

EDDIE S. BEROLDO
ROBERT L. MILLER
JO ANN MILLER

IBLA 91-325

Decided May 28, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing protest and private contest filed to prevent confirmatory patent A-061881.

Affirmed.

1. Patents of Public Lands: Effect

When a patent is issued, title to the lands is transferred from the United States, and the Department of the Interior no longer has jurisdiction to adjudicate the right of private parties to the land.

2. Alaska: Land Grants and Selections--Alaska National Interest Lands Conservation Act: Generally

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1988), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it.

APPEARANCES: Robert L. Breckberg, Esq., Anchorage, Alaska, for appellants; Kenneth C. Powers, Esq., Anchorage, Alaska, for State of Alaska; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Eddie S. Beroldo, Robert L. Miller, and Jo Ann Miller have appealed from a May 7, 1991, decision of the Alaska State Office, Bureau of Land Management (BLM), dismissing their protest and private contest complaint filed to prevent confirmatory patent of certain tentatively approved lands to the State of Alaska.

On October 26, 1964, the State of Alaska filed a state selection application (A-061881) pursuant to section 6(b) of the Alaska Statehood Act, 72 Stat. 339 (July 7, 1958), for all open and available lands within T. 11 N., R. 2 W., Seward Meridian, Alaska. The State amended its application on January 13 and June 16, 1972, to include all lands within that township except patented lands. By decision dated August 5, 1974, and modified on June 4 and August 22, 1975, BLM tentatively approved the state selection.

Among the lands excluded from the tentatively approved state selection were the SW¹/₄ SW¹/₄ sec. 4 and the S¹/₂ SE¹/₄, NE¹/₄ SE¹/₄ sec. 5, T. 11 N., R. 2 W., Seward Meridian. These lands had been patented to Beroldo on January 14, 1966 (U.S. Patent No. 50-66-0273), based on his 1958 homestead entry on those lands. Beroldo transferred his patented lands to the Millers in 1984.

On April 14, 1989, appellants filed a protest to prevent the issuance of a confirmatory patent of the tentatively approved lands pending final resolution of litigation in the Alaska Superior Court, styled State of Alaska v. Robert & Jo Ann Miller, Case No. 3AN-88-10139 Civil, which was currently pending. Appellants stated that one of the issues in the state court proceeding concerned the existence and extent of an R.S. 2477 right- of-way across the tentatively approved land to the Beroldo homestead. 1/

On November 30, 1990, appellants filed a private contest complaint against the State of Alaska with BLM. The complaint alleged that the State had violated the conditions under which it was authorized to select lands, as well as appellants' property rights guaranteed by the homestead laws and the Alaska Statehood Act, by claiming a prescriptive easement across the Beroldo homestead and filing a state court lawsuit to obtain recognition of that easement, by restricting access on the R.S. 2477 road leading to the patented lands to pedestrian traffic only, and by requiring the landowners to obtain a State permit for vehicle access to their land. 2/ Appellants requested that the tentatively approved lands

be returned to the ownership and control of the United States and the State Selection A-061881 be declared invalid for non conformance to the conditions of State Selections as set forth in Section 6 of the Alaska Statehood Act, in the compact between the United States and the State of Alaska and its people.

(Complaint at 10).

On January 23, 1991, the State of Alaska filed a motion to dismiss the contest complaint for lack of jurisdiction. The State argued that since State Selection A-061881 had been tentatively approved on August 5, 1974, and Beroldo's homestead had been patented to him, the Department no longer had any authority or jurisdiction over those lands.

In its May 7, 1991, decision BLM dismissed the protest and the contest complaint. BLM concluded that it had no jurisdiction to rule on the protest or private contest because it had no interest in the lands involved in the dispute. BLM noted that the homestead lands had been patented to Beroldo and that the surrounding lands been selected by the State of Alaska

1/ The record contains a copy of a Sept. 13, 1990, notice from BLM to the State advising that no further action would be taken on the confirmatory patent application until the state court litigation was resolved, and noting that the case was scheduled for trial in the fall of 1991.

