

Editor's note: Reconsideration granted; decision vacated by order dated Dec. 13, 1982 -- See 65 IBLA 401A th C below; Reconsideration granted, decision affirmed in part, vacated in part by order dated March 11, 1983 -- See 65 IBLA 401D th F below; Overruled to the extent inconsistent with Rosander Mining Company, 84 IBLA 60 (Nov. 30, 1984)

BUMBLE BEE SEAFOODS, INC.

IBLA 82-117

Decided July 23, 1982

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting in part right-of-way application A-056938.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Act of February 15, 1901 -- Rights-of-Way: Applications -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Pending applications for rights-of-way filed under the Act of Feb. 15, 1901, 43 U.S.C. § 959 (1970), shall be considered as applications under the Federal Land Policy and Management Act of 1976.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Act of February 15, 1901 -- Rights-of-Way: Applications -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Approval of a right-of-way application filed under the Act of Feb. 15, 1901, is within the discretion of the Secretary of the Interior. Approval of such an application remains a discretionary matter under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1976). Neither an application for a right-of-way nor the building of reservoirs, pipelines, and ditches on public land and continued use without prior authorization earns an applicant a right to a right-of-way under these statutes.

3. Act of July 26, 1866 -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Prior to the repeal of the right-of-way provisions of the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1976), by sec. 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793, one who appropriated water pursuant to the 1866 Act could acquire a right-of-way for reservoirs, dams, pipelines, ditches, and canals crossing public land merely by constructing such improvements, no application to the Federal Government being necessary.

4. Act of July 26, 1866 -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Repeal of the right-of-way provisions of the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1976), by sec. 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793, did not affect rights-of-way previously acquired under the 1866 Act.

5. Act of July 26, 1866 -- Conveyances: Interim Conveyance -- Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents -- Patents of Public Lands: Amendments

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1976), the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. Where a company establishes that it acquired a right-of-way pursuant to the Act of July 26, 1866, prior to the repeal of the right-of-way provisions of that Act by the Federal Land Policy and Management Act of 1976, a subsequent interim conveyance to a Native corporation is subject to that right-of-way, and where the conveyance does not

reflect that fact, the Secretary may act to correct that error.

APPEARANCES: R. Eldridge Hicks, Esq., Anchorage, Alaska, for appellant;
Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior,
Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Bumble Bee Seafoods, Inc., has appealed that part of the decision of the Alaska State Office, Bureau of Land Management (BLM), dated October 5, 1981, rejecting the portion of its right-of-way application A-056938, for certain reservoirs, pipelines, and open channel ditches in secs. 14, 23, and the NW 1/4, E 1/2 SE 1/4 SE 1/4 of sec. 15, T. 17 S., R. 47 W., Seward meridian. BLM stated that it no longer had jurisdiction over that land because it had been conveyed to the Alaska Peninsula Corporation (Interim Conveyance 263), a Native corporation organized pursuant to the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977).

On April 11, 1962, appellant filed an application for a right-of-way across public land to its cannery complex. The right-of-way sought was to include reservoirs, pipelines, and ditches which had previously been constructed. Appellant asserts that the application was complete, and at no time did BLM request any further information. On July 28, 1966, in response to an inquiry from appellant, BLM stated in a letter that "[t]he right-of-way applied for has been field checked and it is anticipated that processing of the application will be complete within 90 days." Appellant states that it heard nothing further from BLM until the decision of October 5, 1981 -- more than 18 years after the application was filed.

On appeal appellant contends that BLM erred in concluding it no longer had jurisdiction to convey the right-of-way. The basis for this contention is appellant's belief that pursuant to its application it had a valid existing right and because the conveyance was subject to valid existing rights, the conveyance was subject to the right-of-way. Appellant also argues it had a vested right in accordance with 43 U.S.C. § 661 (1970) from the first date of continuous use in 1939. Furthermore, appellant asserts that BLM's letter dated July 28, 1966, constituted acceptance of its application and legally bound BLM to grant the application. In addition, appellant contends that BLM should be estopped from rejecting the application.

