G. Ray Arnett, Garrey E. Carruthers, Daniel Miller, Pedro A. Sanjuan, Kenneth L. Smith, J. Robinson West served as Assistant Secretaries of the Interior; Mr. William H. Coldiron, served as Solicitor. Messrs. James Limb and John N. Stafford, served as Directors, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "89 I.D."



Secretary of the Interior.

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whether TVRC's petition should be granted under 43 CFR 4.1110(d). I will only say that in rationalizing its refusal to permit intervention the principal opinion exaggerates the potential cost of permitting it and improperly concerns itself with the Department's possible (I would even say speculative) liability for costs and expenses.

I dissent.

WILL A. IRWIN
Chief Administrative Judge

STATE OF ALASKA, DEPT. OF
TRANSPORTATION AND
PUBLIC FACILITIES
(ON RECONSIDERATION)

7 ANCAB 188

Decided June 24, 1982

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14866-A, F-14866-A2 and AA-9368.

Motion for reconsideration granted: State of Alaska, Dept. of Transportation and Public Facilities, 5 ANCAB 307, 88 I.D. 629 (1981), and decision appealed from modified in part.

1. Alaska Native Claims Settlement Act: Administrative Procedures: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Conveyances—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where, in R.S. 2477, Congress made a grant of rights-of-way which became effective only upon valid acceptance of the grant, and where the Bureau of Land

Management is prohibited from adjudicating the right-of-way to determine whether it is valid and has therefore "issued" within the meaning of § 14(g) of ANCSA, the holding in *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15], requiring identification of valid existing rights in the conveyance document is not applicable to R.S. 2477 rights-of-way.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Conveyances—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the Bureau of Land Management seeks to reserve a § 17(b) public easement over an existing road constructed by the State of Alaska and claimed by the State as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way, "if valid."

APPEARANCES: Susan Urig, Esq., for State of Alaska, Dept. of Transportation and Public Facilities; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Ken Norman, Esq., Cummings & Routh, for Sea Lion Corp.

*OPINION BY ALASKA NATIVE
CLAIMS APPEAL BOARD*

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat, 688, as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR

June 24, 1982

Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On June 26, 1981, the Board issued its decision in this appeal. The Board held therein that the existence of an alleged right-of-way granted pursuant to Revised Statutes Sec. 2477, 14 Stat. 253 (1866) (repealed 1976) (R.S. 2477), precludes neither conveyance of the subject land nor the reservation of a coincident public easement, but that where the Bureau of Land Management (BLM) is informed of the existence of the right-of-way, the decision to issue conveyance and the subsequent conveyance document must expressly declare that the conveyance and the public easement are each subject to the right-of-way. The Board's decision held:

1. Both the decision to convey lands and the subsequent conveyance document must specifically identify interests in the lands being conveyed which are protected under ANCSA as valid existing rights. Since rights-of-way granted by the United States are, if valid, protected under § 14(g) of ANCSA as valid existing rights, they must be specifically identified in both the BLM's decision to convey lands and the subsequent conveyance document.

2. The Nov. 20, 1979, amendment to Secretary's Order No. 3029, 43 FR 55287 (1978) (S.O. 3029) does not preclude identification of claimed R.S. 2477 rights-of-way.

3. Native-selected lands subject to rights-of-way are to be included in conveyances pursuant to ANCSA, but the conveyances are subject to the rights-of-way.

4. The State's acceptance of an R.S. 2477 right-of-way grant did not sever from the public domain the land underlying the right-of-way.

5. A right-of-way granted by R.S. 2477 is a less-than-fee interest in the nature of an easement.

6. Following the acceptance of an R.S. 2477 grant of right-of-way, the Federal Government retains its fee interest in the land, subject to the right-of-way, and may dispose of it pursuant to law. The Federal Government's control of the fee interest in the land affected by an R.S. 2477 right-of-way includes the authority to issue additional rights-of-way affecting the same land.