2/ These issues also appear to be part of the state court litigation.

and tentatively approved. BLM explained that pursuant to section 906(c)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c)(1) (1988), all right, title, and interest of the United States in previously tentatively approved lands were deemed to have vested in the State of Alaska at the time of tentative approval. Because the Department loses jurisdiction over lands once they have been conveyed out of Federal ownership, BLM found that it had no authority to adjudicate disputes over the relative rights of private parties to those lands, including rights in R.S. 2477 roads or prescriptive easements. Such disputes, BLM stated, properly belong in state court.

BLM further indicated that the Department has long considered it unnecessary to adjudicate the existence of R.S. 2477 rights-of-way or to include reservations or exceptions for such rights-of-way in patents or other instruments of conveyance. Additionally, according to BLM, in the case of a patent confirming the prior legislative conveyance in section 906(c)(1) of ANILCA, the Department's limited, ministerial function precluded the insertion in the patent of any right-of-way not included in the tentative approval.

In their statement of reasons for appeal, appellants argue that the Alaska Constitution and the Alaska Statehood Act reserve to the United States authority over Federal lands within Alaska, and that, therefore, the United States retains jurisdiction to mandate the conditions under which the State may select lands and to rule on the issues presented by their contest complaint. BLM and the State respond that BLM has no jurisdiction to rule on the private contest or the protest because it has no interest in any of the lands involved in this case. ^{3/} We agree with BLM and the State.

[1] It is well established that the effect of issuance of a patent is to transfer title to the lands from the United States, and at that time the Department of the Interior loses jurisdiction over such land and may no longer adjudicate the relative rights of private parties to that land. Virgil Horn, 117 IBLA 10, 11-12 (1991); Lone Star Steel Co., 101 IBLA 369, 374 (1988); Goodnews Bay Mining Co., 81 IBLA 1, 6 (1984); see Germania Iron Co. v. United States, 165 U.S. 379 (1897). Thus, BLM has no jurisdiction over the land patented to Beroldo.

[2] Additionally, State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 244, 249, 253, 91 I.D. 331, 335, 338, 340 (1984), held that subsection 906(c)(1) of ANILCA constituted an "immediate legislative conveyance of all previously [tentatively approved] lands," so that legal title was conveyed "the same as the effect of a conveyance by patent," and "the Department no longer possesses jurisdiction over such lands and has no authority on its own to affect title thereto." Congress intended

^{3/} Because we granted the State an extension of time in which to file its answer and the answer was timely filed in accordance with our order, we deny appellants' request to strike the State's answer as untimely.

this "immediate legislative conveyance" to confirm all right, title, and interest in and to such lands in the State of Alaska as of the date of the tentative approval. See also Northwest Alaskan Pipeline Co., 99 IBLA 201, 208 (1987); Charles Renfro, 96 IBLA 311, 313 (1987); Terry L. Wilson, 85 IBLA 206, 215, 92 I.D. 109, 114-15 (1985). Therefore, BLM has no jurisdiction over the land tentatively approved to the State.

When a dispute arises between non-Federal parties over access rights across non-Federal land, BLM cannot adjudicate those rights. The forum for such disputes is the state courts. Lone Star Steel Co., *supra* at 373; Edward J. Connolly, Jr., 94 IBLA 138, 146 (1986). ^{4/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

^{4/} The Department has also taken the position that, even when Federal lands are involved, the proper forum for adjudicating R.S. 2477 rights-of-way is the state courts in the state in which the road is located. The Sierra Club, 104 IBLA 17, 18 (1988); Leo Titus, Sr., 89 IBLA 323, 337-38, 92 I.D. 578, 586-87 (1985).

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

I fully concur with the lead opinion to the extent that it affirms the rejection of the private contest complaint filed by appellant herein. I also concur with the lead opinion's conclusion that the Bureau of Land Management (BLM) has no jurisdiction to rule on appellant's contentions with respect to the State of Alaska's claim to a prescriptive easement across appellant's patented homestead. However, for reasons which I will set forth below, I do not agree with the affirmation of BLM's decision to the extent that it dismisses the protest to the issuance of patent to the State on the ground that BLM has no jurisdiction to entertain the protest because it has no interest in any of the lands involved.

