

DOYON, LIMITED (ON RECONSIDERATION)

IBLA 82-1121, IBLA 82-1122,
IBLA 82-1123, IBLA 82-1124
RLS 79-7, RLS 79-8, RLS 79-9, RLS 79-10

Decided November 28, 1983

Petition for reconsideration of Doyon, Limited, 70 IBLA 302 (1983), in which the Board affirmed in part, and set aside and remanded for a hearing, in part, a decision of the Alaska State Office, Bureau of Land Management, conveying certain selected lands under the provisions of section 12(a) of the Alaska Native Claims Settlement Act. AA 8103-1, AA 8103-2, AA 8103-3, and AA 8103-4.

Affirmed in part; hearing ordered in part.

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

Where selection of lands for conveyance to a Native Alaska corporation includes unpatented mining claims, the Bureau of Land Management is not required to identify unpatented mining claims on the lands to be conveyed.

2. Alaska Native Claims Settlement Act: Easements: Access--Alaska Native Claims Settlement Act: Easements: Public Easements--Evidence: Sufficiency--Hearings

Pursuant to 43 CFR 2650.4-7(b), a transportation easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternate route is put in dispute and the facts of record are insufficient to find that a BLM decision not to reserve an easement based on that route is supported by a rational basis, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

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

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

By decision dated January 28, 1983, this Board affirmed in part and set aside and remanded for hearing in part, ^{1/} a decision of the Alaska State Office, Bureau of Land Management (BLM), approving lands for interim conveyance to the Native villages of Nikolai (AA 8103-2), McGrath (AA 8103-3), and Telida (AA 8103-1), based on selection applications filed by Doyon, Limited (Doyon), under section 12(c) of the Alaska Native Claims Settlement Act (ANCSA) of 1971, 43 U.S.C. § 1611(c) (1976 and Supp. IV 1980). Doyon requests that the Board reconsider only those parts of its decision addressing the identification of mining claims and the reservation of public easements under section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976). In its decision, the Board held that pursuant to the Departmental Manual, 601 DM 2, and Secretary's Order (S.O.) No. 3029, dated November 20, 1978, 43 FR 55287 (1978), as modified by amendment dated November 20, 1979, 45 FR 1692 (1980), BLM is not required to adjudicate mining claims before conveyance of land to a Native corporation. The Board stated that pursuant to ANCSA and S.O. 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.

Regarding easements EIN 7, C3 (hereafter EIN 7); EIN 8, L (hereafter EIN 8); EIN 12, C3, D1, D9 (hereafter EIN 12); EIN 28, C5 (hereafter EIN 28), the Board affirmed BLM's decision to reserve these easements. The Board explained that the records show that the Joint Federal-State Land Use Planning Commission for Alaska (LUPC) strongly favored the reservation of all four easements.

In its petition for reconsideration, Doyon concedes that under the holding in Oregon Portland Cement Co., 6 ANCAB 65, 88 I.D. 760 (1981), BLM is not required to adjudicate the validity of unpatented mining claims prior to an ANCSA conveyance. Doyon contends, however, that the Oregon Portland Cement Company decision did not hold that BLM need not identify with specificity the unpatented mining claims which were to be conveyed to a Native corporation.

Doyon further asserts that S.O. No. 3029, as amended, does not exempt BLM from its duty to identify all third party interests, including mining claims, in ANCSA conveyance decisions and documents.

In the original S.O. No. 3029, the Secretary noted the appropriateness of identifying and adjudicating the validity of interests over which BLM had

^{1/} The Board referred the cases involving the navigability issue to the Hearings Division for an assignment of an Administrative Law Judge to hear the testimony and receive evidence relating to the question of navigability of waters lying over submerged lands within the area selected by Doyon, Limited.

the authority and duty to adjudicate. The Secretary also noted the appropriateness of simply identifying those interests over which BLM did not have the duty or authority to adjudicate validity. Doyon contends that the Secretary's amendment merely revised his earlier order by excluding mining claims from the requirement that BLM perform validity determinations, but did not exempt BLM from the duty to identify interests. Petitioner refers the Board to its briefs filed in IBLA 82-1120, Doyon, Limited, 75 IBLA 65 (1983), in which it more fully discussed BLM's duty to identify and describe unpatented mining claims.

