

Editor's note: Appealed - dismissed, Civ.No. A79-283 (D.Alaska Mar. 4, 1980)

NEW ENGLAND FISH CO.

IBLA 79-114

Decided August 22, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting water pipeline, reservoir, and electric transmission line right-of-way application AA-6043.

Affirmed.

1. Applications: Generally – Federal Land Policy and Management Act of 1976:
Rights-of-way – Rights-of-Way: Generally – Rights-of-Way: Act of February 15, 1901 – Rights-of-Way: Act of March 4, 1911 – Rights-of-Way: Applications – Rights-of-Way: Federal Land Policy and Management Act of 1976

Pending applications for rights-of-way filed under the Acts of Feb. 15, 1901, and Mar. 4, 1911, shall be considered as applications under the Federal Land Policy and Management Act of 1976.

2. Appeals – Rules of Practice: Appeals: Statement of Reasons

Allegations on appeal will not be afforded favorable consideration where they are not stated with some particularity and supported by evidence.

3. Administrative Authority: Estoppel – Administrative Authority: Laches – Estoppel

A delay in adjudication of an application by the Department cannot create rights contrary to law.

4. Alaska: Alaska Native Claims Settlement Act – Alaska Native Claims Settlement Act: Interim Conveyance – Federal Land Policy and Management Act of 1976: Rights-of-way – Rights-of-way: Generally

The granting of a right-of-way under FLPMA and the superseded Acts of Feb. 15, 1901, and Mar. 4, 1911, is within the Secretary's discretion and neither the filing of the application nor the existence of improvements earns appellant a right to the right-of-way. No rights vest in the applicant until the grant is approved by the Secretary. An application for a right-of-way is properly rejected where the land is in an interim conveyance to a Native Corporation.

5. Alaska: Land Grants and Selections: Generally – Alaska Native Claims Settlement Act: Administrative Procedure: Interim Conveyance – Alaska Native Claims Settlement Act: Conveyances: Generally – Federal Land Policy and Management Act of 1976: Generally – Federal Land Policy and Management Act of 1976: Rights-of-way – Rights-of-way: Generally – Words and Phrases

"Public Lands." Land within an interim conveyance to a Native Corporation is no longer "public land" under the Federal Land Policy and Management Act nor subject to Bureau of Land Management jurisdiction to issue rights-of-way under that Act.

APPEARANCES: John A. Treptow, Esq., Adkinson, Conway, Young, Bell & Gagnon, Inc., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

New England Fish Company appeals from the September 28, 1978, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting its application for a right-of-way for an existing water pipeline, reservoir, spring, and electric transmission line.

The application was filed September 16, 1970, for lands located in secs. 19 and 20, T. 56 S., R. 73 W., Seward meridian, Alaska. At that time PLO No. 4582 (34 FR 1025 (1969)) had withdrawn the lands from all forms of appropriation and disposition under the public land laws. On December 18, 1971, the Alaska Native Claims Settlement Act (ANCSA) became law and withdrew the lands in question for Native selection. 43 U.S.C. § 1610 (1976). The lands were subsequently selected by the Natives of Sandy Point, Alaska, (Shumagin Corporation), and Interim Conveyance 121, including the surface estate of these lands, was issued to Shumagin Corporation on September 13, 1978. BLM held that because of this conveyance, it no longer has jurisdiction over the lands and must reject the right-of-way application.

Appellant asserts BLM failed to articulate the reasons for the decision clearly and precisely. It charges the BLM officer with acting arbitrarily and capriciously, abusing his discretion, and failing to act promptly on the application. It complains of not being permitted to submit proposed findings of fact, conclusions of law, exceptions to the decision and supporting reasons. Appellant argues that BLM should be equitably estopped and barred by laches from rejecting the application. It complains of a lack of adequate notice and an opportunity for a hearing. Finally, appellant urges that it has valid existing rights under ANCSA which prevent the Native selection from barring its claim.

[1] The right-of-way application was filed under the Act of February 15, 1901, 31 Stat. 790, and the Act of March 4, 1911, 36 Stat. 1253. These acts were repealed by sec. 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793. Rights-of-way on public lands are now covered by Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1976), which authorizes the Secretary of the Interior to grant rights-of-way for appellant's purposes. Section 510(a), 43 U.S.C. § 1770(a), states that any pending right-of-way application shall be considered an application under FLPMA. See Donald R. Clark, 39 IBLA 182 (1979); Full Circle, Inc., 35 IBLA 325, 85 I.D. 207 (1978); Stanley S. Leach, 35 IBLA 53 (1978).