Counsel for BLM's short answer to appellant's arguments is that since the land has been conveyed, the Board has no jurisdiction to grant relief.

[1] Appellant filed its application pursuant to the Act of February 15, 1901, 43 U.S.C. § 959 (1970). 1/ This Act was repealed by section 706(a) of

1/ That section provided in pertinent part:

"The Secretary of the Interior is authorized * * * to permit the use of rights of way through the public lands * * * for canals, * * * pipes and pipelines, * * * or other water conduits, and for water plants, dams, and

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. Section 510(a), 43 U.S.C. § 1770(a) (1976), states that any pending right-of-way application shall be considered an application under FLPMA. See New England Fish Co., 42 IBLA 200, 202 (1979), and cases cited therein.

[2] Approval of a right-of-way application was within the discretion of the Secretary of the Interior under the Act of February 15, 1901, supra, and remains a wholly discretionary matter under FLPMA. Neither the filing of the application by appellant in 1962 nor the building of the reservoirs, pipeline, and ditches and continued use without prior authorization earned appellant any right to a right-of-way under these statutes. Nelbro Packing Co., 63 IBLA 176, 185 (1982), and cases cited therein. In New England Fish Co., supra, the appellant had filed, pursuant to 43 U.S.C. § 959 (1970), a water pipeline, reservoir and electric transmission right-of-way application in September 1970. The lands involved were among those subsequently selected by a Native corporation, and included in Interim Conveyance 121 issued to the corporation on September 13, 1978. BLM rejected the appellant's right-of-way application 15 days later. The Board held that BLM properly rejected the application stating:

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).

Id. at 204.

Appellant in this case, however, has raised a question which was not examined in New England Fish Co., supra. Appellant asserts under the facts in this case that it had a vested right to a right-of-way under the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1970). The undisputed facts as recited by appellant in its statement of reasons at pages 1-4 are:

fn. 1 (continued)

reservoirs used to promote irrigation or mining or quarrying, * * * or the supplying of water for domestic, public, or any other beneficial uses * * * provided * * * That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, and over any public land, reservations or park." (Emphasis in original.)

Columbia River Packing Company, Inc., predecessor in interest to the Appellant, Bumble Bee Seafoods, Inc., built and first operated the sockeye salmon processing cannery complex at South Naknek in 1939. Water has been appropriated for the processing operation from the same ditch and watershed system since that first year of operation. In the Fall of 1938, a dam was built near the cannery to create a reservoir from the flow through the drainage ditches. In the Spring of 1939, a smaller "wheelbarrow" dam was also constructed near the cannery. (Affidavits of Messrs. Hendrickson and Fahlstrom.)

In 1940, the natural ditch was not providing sufficient flow to sustain the canning operation. The cannery crew augmented the natural flow first by constructing a series of gates to tap the flow of small tundra ponds along the natural drainage, and then by installing a pumphouse at Pump Lake. See, Exhibit II. A few years later, during World War II, the Appellant's predecessor built a five-inch wooden pipeline to feed another natural drainage to Pump Lake from still another, larger lake known as Big Lake, and situated approximately 2.5 miles south of the cannery complex. A Notice of Water Location was executed on June 25, 1945, posted at the pumphouse at Pump Lake, and filed as a document of record in the Kvichak Recording District. (Affidavits of Messrs. Hendrickson and Fahlstrom.)

At this point in time, the system consisted of an appropriation of 5,000 gallons per minute to flow from Big Lake through the pipeline to Pump Lake, from Pump Lake alternatively through a short section of pipeline to the natural watershed, or through a gate (when the water at Pump Lake was higher) to the natural watershed, then along the natural ditches through the series of small tundra ponds discussed above, to the dammed reservoir near the cannery.