In response, BLM requests that the Board reaffirm the decisions of the Alaska Native Claims Appeal Board (ANCAB) 2/ holding that the Secretary is neither obligated to "identify" unpatented mining claims (United States Steel Corp., 7 ANCAB 106, 89 I.D. 293, 302 (1982)), nor "adjudicate" the validity of such claims under the Mining Law of 1872 (Oregon Portland Cement Co., *supra*). 3/

[1] In Doyon, Limited, 75 IBLA 65 (1983), the Board stated that the disposition of the identification issue was controlled by the Board's decision in Doyon, Limited, 74 IBLA 139, 90 I.D. 289 (1983). In that case the Board decided the identification issue adversely to petitioner based upon analysis of Alaska Miners v. Andrus, 662 F.2d 577 (9th Cir. 1981) and the provisions of sections 14(g) and 22(c) of ANCSA, 43 U.S.C. §§ 1613, 1621 (1976). Thus, Doyon, Limited, held at 74 IBLA 148, 90 I.D. 294-95 that:

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 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.

2/ ANCAB was abolished by S.O. 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, 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), 43 FR 26392 (June 18, 1982).

3/ BLM indicated that Doyon was unclear in defining its mining claim issue. Doyon filed a reply in which it clarified the issue.

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 conveyance.

* * * 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 appellant's 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. [4/]

The above discussion fully explains why BLM is not required to identify unpatented mining claims. Based upon the above rationale, we find that petitioner's contentions concerning Oregon Portland Cement Co., supra, and S.O. No. 3029, as amended, are without merit.

Petitioner also alleges that BLM erred in reserving EIN 7, EIN 8, EIN 12, and EIN 28. Petitioner contends that these easements were in violation of 43 CFR 2650.4-7(b)(1)(i) because of the availability of reasonable alternative routes across public lands in topographically suitable locations which provide access to the same public land accessed by EIN 7, EIN 8, and EIN 12. Petitioner alleges that EIN 8 and EIN 28 are unlawful because they provide access to the same public land and are duplicative of one another in violation of 43 CFR 2650.4-7(b)(1)(ii). Petitioner also contends that EIN 7 and EIN 8 are unlawful as being in violation of 43 CFR 2650.4-7(a)(3) because of no present existing use of the trails. Petitioner further asserts that EIN 12 is unlawful because the trail provides access to a private mining claim worked only by two people and thus would not provide public access to public lands as required by ANCSA, 43 U.S.C. § 1616(b) (1976). Doyon contends that this issue is a question of law to be decided by the Board.

Petitioner requests a hearing to offer evidence that EIN 7, EIN 8, and EIN 12 violate 43 CFR 2650.4-7(b)(1) because reasonable alternative access routes exist which do not cross Native lands.

BLM agrees with appellant that factual issues regarding the reservation of easements have been raised, even though BLM denies the validity of each of Doyon's factual allegations. BLM supports Doyon's right to have these issues referred to an Administrative Law Judge for a hearing. However, BLM disagrees with Doyon that the issue of whether EIN 12 meets the requirements of 43 CFR 2650.4-7(b)(1) ("group of private holdings sufficient in

4/ The other arguments presented by Doyon in IBLA 82-1120 were decided adversely to it. See Doyon, Limited, 75 IBLA 65, 67-68 (1983).

number to constitute a public use") can be decided by the Board as a matter of law. BLM contends that this issue is a factual one which should be forwarded for the taking of factual evidence at a hearing. Also, citing Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), BLM points out that the recommendations of LUPC were not binding on the Secretary.

[2] Section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), directs the Secretary of the Interior to reserve public easements across selected lands and at periodic points along the courses of major waterways that are reasonably necessary to guarantee international treaty obligations and a full right of public use and access for recreation, hunting, transportation, utilities, docks, and other public uses. Alaska Public Easement Defense Fund v. Andrus, *supra*.

