

Editor's note: Reconsideration granted; decision affirmed in part, hearing ordered -- See Doyon, Limited (On Reconsideration), 77 IBLA 219 (Nov. 28, 1983)

DOYON LIMITED

IBLA 82-1121, 82-1122

82-1123, 82-1124

RLS 79-7, 79-8, 79-9, 79-10

Decided January 28, 1983

Appeal from decisions of Alaska State Office, Bureau of Land Management, to convey certain selected lands under the provisions of section 12(c) of the Alaska Native Claims Settlement Act. AA 8103-1, AA 8103-2, AA 8103-3, AA 8103-4.

Affirmed in part; set aside and remanded for hearing in part.

1. Alaska National Interest Lands Conservation Act -- Alaska Native Claims Settlement Act: Administrative Procedures: Generally -- Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights -- Alaska Native claims Settlement Act: Navigable Waters Although sec. 901 of the Alaska National Interest Lands Conservation Act provides that the Bureau of Land Management is the only agency in the Department of the Interior with authority to determine navigability of waters covering a parcel of submerged land selected by a Native corporation, and such determination is final unless it is validly challenged, on appeal, prior to Dec. 2, 1980, where an appeal was filed in 1979 challenging the determination of navigability of certain waters, the matter will be referred to the Hearings Division for a hearing before an Administrative Law Judge on the question of the navigability of the waters in question.

2. Alaska Native Claims Settlement Act: Administrative Procedure:
Generally -- Alaska Native Claims Settlement Act: Conveyances:
Valid Existing Rights -- Mining Claims: Determination of Validity

Pursuant to the Departmental Manual, 601 DM 2, requirements in Secretary's Order No. 3029, as to adjudication of Federally-created interests, do not apply to unpatented mining claims and the Bureau of Land Management is not required to adjudicate mining claims before conveyance. Pursuant to the Alaska Native Claims Settlement Act and Secretary's Order No. 3029, as amended, lands selected by a Native corporation must be conveyed by the Bureau of Land Management notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws.

3. Alaska Native Claims Settlement Act: Easements: Decision to Reserve

Where easements have been recommended by the Joint Federal-State Land Use Planning Commission for Alaska, their reservation in a Bureau of Land Management decision of intent to convey will generally be upheld.

APPEARANCES: Elizabeth S. Taylor, Esq., Fairbanks, Alaska, for appellant; Robert Charles Babson, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Shelley J. Higgins, Esq., Assistant Attorney General for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On May 3, 1979, the Alaska State Office, Bureau of Land Management (BLM) published decisions designating lands set out in applications by Doyon Limited (Doyon), as proper for selection under the provisions of section 12(c) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601, 1611(c) (1976), which lands had been withdrawn under 43 U.S.C. § 1610(a) (1976), and approved the lands for interim conveyance to the Native villages of Nikolai, AA 8103-2; McGrath, AA 8103-3; Telida, AA 8103-1. 44 FR 25937 through 25940, 25944 through 25948. On May 14, 1979, BLM published decisions designating lands set out in the application of Doyon for land withdrawn for the Native village of Takotna, AA 8103-4, as proper for selection and approved the interim conveyance. The published decisions set forth the waters considered by BLM to be navigable, and not included in the chargeable acreage of the selections, and the public easements to be reserved in the conveyances.

Doyon appealed all the decisions to the Alaska Native Claims Appeal Board (ANCAB) ^{1/} which assigned docket numbers, as follows:

ANCAB RLS 79-7, AA 8103-1 Telida

ANCAB RLS 79-8, AA 8103-2 Nikolai

ANCAB RLS 79-9, AA 8103-3 McGrath

ANCAB RLS 79-10, AA 8103-4 Takotna

ANCAB consolidated the issues of navigability in appeals RLS 79-7, RLS 79-8, and RLS 79-9 into ANCAB RLS 79-9 Consolidated. ANCAB also consolidated the issues of easements in appeals RLS 79-8 and 79-10, and the issues of unpatented mining claims in all four appeals into ANCAB RLS 79-10 Consolidated.

Doyon moved ANCAB for an order requiring joinder of the State of Alaska as a necessary party for determination of issues of navigability of certain water bodies situate in the lands described in the decisions of BLM. It is not apparent from the record that ANCAB acted upon this motion.

ANCAB has held that where BLM has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which BLM made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable. Doyon Limited, MTNT Ltd., 6 ANCAB 270, 89 I.D. 1 (1982); Doyon Limited, 6 ANCAB 138 (1981); Northway Natives, Inc., 6 ANCAB 1, 88 I.D. 711 (1981); Doyon Limited, 5 ANCAB 354 (1980); Appeal of Nunapitchuk Ltd., 5 ANCAB 139 (1980); Appeal of Bristol Bay Native Corp., 4 ANCAB 355, 87 I.D. 341 (1980).

In these cases, the State of Alaska has asserted that there are more navigable water bodies in the selected areas than the Kuskokwim River, the North Fork Kuskokwim River, and the Swift Fork Kuskokwim River from its mouth to the village of Telida. Such areas were excluded from Doyon's applications.

