IN REPLY REFER TO:

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

ALASKA DEPARTMENT OF TRANSPORTATION

IBLA 84-140 Decided July 23, 1985

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reserving easement across village selections. F-14846-A, F-14846-B.

Affirmed as modified.

1. Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Generally

Where the Bureau of Land Management reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska 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: E. John Athens, Jr., Esq., Fairbanks, Alaska, for the State of Alaska, Department of Transportation; James Q. Mery, Esq., Fairbanks, Alaska, for Doyon, Limited.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The State of Alaska, Department of Transportation and Public Facilities (State), has appealed the reservation of an easement in a Bureau of Land Management (BLM) decision dated September 27, 1983, approving lands near Chalkyitsik, Alaska, for interim conveyance in village selections F-14846-A and F-14846-B, filed pursuant to section 12 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611 (1982).

The decision reserved an easement designated as EIN 1 D1, D9, described as "[an] easement twenty-five (25) feet in width for an existing access trail from sec. 34, T. 24 N., R. 19 E., Fairbanks Meridian, southerly to public lands." The easement was reserved pursuant to section 17(b)(3) of ANCSA, as amended, 43 U.S.C. § 1616(b)(3) (1976). That statutory provision provides that the Secretary, prior to granting a patent to a Native village corporation "shall reserve such public easements as he determines are necessary." 43 U.S.C. § 1616(b)(3) (1982). Public easements are defined by section 17(b)(1) of ANCSA as those easements "which are reasonably necessary to guarantee * * * a full right of public use and access for recreation, hunting,

transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important." Reference to the "Planning Commission" is to the Joint Federal-State Land Use Planning Commission for Alaska, established pursuant to 43 U.S.C. § 1616(a)(1) (1976), which, among other things, was empowered to identify public easements across lands selected by village corporations.

In its statement of reasons, the State points out that BLM failed to note that easement EIN 1 D1, D9 "may be subject to an R.S. 2477 right-of-way claimed by the State." R.S. 2477, 43 U.S.C. § 932 (1970), repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2743, 2793, provided in its entirety as follows: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The State submits that a valid R.S. 2477 highway right of way is a valid existing right protected by sections 701(a) and 509(a) of FLPMA (43 U.S.C. §§ 1701 note and 1769(a) (1982)).

The State argues that where a section 17(b) (ANCSA) easement overlaps a claimed R.S. 2477 right-of-way, BLM should note the claim in its conveyance document. In support of its position, it cites State of Alaska (On Reconsideration), 7 ANCAB 188, 89 I.D. 346 (1982). In that case, the Alaska Native Claims Appeal Board (ANCAB) 1/ held that where "BLM seeks to reserve a sec. 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.'" 7 ANCAB at 198, 89 I.D. at 350. ANCAB noted that the existence of an R.S. 2477 right-of-way precluded neither the conveyance of the underlying fee nor the reservation of an overlapping section 17(b) easement. 7 ANCAB at 197, 89 I.D. at 349.

The State has furnished evidence from the Alaska Department of Transportation showing that EIN 1 D1, D9 overlaps an official historical trail of the State of Alaska designated as Trail 32. The State submits:

> The State of Alaska is particularly concerned that the BLM should note that the trail covered by EIN 1 D1, D9 is claimed by the State as an RS 2477 right-of-way because of the limited uses permitted on the §17(b) easement. If the BLM does not acknowledge the claim by the State that the trail is an RS 2477 right-of-way, confusion as to the status of the trail and the existence of the State's claims will almost certainly be the result.

(Statement of Reasons at 2).

1/ ANCAB was abolished in June 1982 by Secretarial Order and its functions transferred to the Board of Land Appeals. See 47 FR 26392 (June 18, 1982).

In its answer, Doyon, Limited (Doyon), one of the transferees of the proposed conveyance, states there is no legal requirement for identifying unadjudicated R.S. 2477 claims in conveyance documents. Doyon compares R.S. 2477 claims to unpatented mining claims and cites Doyon, Limited, 74 IBLA 139, 90 I.D. 289 (1983), where the Board held that mining claims whose validity had not been adjudicated need not be identified as valid existing rights (under section 14(g) of ANCSA) in a conveyance. Doyon also relies on a letter dated April 28, 1980, from Deputy Solicitor Ferguson to the Assistant Attorney General, United States Department of Justice. The subject of this letter is "Standards to be applied in determining whether highways have been established across public lands under the repealed statute R.S. 2477 (43 U.S.C. § 932)." The Deputy Solicitor discusses various elements, such as construction, actual use, etc., which must be met before a valid right-of-way may be deemed to exist. He states in part:

> In summary, it is our view that R.S. 2477 was an offer by Congress that could only be perfected by actual construction, whether by the state or local government or by an authorized private individual, of a highway open to public use, prior to October 21, 1976, on public lands not reserved for public uses. Insofar as highways were actually constructed over unreserved public land by state or local governments or by private individuals under state or local government imprimatur prior to October 21, 1976, we do not question their validity.
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> * * * [A] state claim of an R.S. 2477 right-of-way is like a miner's location of a claim under the Mining Law of 1872, for which no application is required either. Like a mining claim, however, a claim to an R.S. 2477 right-of-way does not necessarily mean that a valid right exists. The United States has often successfully challenged the validity of mining claims because of the failure of the claimant to establish rights under that law. See, e.g., Cameron v. United States, 252 U.S. 450 (1920); United States v. Coleman, 390 U.S. 599 (1968); Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). The Department has not previously determined the validity of claimed rights under R.S. 2477, because it has had no land or resource management reason to do so; i.e., conflicts generally did not arise between the existence of claimed rights-of-way under R.S. 2477 and the management of the public lands affected by such claims. If there is a resource management reason to do so, such as the review of public lands for wilderness values, claimed rights-of-way may be reviewed to determine their validity under R.S. 2477.

(Exh. A, Doyon Answer Brief, at 8-9, 10).

Doyon fears that identification of EIN 1 D1, D9 as an R.S. 2477 claim will create confusion by encouraging uses beyond those authorized for a dogsled and snowmobile trail. Doyon states that Alaska may assert a claim for a vastly enlarged right-of-way.

[1] In State of Alaska, 5 ANCAB 307, 88 I.D. 629, 635 (1981), ANCAB pointed out that the Secretary's November 20, 1979, amendment to Secretarial Order No. 3029 declared that BLM should not adjudicate rights-of-way claimed under R.S. 2477, but that the amendment did not preclude identification of a claimed R.S. 2477 right-of-way in conveyance documents. The Board stated that "[s]uch rights-of-way shall be identified in the decision to issue conveyance and the conveyance document in the same manner as other third-party interests which the BLM need not adjudicate" and that such identification "does not recognize or declare the validity of the alleged interest." Id.

The Deputy Solicitor's letter submitted by Doyon discusses the elements necessary for perfection of an R.S. 2477 right-of-way but offers no basis for resolving the present appeal. Doyon, Limited, 74 IBLA 139, 90 I.D. 289 (1983), is also inapposite. That case concerned unpatented mining claims noted in the application for regional land selection. As that decision states, unpatented mining claims are treated differently in section 22(c) of ANCSA (43 U.S.C. § 1621(c) 1982)) from other types of pre-existing rights required to be identified under section 14(g) (43 U.S.C. § 1613(g) (1982)). 90 I.D. at 294. Section 22 provides:

> (c) Mining claims; possessory rights, protection
>
> On any lands conveyed to Village and Regional Corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate state or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all requirements of the general mining laws are complied with, proceed to patent.

Thus, no notation is required in the conveyance because the mining claimant's interest is protected by statutory provision. However, ANCSA contains no such provision concerning R.S. 2477 claims. Doyon has not demonstrated how identification of the State's claimed R.S. 2477 right-of-way would be detrimental to it or deprive it of some right. 2/ Moreover, the State has a voice in determining rights-of-way by virtue of its participation in the Joint Federal-State Land Use Commission, and the Departmental policy favors identification of unadjudicated third-party interests in conveyance documents. See Ukpeagvik Inupiat Corp., 81 IBLA 222, 229-30 (1984); Secretarial Order No. 3016, 85 I.D. 1 (1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM is directed to

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2/ The State's reply to Doyon's answer brief observes: "It should be noted that Doyon, or any other person with standing, is free to contest in the proper forum the validity of the State's claimed RS 2477 right-of-way. Doyon loses nothing by having the claim merely noted in the BLM decision" (At 3). Regarding State court jurisdiction over R.S. 2477 claims, see Homer Meeds, 26 IBLA 281, 83 I.D. 315 (1976); Nick Dire, 55 IBLA 151 (1981).

modify its September 27, 1983, decision to indicate that easement EIN 1 D1, D9, is subject to a claimed R.S. 2477 right-of-way of the State of Alaska, "if valid." Its decision is otherwise affirmed. 3/

Wm. Philip Horton
Chief Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge

3/ By motion filed July 1, 1985, BLM sought an order from the Board segregating the land in dispute and remanding the remaining acreage not in dispute to BLM for conveyance. On July 2, 1985, counsel for the State opposed this motion, disagreeing as to which lands are affected by the appeal. Inasmuch as this appeal is now adjudicated, BLM's motion is dismissed as moot.