[2] The determinative issue in this case is whether BLM properly rejected appellant's application on the ground it no longer had jurisdiction over the land because the surface interests are in an interim conveyance to the Native corporation. Appellant's appeal does not substantively address this issue; instead, it raises procedural and tangential matters in a vague and general way without specifically showing the errors allegedly committed by the BLM State Office. Generally, allegations on appeal will not be afforded favorable consideration where they are not stated with some particularity

and supported by evidence. Valley Mobile Communications Inc., 38 IBLA 359 (1978); United States v. Weigel, 26 IBLA 183 (1976). See 43 CFR 4.411, 4.412.

[3] Appellant's argument that BLM is barred by laches and should be equitably estopped from denying its application because 8 years elapsed between filing of the application and its rejection by BLM must be rejected. A delay in adjudication of an application by the Department cannot create rights contrary to law. 43 CFR 1810.3; Guy W. Franson, 30 IBLA 123 (1977); Continental Telephone of California, 34 IBLA 374 (1978). See also Roberts v. Morton, 549 F.2d 158 (10th Cir. 1977).

[4] The only substantive argument put forth by appellant is that under ANCSA it has a valid existing right in the lands selected by the Native Corporation. Sections 11(a) and 14(g) of ANCSA, 43 U.S.C. §§ 1610(a) and 1613(g) (1976), withdrew the lands in question and made conveyances of such lands, subject to valid existing rights. The land was withdrawn at the time appellant filed its application and it was notified of that fact. One year after its application was filed the Alaska Native Claims Settlement Act was passed and the land was further withdrawn by that Act. A copy of a decision dated July 31, 1978, is in the file wherein these and other lands were approved for interim conveyance or patent to the Shumagin Corporation. The decision noted that in accordance with 43 CFR 2650.7(d) notice of the decision is being published once in the Federal Register and once a week, for four consecutive weeks in the Anchorage Times. It advised that any party claiming a property interest in lands affected by the decision may appeal the decision to the Alaska Native Claims Appeal Board, giving its address. It also stated:

2. Any unknown parties, any parties unable to be located after reasonable efforts have been expended to locate, and any parties who failed or refused to sign the return receipt shall have until August 28, 1978 to file an appeal.
3. Any party known or unknown who may claim a property interest which is adversely affected by this decision shall be deemed to have waived those rights which were adversely affected unless an appeal is timely filed with the Alaska Native Claims Appeal Board.

Objections that appellant may have had because it was claiming some interest in the land because of improvements and prior use of the land should have been addressed to the Alaska Native Claims Appeal

Board following publication of the notice of the decision. Appellant's arguments that it was not allowed an opportunity to be heard is negated if it failed to follow this procedure.

Generally the jurisdiction to determine rights under ANCSA, including claims of property interests affected by the Act, is delegated to the Alaska Native Claims Appeals Board. 43 CFR 4.900-4.902. We can point out, however, that the granting of a right-of-way pursuant to the Acts under which appellant filed its application and under FLPMA, which has superseded those Acts, is within the Secretary's discretion and neither the filing of the application nor the existence of improvements earns the applicant a right to a right-of-way. Stanley S. Leach, 35 IBLA 53 (1978); Jack M. Vaughan, 25 IBLA 303 (1976). No rights vest in the applicant until the grant is approved by the Secretary. United States ex rel. Sierra Land and Water Co. v. Ickes, 84 F.2d 228, 231 (D.C. Cir. 1936), cert. denied, 299 U.S. 562; Continental Telephone of California, supra; Zeph S. Calder, 16 IBLA 27, 81 I.D. 339 (1974). See also Kenneth N. Bunch, 37 IBLA 346 (1978); Virgil V. Peterson, 37 IBLA 18 (1978). Furthermore, appellant had no rights when the application was filed and thereafter, because the land was withdrawn. Thus, it was proper to reject the application for the reason given.

[5] Furthermore, under section 103(3) of FLPMA, 90 Stat. 2746, 43 U.S.C. 1702 (1976), the term "public lands" is defined and specifically excludes "(2) lands held for the benefit of Indians, Aleuts, and Eskimos." Because the land is in the interim conveyance to the Native Corporation it is in the category of lands held for the benefit of Indians, Aleuts, and Eskimos, as well as otherwise having been transferred to a specific entity and out of the jurisdiction of this Department.

An interim conveyance to a Native corporation is a conveyance of title to unsurveyed lands, subject to the reservations in section 14(c) of ANCSA. Kodiak Island Borough, 3 ANCAB 65 (1978). It has been held that for purposes of determining if the Secretary retains jurisdiction to review easement interests reserved to the Federal Government, an interim conveyance and patent are documents of equal significance. State of Alaska, 2 ANCAB 1 (1977). When an interim conveyance is issued pursuant to ANCSA, the Department loses jurisdiction over the land and no longer has authority to convey any interests in the land. Jerry S. Roach, 2 ANCAB 277 (1977). Accordingly, the application was properly rejected.

Therefore, 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.

Joan B. Thompson
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