Section 901(b) of Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1631(b) (Supp. IV 1981), provides that BLM is the only agency of the Department of the Interior to have authority to determine navigability of water covering a parcel of submerged land selected by a Native corporation or Native group pursuant to ANCSA. Unless the BLM determination that the water is not navigable was validly challenged on appeal prior to December 2, 1980 (date of enactment of ANILCA), the BLM determination is final.

^{1/} ANCAB was abolished by Secretarial Order No. 5078, dated Apr. 29, 1982, effective June 30, 1982. The order transferred all responsibilities delegated to ANCAB to the Interior Board of Land Appeals (IBLA). An interim rule was published June 8, 1982, enlarging IBLA's scope of authority to include appeals from decisions relating to land selections arising under ANCSA. 43 CFR 4.1(b)(3)(i), 47 FR 26340 (June 18, 1982).

Thus, in these cases there is a dispute over the navigability of certain water bodies, such that resolution of the dispute seems to require a hearing to the factual situation. See Appeal of Doyon, Limited, 4 ANCAB 50, 86 I.D. 692 (1979). Accordingly, inasmuch as an appeal as to the navigability was validly filed prior to December 2, 1980, the question of navigability of the water bodies within the selected lands withdrawn for the Native villages of Telida, Nikolai, McGrath, and Takotna will be referred to the Hearings Division for assignment of an Administrative Law Judge to receive testimony and evidence concerning the navigability of the water bodies set out in the State of Alaska Notice of Ownership of Submerged Lands, which Doyon followed in the preparation of its selection applications.

Doyon asserts that BLM should identify and determine the validity of all unpatented mining claims in the selected lands. This issue was considered by ANCAB in Oregon Portland Cement Co., 6 ANCAB 65, 88 I.D. 760 (1981). There the Board held that pursuant to the Departmental Manual, 601 DM 2, and Secretary's Order No. 3029 (November 20, 1979), BLM is not required to adjudicate mining claims before conveyance of land to a Native corporation. Pursuant to ANCSA and Secretary's Order No. 3029, as amended, lands selected by a Native corporation must be conveyed by BLM notwithstanding the existence of unpatented mining claims within such lands which have not been adjudicated for validity under the general mining laws. We adhere to that position. Doyon's request for adjudication of the unpatented mining claims is denied.

Doyon argues that reservation of the following public easements was contrary to law and regulations, as well as being arbitrary, capricious and an abuse of discretion:

EIN 4, C3, D1, D9 (Takotna)

EIN 1, C5, M, L (Nikolai)

EIN 7, C3, (Nikolai)

EIN 8 L (Nikolai)

EIN 12, C3, D1, D9 (Nikolai)

EIN 13, C3, D1 (Nikolai)

EIN 28, C5 (Nikolai)

Doyon states that EIN 4, C3, D1, D9 (Olpin Road easement), and EIN 13, C3, D1 (Nixon Fork mine easement) were included by the State Director to provide access to public land beyond the Doyon selections. Doyon agrees that both easements cover "existing roads" of the State of Alaska and reservations of the easements are not needed, being blatantly unnecessary and redundant, as well as a violation of ANCSA and regulation 43 CFR 2650.4-7, as they are not reasonably necessary to guarantee access to public lands. BLM had reserved the public easements over the existing roads to make the Native corporation fully aware of the public right of travel along the route as well as to notify the public of the existence of the road as a public highway. Although

BLM imposed the reservations in response to advice from the Regional Solicitor that a section 17(b) easement must be placed over an existing state road, Doyon contends such section 17(b) easement is patently unnecessary as the public easements already exist. Imposition of the easements is duplicative of the existing roads and so is contrary to 43 CFR 2650.4-7(b)(ii). In our opinion, "duplicative," as used in the regulation, means two separate easements, either one of which would suffice to provide passage from one point to another, not an easement over an existing road. We do not find, therefore, that either the Ophir Road easement, EIN 4, C3, D1, D9 (Takotna), or the Nixon Fork mine easement, EIN 13, C3, D1 (Nikolai) is duplicative of any other easement reserved in the conveyance to Doyon.

Doyon requested that easement EIN 1, C5, M, L (Nikolai) be modified by inclusion of this language: "The season of use will be limited to winter use." BLM raised no objection to this request. Accordingly, Doyon's request may be granted and the additional language imposed upon the easement.

Doyon objects to EIN 7, C3; EIN 8, L; EIN 12, C3, D1, D9; and EIN 28 C5 (all Nikolai). The records show that the Joint Federal-State Land Use Planning Commission for Alaska (LUPC), strongly favored the reservation of all four easements. Doyon argues that there are reasonable alternative routes across public lands for which easements 7, 8, and 12 are being reserved, so that their reservation by BLM is violative of the regulations. Doyon also asserts that easements 8 and 28 are duplicative. It has requested a hearing so that it may present factual evidence in support of its position in this matter. In light of the recommendation by LUPC, the decision of BLM to reserve easements 7, 8, 12, and 28 is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the cases involving navigability will be referred to the Hearings Division for assignment of an Administrative Law Judge to hear testimony and receive evidence relating to the question of navigability of waters lying over submerged lands within the area selected by Doyon; the adjudication of unpatented mining claims is not necessary before conveyance of the lands to Doyon, so the appeals are dismissed to that extent; and the BLM decisions reserving the indicated public easements are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

