United States Department of the Interior

OFFICE OF THE SOLICITOR
ANCHORAGE REGION
510 L Street, Suite 408
Anchorage, Alaska 99501

IN REPLY REFER TO:

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Memorandum

To: Mr. Robert D. Arnold, Assistant to the State Director for ANCSA, Bureau of Land Management

From: Regional Solicitor, Alaska

Subject: "Reserved To" vs. "Subject To" Interests

Several appeals pending at ANCAB have raised the issue whether FAS highway and material site rights-of-way granted to the State of Alaska are properly "reserved to the United States." I conclude that they should be referenced under the "subject to" part of the conveyance document and not as "reserved to the United States."

BLM construes its manual (§ 1862 Appendix 1, number 10) to require it to list FAS highway and material site rights-of-way under the "Reserved to the United States" section of the DIC and not under the "Subject to" section. The BLM Manual, as I read it, is less than clear as to whether it distinguishes between "reserved to" and "subject to" and if so on what basis. The only reference I could find to "subject to" in the manual was in a sample patent to John C. Doe (Illustration I, § 1862.11, Form 1860-8, Jan. 1965). This sample patent lists a right-of-way for ditches and canals under "Excepting and Reserving to the United States." It then lists "those rights for pipeline purposes as have been granted to the XYZ Corp. ... under Section 28 of the Mineral Leasing Act" under "Subject to."

This conforms to my understanding of the distinction we make in ANCSA conveyances, which is that "reserving to the United States" refers to property interests which the U.S. is retaining and "subject to" refers to property interests of third parties not leading to the acquisition of fee title. (Third party interests leading to acquisition of title are excluded. 43 CFR 2650.3-1(a).) If the manual requires that material sites granted to the State be "reserved to the United States" it would, in my opinion, be contrary to ANCSA since ANCSA is very specific about what property interests the United States may retain in Sec. 11(a)(1) withdrawal areas. They are National Parks, military reservations, land actually used in connection with a federal installation (3(e)), and 17(b) easements. Unless the State material sites can be justified by the Federal

Highway Administration under 3(e) it does not qualify for federal retention. A valid State material site right-of-way would be a proper "subject to" interest under § 2650.3-1(a) and § 2650.4-1 of 43 CFR since it is a valid existing right and does not lead to the acquisition of fee title.

I do not read § 1862 of the BLM Manual as requiring a contrary result. It simply contains examples of "Reservations and Exceptions" not all of which are specifically "to the United States." Similarly § 1860.14 says "clearly set out and list all exceptions, reservations, and restrictions in all conveyance instruments. Ordinarily, the terms will not be distinguished." In its generic sense therefore "exceptions, reservations, and restrictions" simply mean interests not conveyed whether because they are retained by the United States or for some other reason. Appendix 2 to § 1860.15 lists examples of "reservations" some of which are specifically "to the United States" others of which are not. For example A-4 is:

> "PIPELINE under SEC. 28, MINERAL LEASING ACT, 43 CFR 2234.5. Those rights for pipeline purposes as have been granted to the named company ... under sec. 28...."

This, it may be remembered, is the same interest shown as "subject to" in the sample patent (Illustration I, Sec. 1862.11). It appears therefore that "reservations" is used in the manual to include any interests not conveyed, whether retained by the United States or conveyed to third parties. Accordingly, the manual does not, in my opinion, prohibit drawing that more precise and useful distinction in ANCSA conveyance documents by listing all third party property interests as "subject to" and only property interests retained by the United States as "reserved to the United States."

I do not consider section 508 of the Federal Land Planning and Management Act, P.L. 94-579, Oct. 21, 1979, 43 U.S.C. 1701-1782 (FLPMA), to require a contrary result. That section provides in essence that if the Secretary determines that retention of Federal control over a right-of-way is necessary for one of several reasons he shall either (a) reserve to the United States the land covered by the right-of-way, or (b) convey the land subject to the right-of-way but reserve to the United States the right to enforce any or all of the terms and conditions.

Section 701(e) of FLPMA provides that "Nothing in this Act shall be construed as modifying, resolving or changing any provision of the Alaska Native Claims Settlement Act."

To the extent that Section 508 requires retaining the land covered by a right-of-way in Federal ownership (option (a) above), it is contrary as I have stated above to ANCSA which permits such retention only in limited circumstances. The option of reserving the right to enforce

the terms of the grant (option (b) above) is very similar to the provision in Section 14(g) of ANCSA of retaining administration, particularly as implemented by 43 CFR 2650.4-3, which provides that administration of leases rights-of-way, etc. fully contained within a conveyance will be waived unless the Secretary finds that the interests of the United States require retention. To the extent that the reasons which permit the Secretary to retain administration under 508 differ from the determination of a Federal interest under 2650.4-3, the latter would prevail since valid regulations are considered to have the force and effect of law. Rodway v. U.S. Dept. of Agriculture, 514 F. 2d 809 (DC Cir. 1975).

A final issue that should be discussed is whether listing an interest as subject to without specifying that administration is retained could be construed as a waiver. The regulation (43 CFR 2650.4-3) is silent as to when and how the decision on administration should occur. Although implied waivers are not favored by courts, U.S. v. American Gas Screw, 210 F. Supp. 581 (D. Alaska 1962), Gaffney v. Unit Crane and Shovel Corp., 117 F. Supp. 490 (D. Pa. 1953), the fact that the regulation creates a presumption of waiver, and the fact that in the case of oil and gas leases the practice of the BLM is to specify in the DIC whether or not administration will be waived could support an argument that in the absence of an explicit retention waiver is presumed. For this reason and because the decision not to waive is probably an appealable decision it would seem advisable to include that decision in the DIC for subject to interests other than oil and gas leases.

John M. Allen