

DOYON, LIMITED

IBLA 82-1128

ANCAB RLS 80-2

Decided July 6, 1983

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving conveyance of Native regional land selection. F-19155-16.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements: Access

A regional land selection conveyance must reserve access easements to any isolated tract of publicly owned land and public access easements may be terminated only after an opportunity for public hearing or comment. Therefore, it is not proper to provide in a conveyance for the automatic termination of such easements.

2. Alaska: Mining Claims -- Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances -- Alaska Native Claims Settlement Act: Conveyances: Village Conveyances

Where an application for a regional land selection does not exclude unpatented mining claims as provided in 43 CFR 2651.4(e), the Bureau of Land Management is not required to identify or to adjudicate unpatented mining claims on the lands to be conveyed if no contest has been filed by the applicant pursuant to 43 CFR 4.450 as provided in 43 CFR 2650.3-2(a).

3. Alaska: Mining Claims -- Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment

The Bureau of Land Management is not required to search state record offices for mining claims which have not been recorded with the Bureau of Land Management on behalf of an applicant for an Alaska regional conveyance. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), failure to record such a claim shall be deemed conclusively to constitute abandonment of the claim, and obviates the need for the Bureau of Land Management to search state records.

4. Administrative Procedure: Generally -- Alaska Native Claims Settlement Act: Administrative Procedure: Generally -- Appeals -- Rules of Practice: Appeals: Generally

The Board of Land Appeals will not consider a general protest against a regulation where appellant has not shown how the appealed decision applied or implemented the regulation.

APPEARANCES: James Q. Mery, Esq., Fairbanks, Alaska, for appellant; Robert Charles Babson, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Doyon, Limited (Doyon), appeals from the December 10, 1979, decision of the Alaska State Office, Bureau of Land Management (BLM), approving for

conveyance to appellant the surface and subsurface estates in the land selected by appellant in regional land selection F-19155-16, pursuant to section 14 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613 (1976). By partial decision dated February 24, 1982, the Alaska Native Claims Appeals Board (ANCAB) rejected appellant's argument that BLM erred in approving for conveyance to appellant submerged lands to which the State of Alaska claimed title, and affirmed the decision of BLM on that issue. Doyon, Limited, 6 ANCAB 364 (1982). ANCAB's decision provided, however, that the portion of the appeal relating to unpatented mining claims and to public easement EIN 1a, L would be resolved by future action. This decision resolves these remaining issues. 1/

Public easement EIN 1a, L is an easement for an existing access trail, 50 feet wide, from sec. 2, T. 10 S., R. 9 E., Kateel River meridian, to public lands in secs. 14 and 23, T. 9 S., R. 9 E., Kateel River meridian. Appellant contends that the easement provides access to lands that may be described as "public lands" only in the most technical sense, since secs. 14 and 23 are overselections and will be "public lands" only until they are conveyed either to the village or regional corporation. Appellant contends that although BLM rejected appellant's request to terminate the easement because the land is no longer used by the public, BLM did agree that when secs. 14 and 23 were conveyed, the easement would terminate. On appeal,

---

1/ ANCAB was abolished by Secretarial Order No. 3078 dated Apr. 29, 1982, effective June 30, 1982, which transferred all responsibilities delegated to ANCAB to the Interior Board of Land Appeals (IBLA). An interim rule published June 18, 1982, enlarged IBLA's scope of authority to include jurisdiction to make final Departmental decisions in appeals relating to land selections arising under ANCSA. 43 CFR 4.1(b)(3)(i), 47 FR 26392 (June 18, 1982).

Doyon requests that the easement be amended by adding the following sentence: "The easement shall terminate at such time as secs. 14 and 23 are conveyed out of the public domain" (Statement of Reasons at 14).

[1] When a party appeals a BLM easement determination made pursuant to ANCSA, the burden of proof is upon the party challenging the determination to show that the decision is erroneous. In its response to appellant's statement of reasons, BLM disagrees with appellant's characterization of the status of secs. 14 and 23, stating that "the most that can be said at this time is that the lands have been selected and may be conveyed at some future date." BLM opposes including language providing for the automatic termination of easements and conveyances to Native corporations, contending that it can create potential title search problems in the future, and that the easement regulations provide for a specific method of terminating easements. BLM points out that access easements must be reserved to any isolated tract of publicly owned Federal, State, or municipal lands. 43 CFR 2650.0-5(r). Thus, while lands may be conveyed out of the Federally owned public domain at some time in the future, some may still remain an isolated tract of publicly owned land within the meaning of the easement regulations. As there may be doubt when an automatic termination provision becomes effective, BLM contends that appellant's title to its lands would be more clearly ascertainable if BLM issues a document relinquishing the easement when the tract is, in fact, conveyed to an ANCSA corporation.