Initially, I would point out that it is obvious that BLM has jurisdiction to issue a patent to the State for lands which have been tentatively approved (TA'd). Indeed, BLM is expressly obligated to do so by section 906(c)(2) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c)(2) (1988). Thus, that section provides that "[u]pon approval of a land survey by the Secretary, such lands [as to which title has been confirmed by 43 U.S.C. § 1635(c)(1)] shall be patented to the State of Alaska." That this provision imposes a ministerial duty upon the Department is, I would agree, clear. But I also believe that it is demonstrably erroneous to argue that actions undertaken in fulfillment of this obligation are, simply because the function is termed ministerial, beyond either protest before BLM or review by this Board.

Certainly, BLM would have jurisdiction to entertain a protest filed by the State of Alaska on the grounds that the lands within the patent were not the same lands to which title had been confirmed by section 1635(c)(1). Conversely, I think it equally apparent that BLM would have jurisdiction to adjudicate a third-party protest to the proposed issuance of a patent on the ground that the patent was not in conformity to the tentative approval confirmed by section 1635(c)(1). Section 1635(c)(1) removed the authority of BLM to determine the State's entitlement to lands confirmed thereby. It did not, and could not, affect BLM's jurisdiction to determine which lands these were since that authority is essential for the issuance of patent required by section 1635(c)(2). Thus, the requirement of section 1635(c)(2) that BLM issue a patent for the lands confirmed by section 1635(c)(1) necessarily vests in BLM the adjudicatory authority to determine the nature of its ministerial mandate. This, in turn, requires consideration of the provisions of section 1635(c)(1) to determine what, in fact, was confirmed by that provision since the ministerial mandate of section 1635(c)(2) extends only so far as the confirmation provided by section 1635(c)(1). And, it is on this question that I think the Board must eventually revisit the decision in State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984), and its progeny.

The decision in Thorson essentially stands for the proposition that the effect of section 1635(c)(1) was to transfer, eo instante, title to all

lands ^{1/} described in the tentative conveyance, notwithstanding the fact that section 1635(c)(1), by its own expressed terms, confirmed title to all tentative approvals of land selections "subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act."

In order to reach this result, the decision in Thorson basically read the limiting phrase, "subject only to valid existing rights," out of the statute. Thorson held that the expression "subject only to valid existing rights" were words of limitation which merely denoted that, to the extent valid existing rights existed on the lands within a tentative approval, such lands were conveyed subject to those rights. Therefore, the decision in Thorson concluded, Congress intended to pass title to all lands TA'd to the State as of the date of the adoption of ANILCA, including those lands embraced within valid Native allotment applications which were, themselves, being confirmed by section 1634(a)(1) of ANILCA. For reasons which I will briefly limn, I think it demonstrable that the decision in Thorson is devoid of any defensible rationale, has no basis in the legislative history of ANILCA, completely ignores or blatantly misconstrues other sections of the Act that are inconsistent with its conclusions, disregarding elementary principles of statutory construction in the process, perpetrates an interpretation of the statute that borders on the senseless, and fosters a result that may make it literally impossible for the Department to fulfill its responsibilities under the Native Allotment Act and the Alaska Native Claims Settlement Act (ANCSA).

First of all, to the extent that the decision in Thorson is based on an assertion that the inclusion of the phrase, "subject only to valid existing rights," merely made note of the fact that the State would take title subject to any superior rights in third parties, it must be pointed out that, under this analysis, the phrase provides no substantive limitations to the grant since, even without it, the State would necessarily take subject to superior rights. It is an elementary principle of law that one cannot dispose of what one does not own and, therefore, all conveyances are necessarily subject to valid existing rights in that sense, regardless of whether or not mention is made of this fact in the conveyance.