Hence, during the first six years of cannery operation, the flow in the natural ditches to the dam was expanded and developed to include gates along the right of way ditches, pumps at Pump Lake and Big Lake, a pipeline from Big Lake to Pump Lake, and another pipeline from Pump Lake to the natural drainage ditch. An employee known as "the water commissioner" was hired to ensure that the natural draw and drainage ditches to Pump Lake were kept clear of debris, and that the pumping and gating was maintained properly to ensure a continuous flow. (Affidavits of Messrs. Hendrickson and Fahlstrom.)

In 1959, the Appellant determined that Diamond "O" Creek provided a closer, simpler, more efficient source of water than Big Lake provided. The pump and wooden pipeline at Big Lake were removed and replaced at Diamond "O" Creek, to pump water from that source over the hill into Ace-in-the-Hole Lake, where the gravity flow continued to the cannery reservoir along the same natural draw and drainage ditches. See, Exhibit III. (Affidavits of Messrs. Leonardo, Hendrickson and Fahlstrom.) Thus, by

1960, the distant Big Lake was abandoned in favor of a branch flowing in from Diamond "O" Creek, while Pump Lake continued to augment the flow both in the natural overflow ditches through the chain of tundra ponds, and in a trenched overflow ditch to Diamond "O" Creek.

A Notice of Appropriation of Water was executed on October 10, 1961, posted at the pumphouse at Diamond "O" Creek, and filed as a document of record in the Kvichak Recording District; and a second Notice of Appropriation of Water executed the same day was posted at the pumphouse at Pump Lake (the intermediate lake which now became the highest source of water) and similarly was filed as a document of record in the Kvichak Recording District. (Affidavit of Mr. Hendrickson, with Exhibits.)

This system in 1961 consisted of two cubic feet-per-second flowing from each of two sources along the original 1939 natural drainage system (improved as discussed above) to the reservoir and to the cannery. Each year in the Spring, the ditches have been cleared, the gates set in place, and the pumps started, to build the flow to processing capacity for the year's canning operation. (Affidavits of Messrs. Hendrickson, Leonardo and Fahlstrom.) [Footnotes omitted.]

[3] Thus, we must consider whether appellant established a vested right under the Act of July 26, 1866, supra. That Act read, prior to FLPMA:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section. R.S. §§ 2339, 2340. [Emphasis added.]

Section 706(a) of FLPMA, 90 Stat. 2793, amended 43 U.S.C. § 661 (1970) by deleting those clauses underlined above. Therefore, FLPMA repealed only those portions of the section which granted rights-of-way for construction of ditches and canals for "mining, agricultural, manufacturing or other purposes" where water rights had vested and were duly recognized and which provided that all patents and entries "shall be subject to" such rights to ditches and

reservoirs used in connection with such water rights. The water rights provisions were preserved.

Historically, the reference to "ditches and canals" in the Act of July 26, 1866, as amended, was interpreted broadly so that a right-of-way could be acquired for reservoirs, dams, flumes, pipes, and tunnels pursuant to the Act. Peck v. Howard, 167 P.2d 753, 761 (Cal. App. 1946), citing Utah Light & Traction Co. v. United States, 230 F.343, 345 (8th Cir. 1915). In addition, no application to the Federal Government was necessary; mere construction of the canal, pipeline, etc., constituted the right-of-way grant. Hansen v. Galiger, 208 P.2d 1049 (Mont. 1949); Clausen v. Salt River Valley Water Users' Association, 123 P.2d 172, 175 (Ariz. 1942). Therefore, a subsequent grant would be subject to the right-of-way. See Snyder v. Colorado Gold Dredging Co., 181 F. 62, 70 (8th Cir. 1910); Cottonwood Ditch Co. v. Thom, 101 P. 825 (Mont. 1909).