In support of its contention, BLM refers to Departmental regulation 43 CFR 2650.4-7(a)(13), which provides as follows:

(13) The Director shall terminate a public easement if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001, whichever occurs first. He may terminate an easement at any time if he finds that conditions are such that its retention is no longer needed for public use or governmental function. However, the Director shall not terminate an access easement to isolated tracts of publicly owned land solely because of the absence of proof of public use. Public easements which have been reserved to guarantee international treaty obligations shall not be terminated unless the Secretary determines that the reasons for such easements no longer justify the reservation. No public easement shall be terminated without proper notice and an opportunity for submission of written comments or for a hearing if a hearing is deemed to be necessary by either the Director or the Secretary. [Emphasis added.]

This regulation establishes a policy favoring public comment before terminating public easements. The provision for automatic termination of easements would contravene this policy. Thus, appellant's request to provide for such automatic termination is properly denied.

In its first statement of reasons submitted in this appeal before ANCAB, appellant alleged that BLM erred in failing to identify, exclude, or to adjudicate the validity of unpatented mining claims located upon the lands approved for interim conveyance. To show that some claims do exist on the selected lands, appellant has identified two known unpatented mining claims located in selection F-19155-16, together with approximately 16 other unpatented claims which may possibly lie within the land selection made by Doyon. 2/ However, BLM cannot be made to bear the responsibility for appellant's dissatisfaction. The Department's regulations expressly provided

---

2/ See appellant's brief dated Feb. 22, 1980, at pages 7 and 8 for a description of 18 or more claims owned by Joseph C. Manga.

appellant the opportunity to exclude mining claims from the land described in its application or have those claims adjudicated. Under 43 CFR 2651.4(e), village or regional corporations were not required to select lands within an unpatented mining claim or millsite, and village or regional corporations were permitted to omit such mining claims from their applications. Since appellant chose not to have the claims excluded when it filed its application, appellant cannot fault BLM for failing to exclude them.

One regulation in the part concerning Native selections, 43 CFR 2650.3-2(a), provides: "[T]he validity of any unpatented mining claim may be contested by the United States, the grantee of the United States or its successor in interest, or by any person who may initiate a private contest." The regulations governing such contests are set forth at 43 CFR 4.450. Appellant did not take advantage of these procedures before BLM issued its decision. Appellant's own failure to take advantage of the procedures provided for seeking adjudication of these mining claims makes it unnecessary for BLM to do so.

Section 22(c) of ANCSA, 43 U.S.C. § 1621(c) (1976), permits the conveyance of land that is subject to unpatented mining claims located prior to August 31, 1971, to a regional Native corporation. Theodore J. Almasy, 69 IBLA 160, 89 I.D. 619 (1982). In a suit brought by owners of such unpatented mining claims seeking a declaratory judgment and injunctive protection against BLM's conveyance of their alleged vested property rights in the claims, the court examined section 22(c) of ANCSA and the Department's regulations and held that ANCSA permits the Federal Government to convey lands

subject to validly located mining claims and that the 5-year time limitation on the ability to patent placed on such claims by ANCSA is constitutional. Alaska Miners v. Andrus, 662 F.2d 577 (9th Cir. 1981); Accord, United States Steel Corp., 7 ANCAB 106, 89 I.D. 293 (1982); Oregon Portland Cement Co., 6 ANCAB 65, 88 I.D. 760 (1981). Theodore J. Almasy, supra at 165 n.5, 89 I.D. at 621 n.5, specifically rejected Doyon's argument that BLM is required to adjudicate the validity of such claims, noting that it is now well established that BLM is not required to adjudicate mining claims before conveyance, citing United States Steel Corp., supra; Oregon Portland Cement Co., supra; and Alaska Miners v. Andrus, supra at 580, in which the court described Doyon's arguments as "groundless." 3/

In light of the Alaska Miners decision, appellant is no longer contending that the Department must adjudicate every claim. Appellant suggests, however, that the court only meant that BLM did not have to determine whether a discovery has been made. Appellant maintains that the Department still has a duty to void certain claims such as those located after the land

---

3/ The court also noted: "We have considered their other suggestions and fail to find anything which requires further discussion." The nature of the "other suggestions" is not explained by the court. In argument advanced in this appeal, counsel for BLM has suggested the "other suggestions" by Doyon made in the Alaska Miners appeal are the same arguments now urged upon this Board by Doyon. The Board expresses no opinion concerning this argument.

