

UNITED STATES
FISH & WILDLIFE SERVICE

IBLA 83-128, 83-129

Decided April 25, 1983

Appeal from decisions of the Alaska State Office, Bureau of Land Management, reserving certain easements under the Alaska Native Claims Settlement Act. F-19155-2 and F-14837-A.

Affirmed in part, reserved in part.

1. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Review--Administrative Procedure: Substantial Evidence--Appeals: Generally--Evidence: Preponderance--Officers and Employees--Rules of Practice: Appeals--Supervisory Authority of the Secretary--Secretary of the Interior

In the Department's appellate process involving review of decisions made by subordinate officers and employees, the Secretary, or an appeals board with authority to act as fully and finally as might the Secretary, is not so limited in the scope of review and decisionmaking as to be required to affirm such decisions as are supported merely by "substantial evidence" or which are perceived not to be arbitrary or capricious, unless such a limitation on the scope of appellate review has been imposed by the Secretary himself in a duly promulgated regulation or he has been so constrained by enacted law. Otherwise, the Secretary, as chief executive officer of the Department with full supervisory powers, has plenary authority to review de novo all official actions and to decide appeals on the basis of a preponderance of the evidence in cases involving substantive rights, or on

the basis of public policy or public interest in cases involving the exercise of discretion.

2. Alaska Native Claims Settlement Act: Easements--Review

When a party appeals a BLM easement determination made pursuant to ANSCA, the burden of proof is upon the party challenging the determination to show that the decision is erroneous. While a decision to reserve an easement will ordinarily be affirmed where it is supported by a rational basis, a decision which lacks a rational basis and is unsupported by the record of the determination process will be reversed.

OVERRULED: Northway Natives, Inc., 69 IBLA 219 (1982), is overruled to the extent it is inconsistent herewith.

APPEARANCES: Mitchell Sheldon, Refuge Manager, Yukon Flats National Wildlife Refuge, U.S. Fish & Wildlife Service.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The U.S. Fish & Wildlife Service, Yukon Wildlife Refuge, appeals decisions of the Alaska State Office, Bureau of Land Management (BLM), dated September 15, 1982 (F-19155-2) and September 23, 1982 (F-14837-A), reserving to the United States certain easements across lands selected pursuant to section 12 of the Alaska Native Claims Settlement Act (ANSCA), as amended, 43 U.S.C. §§ 1601, 1611 (1976), by Beaver Kwit'chin Corporation (Village Selection) and Doyon, Limited (Regional Selection). ^{1/} These easements were reserved by BLM under the authority of section 17(b) of ANSCA, 43 U.S.C. § 1616(b) (1976). Appellant specifically appeals "winter only" restrictions applied to easements EIN-15-D9 and EIN-25-E.

In its statement of reasons, appellant argues that the limitation of use to the winter season only does not provide reasonable public access across the corporation lands contrary to law and would hinder its responsibility to manage public lands. It claims that while all other easements within the Yukon Flats area encompass comparable terrain as the subject easements, none of them have similar winter only use stipulations. Consistency in restrictions imposed on the easements has been requested.

[1] Section 17(b) of ANSCA, 43 U.S.C. § 1616(b) (1976), directs the Secretary of the Interior, after consultation, to "reserve such public easements as he determines are necessary." The Secretary, however, must adhere

^{1/} Beaver Kwit'chin appealed the decision dated Sept. 23, 1982, pertaining to lands selected by the Native corporation, F-14837-A. The appeal was subsequently withdrawn.

to specific selection criteria set forth in section 17(b)(1) of the Act. Alaska Public Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977). Only public easements which are reasonably necessary to guarantee access to publicly owned lands shall be reserved. 43 CFR 2650.4-7(a)(1). The primary standard for determining which public easements are reasonably necessary for access is "present existing use." However, a public easement may be reserved if there is no reasonable alternative route or if it provides access to an isolated tract or area of publicly owned land. 43 CFR 2650.4-7(a)(3).

The burden of proof upon a party challenging a BLM easement determination made pursuant to ANCSA is to show that the determination is erroneous. However, our research of previous cases presenting similar issues has led to the conclusion that at least two prior Departmental expressions have misstated the rules regarding the scope of agency review and the basis of administrative appellate decisions. In an unpublished interlocutory order in Appeal of Goldbelt, Inc., AN CAB G 80-1 (1981), the Alaska Native Claims Appeals Board said that a decision to reserve easements "must be affirmed unless the appellant shows by substantial evidence that such decision was arbitrary and capricious." (Emphasis added.) This language was cited and quoted with approval in Northway Natives, Inc., 69 IBLA 219, 226 (1982), and discussed at note 2 thereof, where it is declared,

[T]hus, it is fair to say that as long as the easement decision is supported by a rational basis and is consistent with the selection criteria of section 17(b)(1) of ANCSA, it should not be nullified by a reviewing board even though from the facts presented the Board might reach a different result. [Emphasis added.]