In John V. Hyrup, 15 IBLA 412 (1974), the appellant sought a right-of-way pursuant to 43 U.S.C. § 661 (1970), having constructed a water pipeline across public land. The Board held that the appellant was not entitled to a right-of-way under that section. The Board's decision was based on a Solicitor's opinion. The Board stated:

Even if we assume, arguendo, that Hyrup did have a vested right under Colorado law to appropriate the waters from the spring, which right was protected by 43 U.S.C. § 661, this would not entitle him to a right-of-way over federal land. Utah Power and Light Company v. United States, 243 U.S. 389,410, 411 (1916). Water rights are distinct from rights-of-way over public land and are so treated by statute. The Acting Solicitor's opinion on Right-of-Way for Ditches and Canals, issued July 16, 1942 (58 I.D. 29), discussed at length the issue of whether the right-of-way clause in the Act was superseded by subsequent legislation. It was his opinion that the right-of-way clause in § 2339 of the Revised Statutes, now 43 U.S.C. § 661, has been entirely superseded by § 1 of the Act of May 11, 1898, 30 Stat. 404, 43 U.S.C. § 956 (1970). This Act was superseded by the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959 (1970). Therefore, appellant is not entitled to a right-of-way under 43 U.S.C. § 661 (1970).

Id. at 420.

The Board's decision was reversed by the U.S. District Court, District of Colorado, Hyrup v. Kleppe, No. 74-M-689 (Jan. 14, 1976), and the district court was affirmed by the Tenth Circuit Court of Appeals in an unpublished opinion, Hyrup v. Kleppe, Nos. 76-1452 and 76-1767 (Nov. 7, 1977). The circuit court stated at pages 5, 9:

The trial court held that the 1866 Act, 43 U.S.C. § 661, had not been repealed by implication contrary to the position taken by the agency. The BLM determinations on plaintiff's application had expressed the view that 43 U.S.C. § 959 (the 1901 Act) was the only operative provision relating to such a right of

way, and apparently denied the application for that reason. The trial court read both sections 661 and 959 together, finding that there was room for the application of both, thus holding that the right of way was acquired under the older Act, but under section 959 the Secretary could impose reasonable conditions on it.

* * * * *

We hold that the Act of 1866 was not superseded or repealed, as far as the problem before us is concerned, by the Act of 1901. Thus, the trial court's analysis of this matter was correct.

Therefore, the court ruled that the 1866 Act remained viable, and that one who had established a water right could acquire a right-of-way across public land under 43 U.S.C. § 661 (1970).

[4] The question that next arises is the impact of section 706(a) of FLPMA on a right-of-way acquired pursuant to 43 U.S.C. § 661 (1970). That section of FLPMA repealed the right-of-way provisions in 43 U.S.C. § 661.

Our analysis indicates that the repeal did not affect rights-of-way previously acquired under 43 U.S.C. § 661 (1970). The basis for this conclusion is twofold. First, section 701(a) of FLPMA, 90 Stat. 2786, provides as follows: "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." Clearly, since no consent or permission is required under 43 U.S.C. § 661 to initiate a right-of-way, one who had complied with 43 U.S.C. § 661 on or before October 21, 1976, had a "valid right-of-way or other land use right or authorization" within the meaning of section 701(a) of FLPMA.

Second, if the repeal of the right-of-way portion of 43 U.S.C. § 661 (1970) could be considered as applying to rights-of-way previously acquired under that section, then such an interpretation would have controlled the circuit court's decision in Hyrup. It did not. There is no question that the court was aware of the FLPMA repeal. The court was urged to give conclusive effect to the repeal in support of the position that the repeal demonstrated that 43 U.S.C. § 661 was then in effect. The court declined to do so, even though it recognized the doctrine, stating: "It is just as reasonable under the circumstances before us to view the express repeal as an effort to resolve the doubts as to the current state of the right-of-way statutes, and the decision seeking to apply them." Hyrup v. Kleppe, *supra* at 7-8. Thus, while not addressing specifically the question of the effect of the repeal on section 661 rights-of-way, the implication may be drawn that having discussed the repeal in another context, the court did not find that the repeal affected Hyrup's right-of-way.