It could, of course, be argued that the inclusion of the phrase in section 1635(c)(1) was merely an attempt by Congress to recognize this principle, as it often does in legislation conveying title to land. This argument, however, has two deficiencies. First, it ignores the fact that ANILCA does contain a specific provision, section 1635(l), which deals with valid existing rights as a general matter and which provides that "all conveyances to the State * * * shall be subject to valid existing rights." It

^{1/} Technically, this is not totally true since the decision in Thorson inferentially held that BLM had authority under this provision to revoke TA's after passage of ANILCA where they conflicted with Native selections under ANCSA, even while it was holding that no such authority existed with respect to "valid existing rights." No rational justification was proffered for this bifurcated result.

scarcely is logical to assume that Congress would feel the need to specify the general limitation on conveyances twice in the same section. The far more plausible conclusion is that, having expressly provided for recognition of the general principle of conveyancing in one subsection, the use of the phrase in another subsection denoted a differing intent rather than an exercise in redundancy.

Second, such an interpretation requires that at least three other sections of ANILCA be ignored. Thus, section 1635(c)(2) places the affirmative duty on the Department to patent such lands upon approval of a land survey. Section 1635(c)(3), however, permits the State to receive patent on the basis of protracted surveys. It provides that, if the State so elects, the Secretary shall issue a patent on that basis within six months after notice of the election. But, that section continues, "For townships having such adverse claims of record, patent on the basis of protraction surveys shall be issued as soon as practical after such election." 43 U.S.C. § 1635(c)(3) (1988) (emphasis supplied). The only antecedent of "such adverse claims of record" is "valid existing rights and Native selection rights under [ANCSA]." And, the only purpose for permitting a delay in the patenting of such lands to the State would be to adjudicate such rights. ^{2/} Surprisingly, this provision is not even mentioned in Thorson.

Far more inexplicable, especially given the fact that Thorson dealt with Native allotment claims, is the failure of that decision to meaningfully discuss the provisions of section 1634(a)(4) of ANILCA, which deals with Native allotment claims. That section provides, in relevant part, that:

[W]here an allotment application describes land which has been patented or deeded to the State of Alaska or which on or before December 18, 1971, was validly selected by or tentatively approved to the State of Alaska pursuant to the Alaska Statehood Act * * *, paragraph (1) of this subsection and subsection (d) of this section shall not apply and the application shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act and other applicable law. [Emphasis supplied.]

This section clearly requires the adjudication of allotment claims on lands selected by or tentatively approved to the State, notwithstanding the provisions of section 1635(c)(1), confirming State title to such land selections. Yet, in the face of this direct admonition, the decision in Thorson proceeds to interpret the phrase "subject only to valid existing rights" in such a way that the Department has "no jurisdiction to hear or adjudicate" such conflicting claims. Thorson at 242, 91 I.D. at 334. The

^{2/} If, as might be contended (see note 1, supra), Congress had only meant to exclude Native selections under ANCSA, Congress could have easily used that exact phrase rather than the more inclusive language "such adverse claims of record."

decision in Thorson effectively interprets section 1635(c)(1) so as to nullify the duty imposed by section 1634(a)(4), rather than attempting to achieve an interpretation of section 1635(c)(1) which can be applied consistent with the mandate of section 1634(a)(4).

The treatment given section 1634(a)(4) in Thorson is simply incoherent. Thus, having determined that the Department has no jurisdiction over any of the lands claimed by a Native allotment applicant within a TA, the decision goes on to recognize a duty "to make a preliminary determination as to the validity of Native allotment applications and to pursue recovery of land where appropriate through negotiation with the State or litigation," citing the provisions of section 1634(a)(4) which require that allotment applications for TA'd lands be "adjudicated." Id. at 254, 91 I.D. at 341. The problem, of course, is that section 1634(a)(4) says nothing about "a preliminary determination"; it requires an "adjudication." And, if one principle is clear from Germania Iron Co. v. United States, 165 U.S. 379 (1897), it is that absent title to the land the Department cannot "adjudicate" claims thereto since it lacks subject matter jurisdiction over the land at issue.