7. The reservation of an overlapping § 17(b) public easement, and the conveyance of the underlying fee, are each subject to, and do not affect, a previously existing R.S. 2477 right-of-way.

On Sept. 11, 1981, the BLM moved that the Board reconsider that portion of the June 26, 1981, decision which holds that BLM is required to specifically identify, in ANCSA decisions and conveyance documents, rights-of-way which are claimed under R.S. 2477. The motion was based on an alleged lack of adequate briefing of the issue prior to decision.

BLM argued that compliance with the Board's holding is not feasible and will adversely affect the parties to the appeal. The

BLM cited the administrative burden of discovering and listing R.S. 2477 rights-of-way. The BLM also declared that the listing of claimed but questionable R.S. 2477 rights-of-way in ANCSA conveyances, a listing made in neither non-ANCSA conveyances nor in prior ANCSA conveyances of 22 million acres of land, is likely to generate confusion and to adversely affect marketability of title.

Further, the BLM argued that the Nov. 20 1979, amendment to S.O. 3029 should be construed to preclude identification as well as adjudication of claimed R.S. 2477 rights-of-way. The memorandum amending S.O. 3029, written by the Solicitor and concurred in and adopted by the Secretary, referenced two Departmental cases "careful reading of [which] indicates that the Department has consistently refused to identify or list such claimed rights-of-way in its decisions and conveyance documents." (Motion for Reconsideration, page 5.) The BLM asserted that the memorandum should be construed to require a result consistent with that required by the cited cases.

The State of Alaska, Dept. of Transportation and Public Facilities (State) answered that the identification question was sufficiently briefed and was correctly decided by the Board, and that the Nov. 20, 1979, amendment to S.O. 3029 does not preclude identification of claimed R.S. 2477 rights-of-way. The State also argued that the identification requirement will not be an undue burden, and that identification is necessary to protect the State's in-

terest and will benefit the other parties to the appeal by clarifying the nature and extent of the State's claim.

The BLM replied that the Department decided long ago that identification of claim R.S. 2477 rights-of-way in conveyance documents is not necessary to protect the right-of-way and should not be done. BLM declared that nothing in ANCSA suggests that Congress intended patents to Native corporations to be different from other patents in this respect. The BLM also asserted that identification of R.S. 2477 rights-of-way would adversely affect the Native corporations receiving fee title to the underlying land.

Further, the BLM disputed the State's assertion that accurate information concerning its claimed R.S. 2477 interests is readily available. BLM alleged that the State's proffered information was incomplete and did not allow determination of the exact location of the claimed rights-of-way, and that the State's listing included some obviously invalid claims.

Finally, BLM argued that while it does not adjudicate all third-party interests identified in ANCSA conveyances, no ANCSA conveyance is expressly made subject to an unadjudicated interest. In this context, BLM declared that all third-party interests which are "of record" have been adjudicated by a governmental entity.

Decision

The holding of the Board in its original decision in this appeal, that claimed R.S. 2477 rights-of-way must be identified in both the

June 24, 1982

decision to issue conveyance (DIC) and the subsequent conveyance document, was based on a holding in *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]. The referenced holding was that the DIC and the subsequent conveyance document must both specifically identify interests in the land being conveyed which are protected under ANCSA as valid existing rights. *State of Alaska/Seldovia Native Association, Inc.*, 84 I.D. 382; *State of Alaska, Dept. of Transportation and Public Facilities*, 5 ANCAB 307, 318, 88 I.D. 629, 633 (1981) [VLS 80-51].

On reconsideration, the Board holds that said holding is not applicable to R.S. 2477 rights-of-way.

In *State of Alaska/Seldovia Native Association, Inc.*, *supra*, 84 I.D. 380, the Board also held that the BLM has the duty to ascertain whether a less-than-fee interest was issued to a third party, and must recite in the DIC that the conveyance is "subject to" the interest. Sec. 14(g) of ANCSA expressly requires such a recitation in the conveyance document.