[5] The undisputed facts in this case are that appellant's predecessor in interest commenced a cannery operation in 1939, which operation involved the appropriation of water for processing. In 1945 that company posted a "Notice of Water Location" and filed a copy of the same in the Kvichak recording District. Subsequently, two other "Notices of Appropriation" were

posted and recorded by appellant. Two former superintendents of appellant's South Naknek cannery whose years of employment with appellant and appellant's predecessor spanned the years 1939-1980 both stated that they had never seen "even the slightest evidence of use or occupancy by any person of the above-described chain of tundra ponds, or the 100-foot-wide right-of-way composed of pump houses, pipelines, and improved natural drainage ditches, with the sole exception of Alaska Packers Association, Inc., drawing water from Big Lake until the late 1950's" (Affidavits of Ralph Hendrickson and Warner Leonardo, attached to appellant's Statement of Reasons).

The appropriation of water in Alaska under 43 U.S.C. § 661 (1970), was explained by the Alaska Supreme Court in Paug-Vik, Inc. v. Wards Cove Packing Co., 633 P.2d 1015 (Alaska 1981):

The rights passed by § 661 are dependent on local law in effect at the time of the appropriation. The status of water law in the Territory of Alaska has been reviewed and summarized in Trelease, Alaska's New Water Use Act, 2 Land and Water Law Review 1, 6-10 (1967). Briefly, territorial law was in accord with "the universal law of the Pacific Coast states and territories," Miocene Ditch Co. v. Jacobson, 2 Alaska 567, 574, 146 F. 680 (1905), under which the first appropriator of water on public land acquired the right to the water to the extent of his actual use. Id.; see also Eglar v. Baker, 4 Alaska 142 (1910). The appropriator's water rights were vested at the time of the act of appropriation. There was no legal requirement to post or record notices of appropriation. Van Dyke v. Midnight Sun Mining & Ditch Co., 177 F. 85 (9th Cir. 1910); Kernan v. Andrus, 6 Alaska 54 (Alaska 1918). Further,

[t]o constitute a valid appropriation of water three elements must always exist: first, an intent to apply it to some beneficial use, existing at the time or contemplated in the future; second, a diversion from the natural channel by means of a ditch, canal, or other structure; and, third, an application of it, within a reasonable time, to some useful industry.

Hoogandorn v. Nelson Gulch Mining Co., 4 Alaska 216, 220 (1910) quoting Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896).

Id. at 1019-1020.

Thus, it appears that in accordance with Alaska law appellant established a water right pursuant to 43 U.S.C. § 661 (1970). Likewise, by construction of its reservoirs, pipeline, and ditches prior to revocation by FLPMA of the right-of-way provisions of section 661, appellant also acquired a right-of-way which preexisted Interim Conveyance 263, dated November 27, 1979.

The Solicitor argues that the Board has no jurisdiction to grant any relief because of the conveyance. Ordinarily this would be true; however, in

this case we disagree. The record discloses that appellant had the right-of-way at the time of the conveyance and that the conveyance should have been made subject to that right-of-way. The fact that the grant has been made does not foreclose correction of the error. Section 316 of FLPMA, 43 U.S.C. § 1746 (1976), provides the authority for making such corrections. Pursuant to that section, the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. Ben R. Williams, 57 IBLA 8, 12 (1981); George Val Snow, 46 IBLA 101, 104 (1980). See also Mantle Ranch Corp., 47 IBLA 17, 87 I.D. 143 (1980).

In this case the error has been clearly established. Appellant acquired a preexisting right-of-way pursuant to 43 U.S.C. § 661 (1970), prior to the repeal by FLPMA of the right-of-way provisions of that section. In addition, equitable considerations exist in this case. Appellant filed its application in 1962. No definitive action was taken until 1981 when BLM rejected the application. ^{2/} Copies of documents relating to Interim Conveyance 263 were placed in the case file for this case. Those documents indicate that they received wide distribution with copies served on numerous individuals and organizations. Neither appellant's name nor the name of counsel for appellant appear on any of those lists for distribution.