In Germania Iron Co. v. United States, supra, the Supreme Court noted that the effect of the issuance of a patent "is to transfer legal title, and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact." Id. at 383. Thus, by determining that section 1635(c)(1) constituted an eo instante transfer of legal title, the decision in Thorson made the adjudication required by section 1634(a)(4) a legal impossibility. A precondition of any Departmental adjudication of rights is subject matter jurisdiction and, where this is lacking because title to the land has been conveyed, the correct course of action, as charted by the decision in Germania Iron and similar cases, is the initiation of a Federal court suit to restore the Department's jurisdiction so that it might adjudicate the conflicting claims. See, e.g., Southern Pacific R. Co. v. United States, 51 F.2d 873 (9th Cir. 1931); Sage v. United States, 140 F. 65 (8th Cir. 1905).

This is made absolutely clear when one examines the decision in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), in light of its subsequent history. That case involved a class action suit brought by various Native allotment applicants in those situations in which the Department had already conveyed to the State title to the land sought for allotment. Rejecting the Department's position that it had no authority to investigate the circumstances surrounding patent issuance, the District Court held that it was the Department's responsibility to make an initial determination as to the validity of the allotment claim in order to determine whether or not the Government would bear the burden of going forward with a suit to annul the patent and have jurisdiction restored to the Department.

Implementation of the court's decision in Aguilar was the subject of a subsequent proceeding. On February 9, 1983, the District Court accepted stipulated procedures. Of relevance herein is paragraph 3 of those procedures. Therein, it is provided, in relevant part:

Where the merits of the application turn on whether the applicant's use and occupancy predate the commencement of the rights of the State, the BLM will examine the file. The examination, and all further proceedings until a federal court

action to cancel the State's patent is initiated, shall be for investigatory purposes only and shall not constitute an administrative agency adjudication of the rights of third parties. [Emphasis supplied.]

Stipulated Procedures for Implementation of Order, filed Feb. 7, 1983, in Ethel Aguilar v. United States, Docket No. A76-271 Civil.

Regardless of whether or not the Aguilar proceedings fulfill the notice and hearing requirement established in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), it seems abundantly clear that they cannot discharge the Department's obligation under section 1634(a)(4) of ANILCA to "adjudicate" Native allotment claims on TA'd lands since, absent title, no adjudication can occur.

Finally, the decision in Thorson cites 43 U.S.C. § 1635(i) (1988) as supportive of its conclusion that the Secretary only has authority to adjudicate conflicting claims prior to the confirmation of title effected by subsection (c)(1). This, however, is a complete misinterpretation of that section. That section provides, in its entirety:

Nothing contained in this section shall relieve the Secretary of the duty to adjudicate conflicting claims regarding the lands specified in subsection (g) of this section, or otherwise selected under authority of the Alaska Statehood Act, subsection (b) of this section, or other law, prior to the issuance of tentative approval. [Emphasis supplied.]

Doubtless relying on the last phrase of this subsection, Thorson concluded that this provision supported its interpretation of subsection 1635(c)(1). The problem, however, with this interpretation is that subsection 1635(i) expressly references subsection 1635(g) which is, itself, an eo instante conveyance of certain lands 3/ that, under subsection 1635(h)(1), are expressly conveyed "subject to valid existing rights."

The use of the phrase "prior to the issuance of tentative approval" can only be understood in the context of subsection 1635(h). Subsection 1635(h)(1) provides that:

Lands identified in subsection (g) of this section are conveyed to the State subject to valid existing rights and Native

3/ Subsection (g) conveyed, with certain exceptions, all right, title and interest of the United States, with respect to those lands specified in the list entitled "State Selection Lands May 15, 1978," dated July 24, 1978, and on file with the Secretary of the Interior.

selections rights under [ANCSA]. All right, title, and interest of the United States in and to such lands shall vest in the State of Alaska as of December 2, 1980, subject to those reservations specified in subsection (l) of this section.

Thus, this section makes a clear distinction between the conveyance of the land, which is subject to valid existing rights and Native selection rights under ANCSA, and the nature of the rights which are conveyed, which are subject to the reservations set forth in subsection (l).