The Nov. 20, 1979, amendment to Secretary's Order No. 3029 precludes BLM adjudication of claimed R.S. 2477 rights-of-way. In R.S. 2477, Congress made a grant of rights-of-way which became effective only upon a valid acceptance of the grant. Since BLM is prohibited from adjudicating R.S. 2477 rights-of-way, it is precluded also from determining whether unadjudicated R.S. 2477 rights-of-

way have issued, within the meaning of § 14(g) of ANCSA.

[1] The Board modifies its holding in the original decision and holds that where, in R.S. 2477, Congress made a grant of rights-of-way which became effective only upon valid acceptance of the grant, and where the Bureau of Land Management is prohibited from adjudicating the right-of-way to determine whether it is valid and has therefore "issued" within the meaning of § 14(g) of ANCSA, the holding in *Appeals of State of Alaska and Seldovia Native Association, Inc.*, *supra*, requiring identification of valid existing rights in the conveyance document, is not applicable to R.S. 2477 rights-of-way.

Accordingly, claimed R.S. 2477 rights-of-way need not be listed in a DIC or conveyance document in a provision specifying that the conveyance is subject to valid existing rights.

A different rule applies, however, where the BLM seeks to reserve a § 17(b) public easement over a road constructed by the State of Alaska and claimed under R.S. 2477.

As noted in the Board's original decision in this appeal, the existence of an R.S. 2477 right-of-way precludes neither the conveyance of the underlying fee nor the reservation of an overlapping § 17(b) public easement, but the conveyance and/or reservation is subject to the right-of-way. *State of Alaska, Dept. of Transportation and Public Facilities*, *supra*, 88 I.D. 635.

[2] Thus, it is not disputed that as a matter of law the public easement reserved by the BLM for the Hooper Bay Airport Road is subject to the State's R.S. 2477 right-of-way. Therefore, to avoid confusion and to reflect on the conveyance document the accurate legal relationship between the § 17(b) public easement and the R.S. 2477 right-of-way, the Board holds that where the BLM seeks to reserve a § 17(b) public easement over an existing road constructed by the State and claimed by the State as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way "if valid."

The above requirement does not unduly burden the BLM in relation to the importance of rights claimed by the State. Compliance with such requirement is clearly feasible and will not adversely affect the other parties to this appeal. Since the above-mandated inquiry arises in the context of the reservation of § 17(b) public easements, any additional administrative burden on the BLM is minimal. Moreover, the required provision should neither generate confusion nor adversely affect marketability of title.

Order

The original decision of the Board in this appeal, *State of Alaska, Department of Transportation and Public Facilities*, 5 ANCAB 307, 88 I.D. 629 (1981) [VLS 80-51] is hereby amended to conform with the above holdings of the Board. The above-designated decision of the Bureau of Land

Management is hereby amended so as to conform to this decision of the Board. Publication of an amended decision to issue conveyance is not required. The conveyance document issued pursuant to the above-designated decision of the Bureau of Land Management shall expressly state that the reservation of a public easement for the Hooper Bay Airport Road is subject to the State's R.S. 2477 right-of-way, if valid, for the Hooper Bay Airport Road.

JUDITH M. BRADY
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF EYRING RESEARCH INSTITUTE

IBCA-1169-10-77

Decided June 25, 1982

Contract No. JO166201, Bureau
of Mines.

Sustained in part.

1. Contracts: Formation and Validity: Cost-type Contracts

Where the Government entered into a sole source, cost-plus-fixed-fee contract with appellant for the purpose of conducting a research and analysis study to determine the toxicity of certain gases emanating from a citrate process used for flue gas desulfurization in the operation of mines, and appellant entered into a subcontract with a University to accomplish the major portion of the required research, the Board found that the Government was not involved in the formation or preparation of the subcontract, and that although they may have intended to enter into a firm, fixed-price contract, the contracting parties did, in fact, by the clear and unambi-