In Nelbro Packing Co., 5 AN CAB 174, 189-90 (1981), the Alaska Native Claims Appeal Board held, "Where conveyance of land to a Native corporation under ANCSA would effectively deny a pending application for a right-of-way across such land, the applicant is entitled to a decision expressly granting or denying the right-of-way and stating the reasons therefore." The Board continued at page 191:

[A]s a matter of elementary fair dealing between a Federal agency and citizens, a principle similar to that expressed in Ashbacker [Ashbacker Radio Corp. v. Federal Communications Comm.], 326 U.S. 327 (1945)] must be applied. BLM's discretion to grant or deny rights-of-way is not completely unbridled or quixotic, but must be exercised in a fair and reasonable manner. To deny an applicant the opportunity to know the reasons for an implied denial of his application, after action on the application has been delayed 17 years, borders on the arbitrary and capricious.

In this case, BLM's failure to notify appellant of the proposed conveyance and to take action on the pending application prior to the conveyance worked a hardship on appellant. Had it known of the action, appellant might have convinced BLM of the legitimacy of its claim.

^{2/} Despite appellant's claim that the 1966 letter from BLM constituted acceptance of its application, that letter was merely a status report, and although it may have implied that approval was imminent, it was not a decision approving or denying the application. In addition, we note that delay in adjudication of an application by the Department cannot create rights contrary to law. Simon A. Rife, 56 IBLA 378, 381 (1981); New England Fish Co., *supra* at 203; Roberta Thompson, 38 IBLA 333 (1978).

For the above-stated reasons, all else being regular, Interim Coonveyance 263 should be corrected to indicate that it is subject to appellant's right-of-way acquired pursuant to 43 U.S.C. § 661 (1970). BLM, however, may impose reasonable conditions on the right-of-way.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is reversed and the case remanded for action consistent with this decision.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

Second, the Board held incorrectly that 43 U.S.C. § 661 was not impliedly repealed by 43 U.S.C. § 959. The Board relied on the Tenth Circuit's unpublished opinion Hyrup v. Kleppe, Nos. 76-1452 and 76-1767 (November 7, 1977). The controlling law in Alaska is to the contrary. Nelbro Packing Co. v. United States, No. A80-188 Civil, Memorandum and order, January 16, 1981 (copy attached),

(Motion for Reconsideration at 1).

Since the basis for our holding that the interim conveyance should be amended was our conclusion that Bumble Bee had a vested right to a right-of-way, we will address the second ground first.

Regarding the second ground the regional Solicitor stated:

The Tenth Circuit decision in Hyrup v. Kleppe, *supra*, is not binding on the Department, except in that Circuit. In a case involving the same legal issue in Alaska, the Department urged the contrary view at the District Court level and was successful. Nelbro v. United States, *supra*. That case is now on appeal to the Ninth Circuit. If the circuit court affirms, the issue may go up to the Supreme Court where Hyrup v. Kleppe would hopefully be reversed. The Government's position at oral argument in Nelbro would be seriously undermined if the Board, as a delegate of the Secretary, follows the Ninth Circuit decision in a case arising in Alaska. This office was remiss in not calling the Nelbro decision to the Board's attention during the initial briefing,

(Motion for Reconsideration at 3).

We have examined the Nelbro memorandum and order. U.S. District Court Judge von der Hydt stated therein:

The court finds it must consider the larger issue of whether 43 U.S.C. § 959 impliedly repealed the right-of-way provisions of 43 U.S.C. S 661. * * * The Court's own examination of the issue leads it to conclude that such an implied repeal did in fact take place and that as a result, plaintiff's claim of a right-of-way under S 661 must be dismissed * * *.

Id. at 1-2. There is no indication that the U.S. district court was aware of the Hyrup decisions.