These statements are incorrect. The Secretary, or an appeals board with authority to act as fully and finally as might the Secretary, is not so limited in the scope of appellate review and decisionmaking as to be required to affirm decisions by subordinate officers and employees merely because they are supported by "substantial evidence" or are perceived not to be arbitrary and/or capricious, particularly where a preponderance of the evidence leads to a different result. The Secretary, as chief executive officer of the Department with full supervisory powers, has plenary authority to review de novo all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of public policy or public interest in cases involving the exercise of discretion. Act of March 3, 1849; 9 Stat. 395. 2/ The Secretary's

2/ The Supreme Court of the United States has repeatedly acknowledged and defined the supervisory and judicial roles of the Secretary, e.g.:

"Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and quasijudicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands." Plested v. Abbey, 228 U.S. 42, 52 (1913), accord, United States v. Fisher, 223 U.S. 683, 693 (1912); United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324 (1903).

inherent authority in this regard may not be diminished or constrained by those whose only authority derives from the delegated powers of the Secretary. Therefore, the scope of appellate review by or on behalf of the Secretary can be so limited only by the Secretary himself in a duly promulgated regulation, or by the Congress through enacted law. No such restraint on the scope of agency review has been imposed in cases such as this one. Therefore, the Board has a duty to consider and decide them "as fully * * * as might the Secretary." 43 CFR 4.1. To the extent that the opinions of the boards in Appeal of Goldbelt, Inc., *supra*, and Northway Natives, Inc., *supra*, declare otherwise, they are overruled.

Of course, where the Board perceives that the decision appealed from is in fact arbitrary and capricious it will not be affirmed. See, e.g., Margaret A. Ruggiero, 34 IBLA 171 (1978). Also, in certain classes of cases involving judgmental decisions by agency personnel who have special authority and/or qualifications to make such decisions, the Board may accord considerable weight or deference to such decisions if they are supported by substantial evidence, but they may be overcome, nevertheless, by a preponderance of countervailing evidence. See National Public Lands Task Force, 66 IBLA 340 (1982); James Muslow, Sr. (On Reconsideration), 65 IBLA 352 (1982); cf. Richard J. Leumont, 54 IBLA 242, 88 I.D. 490 (1981); Rosita Trujillo, 21 IBLA 289, 291 (1975).

[2] In Northway Natives, we noted a relevant portion of Solicitor's Opinion M-36880, 82 I.D. 325, 331 (1975):

fn. 2 (continued)

"[T]he Secretary of the Interior is the supervising agent of the government to do justice to all claimants and to preserve the rights of the people of the United States. * * * 'The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department * * * by direct orders or by review on appeals.'" Knight v. United States Land Assoc., 142 U.S. 161, 178 (1891). Accord, Cameron v. United States, 252 U.S. 450, 460 (1920); United States v. Fisher, 223 U.S. 683 (1912); Stoneroad v. Stoneroad, 158 U.S. 240, 249 (1895); Orchard v. Alexander, 157 U.S. 372, 381 (1895); McDaid v. Oklahoma Territory, 150 U.S. 209, 215 (1893); Hastings & Dakota R.R. Co. v. Whitney, 132 U.S. 357 (1889).

"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."

Cameron v. United States, 252 U.S. 450, 459 (1920).

In the exercise of his [the Secretary's] authority he must be reasonable and not capricious in his determination of what easements are necessary or not necessary. A determination that an easement is necessary or not necessary should be recorded and accompanied by a written record in support thereof in case the determination is challenged. (Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973).

Northway Natives, Inc., supra at 230.

EIN-15-D9 is shown in the record as an easement upon an existing access trail allowing for those uses permitted for a 25-foot wide trail easement. The record indicates that use of this trail prior to the Native selection and reservation of the easement was considered to be winter use. As noted, 43 CFR 2650.4-7(a)(3) denotes the primary standard for determination of easements as "present existing use." Appellant has not substantiated how the BLM decision limiting the future use of this easement to the presently-existing winter use is erroneous.

EIN-25-E was created to provide access to an isolated parcel of public lands. 43 CFR 2650.4-7(3). The reservation allows for those uses permitted for a 25-foot wide trail easement. However, the record fails to support BLM's decision in distinguishing this easement from others in the general vicinity which have not been similarly restricted. By contrast, Fish & Wildlife Service has asserted a public need in favor of reasonable year-long access to this isolated tract by this easement. We are unable to find any rational basis for BLM's determination to limit EIN-25-E to winter use only. The decision pertaining to this restriction appears to be arbitrary and capricious, and year-round use appears to be more in the public interest.

Based on our review of the record, as recited above, we would uphold the BLM winter-use limitation as it pertains to EIN-15-D9 but set it aside for EIN-25-E. The parties, however, by motion filed April 19, 1983, request we limit both easements to winter use except for year-around foot travel. The parties' agreement appears to be as sound a resolution of this appeal as we would have been able, given the incompleteness of the record, to achieve. Therefore, BLM's decisions of September 15 and 23, 1982, are modified to limit easements EIN-15-D9 and EIN-25-E to winter use only except that they may both be used year-around for foot travel.

Edward W. Stuebing
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