More importantly, the essential fallacy of Thorson's reliance on the use of the phrase, "prior to the issuance of tentative approval," within the context of subsection (g) is made manifest by subsection (h)(2) which provides that "[a]s soon as possible after December 2, 1980, the Secretary shall issue to the State tentative approvals to such lands as required by the Statehood Act and pursuant to subsection (i) of this section." The critical point to note is that, in the context of subsection (g), tentative approval occurred after the confirmation of title. Yet, subsection (i) clearly required adjudication of adverse claims, notwithstanding this confirmation. Thus, reliance on the phrase "prior to the issuance of tentative approval" in subsection (i) to support the Thorson holding that the confirmation of title by subsection (c)(1) removed the authority of the Department to adjudicate conflicting claims to land is singularly misplaced. ^{4/}

But, not only is the interpretation which Thorson accords to subsection 1635(c)(1) demonstrably inconsistent with numerous other provisions of ANILCA, it ends up positing a legislative structure that borders on the absurd. Thus, the Thorson decision envisages a legislative scheme in which Congress directs, under subsection 1634(a)(4), that Native allotment applications be adjudicated under the Native Allotment Act where they are in conflict with tentative approvals, but then prevents their adjudication by immediately conveying the land sought to the State. Similarly, under subsection 1328(a)(1) of ANILCA, 94 Stat. 2489, various entries under public lands laws were approved effective 180 days after the adoption of ANILCA. Subsection 1328(a)(3), however, provided that the legislative approval would not apply in certain circumstances and the application would be adjudicated pursuant to the Act under which it was initiated. Among those circumstances in which adjudication would be necessary was where, within one hundred and eighty days from the date of the adoption of ANILCA, the State of Alaska filed a protest with the Secretary respecting an entry which was made prior to, inter alia, a tentative approval. See ANILCA section 1328(a)(3)(D), 94 Stat. 2490. Thus, even though Congress has provided that the filing of

^{4/} I would also point out that subsection (h)(4), which permits the State to obtain patent to the subsection (g) lands on the basis of protracted surveys, provides, similar to subsection (c)(3), that the State shall received patent within 6 months of its election for those townships "having no adverse claims on the public land records," and "as soon as practicable" for townships having such adverse claims.

a protest based on the existence of a tentative approval would require adjudication of the public land entry, the effect of the Thorson decision is to preclude the Department from adjudicating the entry as Congress directed.

It is no answer to suggest that the effect of the Thorson procedure is not to nullify rights arising under such entries or applications but merely to compel such individuals to pursue their remedies in Federal court. Not only is there not a scintilla of evidence that this was the intent of Congress, 5/ it is a course of action which is totally inconsistent with the entire history of public land law adjudications in this country. Thus, the Department of the Interior has, with one notable exception, 6/ always endeavored to adjudicate conflicting claims to land prior to the issuance of patent for that land. Indeed, recognition of this Departmental responsibility has animated numerous decisions of the United States Supreme Court. Thus, the Court observed in Cameron v. United States, 252 U.S. 450 (1920), a decision penned by Justice Van Devanter, a noted authority on public land law:

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.

Id. at 459-60. Far from attempting to fulfill this mandate, the decision in Thorson results in a complete abnegation of the Department's primary role in determining the validity of those claiming rights under public land and mineral statutes.

5/ Moreover, there is not a single hint in the legislative history of ANILCA that Congress desired to dramatically increase Federal court suits as a prerequisite to the resolution of Native land claims in Alaska. Indeed, the one consistent thread which does appear in congressional actions in this area, which is clearly manifested in section 905 of ANILCA, is the congressional desire to settle such questions as quickly as possible. It is difficult to conceive of a policy more likely to result in the opposite effect than that inferentially ascribed to Congress in the Thorson decision.