We are persuaded that the proper action in this case, based upon the memorandum and order in Nelbro, is to vacate our earlier decision. The Nelbro decision represents the prevailing law in Alaska concerning the status of a right-of-way under 43 U.S.C. § 661 (1970). Because Bumble Bee had no vested right to a right-of-way under that statute, and BLM has conveyed the land in question, the Department has no jurisdiction over that land. While we cannot condone the actions of BLM in conveying the land without notice to

Bumble Bee, which had a 43 U.S.C. § 959 right-of-way application pending at the time of the conveyance, we must affirm the BLM decision rejecting that application.

We need not address the other ground stated by the Regional Solicitor since our direction to correct the interim conveyance was based entirely on our conclusion that Bumble Bee had a vested right to a right-of-way pursuant to 43 U.S.C. § 661 (1970)*

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in Bumble Bee Seafood, Inc. is vacated, and the decision of the Bureau of Land Management is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative judge

Douglas E. Henriques
Administrative Judge

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March 11, 1983

IBLA 82-117 : A-056938
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BUMBLE BEE SEAFOOD, INC. : Right-of-Way
65 IBLA 391 :
:
: Petitions for Reconsideration
:
:
: Granted; Order of December 13,
: 1982, vacated; 65 IBLA 391
: affirmed in part, vacated in
: part.

ORDER

In Bumble Bee Seafood, Inc., 65 IBLA 391 (1982), we reversed the Bureau of Land Management's (BLM) rejection of a portion of Bumble Bee Seafood, Inc.'s (Bumble Bee) right-of-way application A-056938, for certain reservoirs, pipelines, and open channel ditches in secs. 14, 23, and the NW 1/4, E 1/2 SE 1/4 of sec. 15, T. 17 S., R. 47 W., Seward meridian. BLM had stated that it no longer had jurisdiction over that land because it had been conveyed to the Alaska Peninsula Corporation (Interim Conveyance 263), a Native corporation organized pursuant to the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977).

Our decision in Bumble Bee was based on our consideration of Bumble Bee's argument that it had a vested right to a right-of-way under the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1970) (repealed in part 1976). We concluded, based on an unpublished decision of the Tenth Circuit Court of Appeals, Hyrup v. Kleppe, Nos. 76-1452 and 76-1767 (Nov. 7, 1977), which affirmed a United States District Court, District of Colorado, decision, Hyrup v. Kleppe, 406 F. Supp. 214 (D. Colo. 1976), reversing a decision of this Board, John V. Hyrup, 15 IBLA 412 (1974), that Bumble Bee did, in fact, have a vested right-of-way under 43 U.S.C. § 661 (1970). We remanded the case for correction of Interim Conveyance 263 to indicate that it was subject to appellants right-of-way.

Subsequently, the Regional Solicitor, Alaska Region, on behalf of BLM, petitioned for reconsideration of our decision. one ground urged for reconsideration was that the Board incorrectly held that 43 U.S.C. § 661 (1970) was not impliedly repealed by the Act of February 15,, 1901, 43 U.S.C. § 959 (1970). The Regional Solicitor asserted that although the Board had relied on the Hyrup decision, the controlling law in Alaska was that set forth in Nelbro Packing Co. v. United States, No. ABO-188 Civil, Memorandum and Order, January 16, 1981. Bumble Bee filed no response to the petition.

Based on the representation made by the Regional Solicitor and our reading of Nelbro, on December 13, 1982, we issued an order vacating our earlier

decision. Subsequent to the issuance of our order, but on the same day, we received a supplemental brief from the Regional Solicitor stating:

On January 30, 1981, the Ninth Circuit Court of Appeals adopted the reasoning of the Hyrup decision in Grindstone Butte Project v. Kleppe, 638 F.2d 100 (1981). This casts considerable doubt on the District Court decision in Nelbro, *supra*. BLM therefore withdraws its contention that Nelbro is the controlling case in this District, and that Section 959 impliedly repealed Section 661.