Doyon argues that the holding in United States Steel Corp., supra, is inconsistent with the result in another ANCAB decision, State of Alaska and Seldovia Native Ass'n, 2 ANCAB 1, 71-72, 84 I.D. 349, 382 (1977), modified by Secretarial Order No. 3016, 85 I.D. 1 (1977), and explained by State of Alaska, Department of Transportation and Public Facilities (On Reconsideration), 7 ANCAB 188, 89 ID. 346 (1982). As the Secretarial order points out at 85 I.D. 1, there is no requirement upon the Department to adjudicate all third party interests in conveyances to Native corporations. The Seldovia appeal did not concern mining claims, but was, rather, concerned with those preexisting rights other than unpatented claims described in other sections of ANCSA.

was withdrawn or in those cases where there is failure to make the filings required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). Appellant concedes that BLM is adjudicating such claims for the most part (Briefing on Mining Claim Issues at 4). Yet, appellant identifies several types of claims that should be declared void that may not be so adjudicated. <sup>4/</sup> This appeal provides no basis for requiring BLM to make any such adjudication because appellant has not challenged the validity of any particular claim.

Doyon now raises four other issues: (1) Whether BLM has a duty to identify in the conveyance instruments by location and Bureau file number all "facially valid" unpatented mining claims which encumber land being conveyed to Doyon; (2) whether BLM has a duty to exclude from conveyance to Doyon lands containing unpatented claims upon which BLM has suspended review pending reconsideration of the Montana District Court's decision in Rogers v. United States, CV-80-114-H (D. Mont. June 28, 1982) (petition for reconsideration filed July 8, 1982); (3) whether BLM has a duty to search state records for mining claim filings not recorded pursuant to section 314 of the FLPMA, 43 U.S.C. § 1744 (1976), and to include findings based upon the search of state records in the conveyance documents furnished to Doyon; and

---

<sup>4/</sup> Both parties on appeal have categorized several types of mining claim adjudications which may become the subject of analysis by BLM. Claims are cataloged variously by the parties according to the manner in which they may be affected by the provisions of section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and arguments are advanced whether certain claims ought to be subject to adjudication under the current statutory framework for recording mining claims. These arguments are beside the point in view of our decision that unpatented mining claims need not be adjudicated by BLM prior to conveyance to Native corporations under ANCSA.

(4) whether the provision of 43 CFR 2650.3-2(c) which allows a miner to apply for patent to land within Native selections after December 18, 1976, under certain circumstances, is invalid for lack of a statutory basis.

After the court in Alaska Miners v. Andrus, supra, rejected Doyon's contention that BLM must adjudicate unpatented mining claims on lands to be conveyed, Doyon has modified its argument, contending that there is only a duty on the part of BLM to identify unpatented mining claims in the conveyance documents. Appellant now characterizes the action it seeks from BLM to be in the nature of a "preadjudication" or "adjudication of legal sufficiency" which appellant distinguishes from an "adjudication" or "adjudication of validity," which would involve a determination whether a discovery has been made. <sup>5/</sup> While, as appellant contends, it has consistently tried to distinguish between adjudication of, and identification of, unpatented mining claims in an effort to obtain a determination by BLM concerning mining claims on selected land, it is clear that the distinction sought to be made has previously been rejected by the Department. Oregon Portland Cement Co., supra; United States Steel Corp., supra.

Appellant bases its contention that BLM is required to individually identify each mining claim on the requirement that valid existing rights be identified pursuant to section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1976). The Department's position with respect to this contention is set forth in a

---

<sup>5/</sup> See appellant's reply brief dated Feb. 23, 1983, at page 2, and appellant's brief dated Nov. 10, 1982, at page 3.

Solicitor's memorandum approved by the Secretary which states: "Congress, in section 22(c) of ANCSA, specifically treated unpatented mining claims differently from other types of possible pre-existing rights." 45 FR 1693 (Jan. 8, 1980). Since section 14(g) does not concern mining claims, it cannot serve as a basis for requiring the Department to identify mining claims. Even if section 14(g) were applicable, it would be improper to identify a mining claim whose validity had not been determined. In order for a mining claim to constitute a valid existing right, it must be established that a mining claim not only was located prior to the date of the withdrawal and maintained in accordance with the requirements of the mining laws, it must also be established that a valuable mineral deposit had been discovered on the claim prior to the withdrawal. See United States v. Beckley, 66 IBLA 357 (1982). It would be improper to identify a mining claim as a valid existing right unless the issue of discovery of a valuable mineral deposit is fully adjudicated. Since the court in Alaska Miners, supra, held that the Department is not required to adjudicate the validity of mining claims, it necessarily follows that the Department cannot be required to identify them as valid existing rights in the absence of proof of a discovery of a valuable mineral deposit.