6/ The one exception is based in 30 U.S.C. §§ 29 and 30 (1988), which provide that adverse claims based on the right of possession of a mining claim arising in a patent proceeding will be determined by a court of competent jurisdiction. This exception, however, is quite narrow and applies only to adverse claims by mineral claimants. See, e.g., In re Pacific Coast Molybdenum, 68 IBLA 325, 328-30 (1982). Moreover, patent proceedings within the Department are suspended until the completion of the state court litigation.

Finally, to the extent that the decision in Thorson suggests that the Department will be able to fulfill its trust responsibilities by suing for a reconveyance of the lands within valid Native allotment applications, ^{7/} I believe the decision displays a fundamental misconception as to the nature of Federal suits seeking to reconvey title to the Government for the purpose of restoring the Department's authority to adjudicate conflicting claims to land. Thus, the Court in Germania Iron Co. v. United States, supra, noted that such action "is in effect a suit by the government to restore to a tribunal to which it has committed exclusive jurisdiction over certain matters that jurisdiction which through inadvertence and mistake it has been deprived of." Id. at 383 (emphasis supplied). To similar effect are other such decisions. See, e.g., Southern Pacific R. Co. v. United States, supra at 359; Sage v. United States, supra at 68. And, in the District Court's decision in Aguilar v. United States, supra, the court noted that "[i]f the defendant has mistakenly and wrongfully conveyed land to the State of Alaska to which plaintiffs have a superior claim, it is the responsibility of the defendant to recover that land." Id. at 847 (emphasis supplied).

The problem, however, is that if the Thorson decision is correct and Congress intended to pass title to such disputed lands to the State, there is no error or mistake involved. The actions of Congress, under the Thorson interpretation, might constitute a "taking" within the meaning of the Fifth Amendment for which compensation would be owed, and the individual claimants might still proceed to file suit seeking vindication of their own rights under theories of constructive trust, but it would be difficult for the United States to maintain a suit alleging, in effect, that Congress intended to pass title to the State but that it was a mistake for Congress to do so, particularly in light of Congress' recognized plenary authority over the public lands.

It would seem to me that the obvious answer to these myriad interpretative and substantive problems is that Congress never intended the confirmation of title to TA'd lands, which it expressly made subject to "valid existing rights," to deprive the Department of the authority to adjudicate just which rights those were. To the extent that Thorson holds to the contrary, I think its conclusions are clearly insupportable. It is my view, therefore, that the Department has not only the authority but the obligation to determine the existence and scope of "valid existing rights" within TA'd lands. Accordingly, I do not agree that either BLM or this Board lacks the jurisdiction to determine the issues pressed by appellant herein.

But, even though I conclude that the Department has the jurisdiction to entertain appellant's protest, I believe that a review of the substance of his protest requires that it be denied. Appellant, in effect, seeks to have the patent to the State impressed with an express reservation for an R.S. 2477 right-of-way. But, as this Board ruled in Leo Titus, Sr.,

^{7/} Those claiming valid existing rights based on the general public land statutes are clearly not included within this group and, thus, are left with literally no recourse but to sue on their own behalf.

89 IBLA 323, 92 I.D. 578 (1985), the Department has traditionally refused to adjudicate the existence of R.S. 2477 rights-of-way because the question whether or not such a right-of-way exists is determined by the law of the State in which the public land is located and the Department has historically considered State courts as the proper forum for ascertaining whether a road is a public highway within the meaning of R.S. 2477. Id. at 335-40, 92 I.D. at 586-88. Moreover, should it eventually be determined that such a right-of-way did exist, any disposal of the underlying fee would have been subject to the R.S. 2477 easement regardless of whether or not a reservation was expressed in the conveyance document, and, therefore, no party would suffer any substantive injury by the failure of a patent to expressly reserve the right-of-way. See, e.g., Leo Titus, Sr., *supra*; Alfred E. Koenig, A-30139 (Nov. 25, 1964). Thus, to the extent that appellant seeks to have BLM expressly reserve an easement for an R.S. 2477 right-of-way in the State patent, this request is properly denied.

For the foregoing reasons, I concur with the denial of the instant appeal.

James L. Burski
Administrative Judge