On January 24, 1983, Bumble Bee filed a petition requesting that the Board reconsider its December 13, 1982, order based on the representations made by the Regional Solicitor in his supplemental brief. On January 25, 1983, the Regional Solicitor also sought further reconsideration of our decision and order in light of his original petition and supplemental brief.

Bumble Bee's petition for reconsideration is granted. Our December 13, 1982, order is vacated. The Board's decision in Bumble Bee Seafood, Inc., is reaffirmed to the extent we determined that Bumble Bee had a vested right to a right-of-way under 43 U.S.C. § 661 (1970).

Since Bumble Bee has a vested right-of-way, we must address the other ground asserted by the Regional Solicitor in this original petition for reconsideration. That is that "the Board incorrectly applied 43 U.S.C. § 1746 (FLPMA) [Federal Land Policy and Management Act of 1976] in holding that the interim conveyance may be administratively 'corrected' to reflect a pre-existing valid right-of-way."

In Bumble Bee Seafood, Inc., 65 IBLA at 400, we stated:

The record discloses that appellant had the right-of-way at the time of the conveyance and that the conveyance should have been made subject to that right-of-way. The fact that the grant has been made does not foreclose correction of the error. Section 316 of FLPMA, 43 U.S.C. § 1746 (1976), provides the authority for making such corrections. Pursuant to that section, the Secretary of the Interior has discretionary authority to correct an error in a conveyance document when the error is clearly established and equitable considerations dictate that relief be granted. Ben R. Williams, 57 IBLA 8, 12 (1981); George Val Snow, 46 IBLA 101, 104 (1980). See also Mantle Ranch Corp., 47 IBLA 17, 87 I.D. 143 (1980).

We ordered that BLM correct the conveyance to show Bumble Bee's right-of-way.

The Regional Solicitor asserts that a patent may not be administratively corrected against the wishes of the patentee. He directs our attention to proposed Departmental regulations implementing section 316 of FLPMA, 43 U.S.C. 1746 (1976). ^{1/} Those regulations state that the purpose of section 316 is

^{1/} The proposed regulations were published at 47 FR 19062 (May 3, 1982). As of the date of this order, these regulations have not been finalized.

to allow the Secretary principally to correct errors in legal descriptions in patents. The regulations provide that application may be made for such a correction, Proposed 43 CFR 1865.1-3(c), however, requires that the applicant surrender the original patent. Thus, the regulations do not contemplate applications being made by a stranger to the patent.

The proposed regulations, 43 CFR 1865.3, do provide that the authorized officer may on his or her own motion correct a conveyancing document where all existing or prospective owners agree to the correction. The Regional Solicitor represents that the patentee, Alaska Peninsula Corporation, "very much opposes the 'correction.'" The Regional Solicitor argues that if Bumble Bee did have a vested right, it would take a court action to establish that right.

The Regional Solicitor's argument concerning our interpretation of 43 U.S.C. § 1746 (1976) is well taken. To the extent that our Bumble Bee decision directed that Interim Conveyance 263 be administratively corrected, it is vacated. However, since BLM failed to take action and finally consider Bumble Bee's application prior to conveying the land in question, Bumble Bee's vested rights were adversely affected.

The Department does not ordinarily recommend that the Attorney General start suit to cancel a patent unless (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issuance of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. Dorothy H. Marsh, 9 IBLA 113 (1973). Herein, there are significant equitable considerations, Therefore, under the circumstances of this case it is proper for this Board to recombined to the Solicitor that this case be referred to the Attorney General for initiation of a suit seeking cancellation of the Interim Conveyance to the extent that that conveyance includes lands to which Bumble Bee held a vested right. 2/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted, the Board's December 13, 1982, order is vacated,, and our decision in Bumble Bee Seafood, Inc., 65 IBLA 391 (1982), is reaffirmed in part and vacated in part.

Bruce R. Harris
Administrative Judge

We concur:

C. Rental Grant, Jr.
Administrative Judge

Douglas Henriques
Administive Judge

2/ Negotiated settlement of Bumble Bee's rights negate the necessity for such a suit.

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