Appellant's contention that section 22(c) requires identification of unpatented mining claims is incorrect for the same reasons. That section protects possessory rights arising only from valid mining claims initiated before August 31, 1971, so a claim cannot be identified as protected by section 22(c) without adjudication of its validity. Since the Department is

not required to adjudicate the validity of mining claims on lands conveyed to a regional corporation, there is no basis for identifying them in a conveyance.

[2] The only other argument appellant makes in support of such identification is the need to convey clear title. Appellant's concern about this is belied by its failure to exclude claims from its selection application or seek adjudication of those claims by the procedures provided by Departmental regulations. We hold that BLM is not required to identify or adjudicate unpatented mining claims on the land conveyed since no contest has been filed by appellant.

The second issue raised by appellant Doyon concerns whether the action pending in Rogers v. United States, supra, is cause for excluding from conveyance to Doyon certain claims identified to fall into the same category of unpatented mining claim as was considered by the Rogers decision. The Montana court found section 314(c) of FLPMA to be an unconstitutional violation of due process insofar as it creates a conclusive presumption of abandonment of an unpatented mining claim located before the enactment of FLPMA for which no notice of location was filed with BLM prior to October 22, 1979. 6/ The ultimate resolution of the Rogers case can have no effect upon

---

6/ The Board notes the United States Supreme Court has recently approved a state statute having similar provision and effect in Texaco, Inc. v. Short, 454 U.S. 516 (1982) (provision permitting extinguishment of mineral interests without notice for failure to use or file notice of claim under Indiana Dormant Minerals Act held constitutional). The Department has consistently held that failure to file a notice of location with the Department on or before Oct. 22, 1979, establishes a conclusive presumption of abandonment under section 314(c) of FLPMA. John Walter Chaney, 46 IBLA 229 (1980), and cases cited. See also Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981).

this appeal. If the court adheres to its original decision and holds that the Department improperly declared the claims abandoned and void, the claims will have the same status as other unpatented claims and would be subject to exclusion from appellant's conveyance only if appellant had excluded the claims in its conveyance application or if a patent application has been filed. On the other hand, if the court reconsiders and finds such claims to be properly declared abandoned, there would be no basis for identifying or excluding such abandoned claims from appellant's conveyance.

[3] Appellant's contention that BLM has a duty to search the State of Alaska records for mining claims affecting selection F-19155-16 is groundless. Section 314 of FLPMA, 43 U.S.C. § 1744 (1976), provides that failure to record such a claim with BLM "shall be deemed conclusively to constitute an abandonment" of the claim. A principal purpose of this statute was to obviate the need for BLM to make the search appellant would require of it.

Appellant's final argument is that 43 CFR 2650.3-2(c) unlawfully extends the period within which a miner may apply for patent, contrary to the provisions of section 22(c) of ANCSA. The regulation states:

Any mineral patent application filed after December 18, 1976, on land conveyed to any village or regional corporation pursuant to this act, will be rejected for lack of departmental jurisdiction. After that date, patent applications may continue to be filed on land not conveyed to village or regional corporations until such land is conveyed. [Emphasis supplied.]

Section 22(c) of ANCSA, provides:

On any lands conveyed to Village and Regional Corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate State or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all requirements of the general mining laws are complied with, proceed to patent. [Emphasis supplied.]

Doyon perceives a conflict between the emphasized portions of the statute and the Department's regulation. Appellant contends this question was not decided by the Alaska Miner's decision, and avers the clear intent of Congress was to establish a 5-year statute of limitations which had the effect of terminating, on December 18, 1976, the rights of miners to apply for mineral patent on public lands selected by Native corporations.

[4] Appellant has not established the relevance of this argument to this appeal. Neither appellant's statement of reasons nor the record submitted on appeal establish whether the patent applications for the claims BLM excluded from appellant's conveyance were filed during the period which appellant contends to be an unlawful extension of the statutory period. Appellant's argument appears to be in the nature of a general protest against the regulation rather than an allegation of error in the decision appealed. In the absence of a decision implementing the regulation, there is no action by BLM that is subject to review by this Board. See Tenneco Oil Co., 36 IBLA 1 (1978).

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.

Franklin D. Arness  
Administrative Judge  
Alternate Member

We concur:

Anne Poindexter Lewis  
Administrative Judge

Gail M. Frazier  
Administrative Judge