Departmental regulations governing the reservation of public easements specify that the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. 43 CFR 2650.4-7(a)(3). The Board has held that present existing use is most reasonably interpreted to mean that public easements substantially conform to existing uses and that the evidence of such use be recent. Northway Natives, Inc., 69 IBLA 219, 234, 89 I.D. 642, 649 (1982). In the case of transportation easements, however, there are additional regulatory standards to be applied. The Department may reserve transportation easements across lands conveyed to a Native corporation that are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways. 43 CFR 2650.4-7(b) also requires that if public transportation easements are to be reserved they shall:

(i) Be reserved across Native lands only if there is no reasonable alternative route of transportation across publicly owned lands;

(ii) Within the standard of reasonable necessity, be limited in number and not duplicative of one another (nonduplication does not preclude separate easements for winter and summer trails, if otherwise justified);

* * * * *

(iv) Follow existing routes of travel unless a variance is otherwise justified;

* * * * *

(xii) Not be reserved simply to reflect patterns of Native use on Native lands.

Doyon notes that BLM's sole rationale for affirming the reservation of the easements was that LUPC "strongly favored the reservation of all four easements." Doyon, Limited, 70 IBLA 302, 306 (1983). Doyon objects to this rationale. Doyon refers to BLM's trip report dated April 23, 1979 (Exh. B), which summarizes discussions at meetings with representatives of BLM, Doyon

and LUPC. In this report BLM stated that LUPC strongly objected to relocating EIN 7 because "[t]hey felt that the whole purpose for the easement reservation was to protect existing travel routes * * *" (Exh. B at 5-6). Doyon states that it is an undisputed fact that there has been no use of this trail in recent history.

Doyon refers to LUPC's objection to relocating EIN 8. Doyon had suggested EIN 28 as an alternative route on the basis that EIN 8 and EIN 28 were duplicative and that only one easement was needed into the same public lands. LUPC contended that because EIN 8 was a cleared trail, the reservation of "a nonuseable easement [EIN 28] is worse than reserving no easement at all" (Exh. B at 6). Petitioner states that LUPC's statement supports petitioner's position that one of the two easements, 8 or 28, is unnecessary.

Regarding EIN 7 and EIN 8, petitioner contends that the Kuskokwim River is one of the available, reasonable, alternative routes of transportation for both summer and winter use. Petitioner notes that BLM reserved both EIN 7 and EIN 8 as year-round easements even though LUPC actually stated in its Easement Recommendation that both trails be restricted to winter use only because summer access was provided by the Kuskokwim River (Exh. D at 2).

Doyon challenges the need for EIN 12 because of alternate routes around the Doyon lands to public lands. We note that in the Trip Report, BLM states that initially it had considered dropping this trail because of alternate access routes which could be provided to the west of the Doyon lands (Exh. B at 7). Where there are disputed facts determinative of legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415. State of Alaska, 71 IBLA 256 (1983); Patricia C. Alker, 70 IBLA 211 (1983). Therefore, this case shall be referred to the Hearings Division, Office of Hearings and Appeals, for a hearing and a recommended decision as to the reasonableness of the Kuskokwim River as a summer and winter route for EIN 7 and EIN 8 and the reasonableness of alternative routes for EIN 12 and EIN 28.

Doyon questions the legality of EIN 7 and EIN 8 because petitioner contends there has been no use of these trails in recent memory. It may not be necessary to reach this question if the evidence adduced at the hearing shows that there are reasonable alternatives for these routes. If it is determined that no reasonable alternative routes exist, these easements may still be properly reserved under 43 CFR 2650.4-7(a)(3). This regulation states that the reservation of an easement which also does not enjoy any existing use may be proper if there are no reasonable alternatives. Since a finding that there are no alternative routes then requires assessment of whether EIN 7, EIN 8, and EIN 28 meet the requirements of 43 CFR 2650.4-7, evidence should also be taken as to the propriety of reserving these easements in the conveyance to Doyon.

Petitioner objects to BLM's reservation of EIN 12 because it contends that this easement would provide public access to one private mining claim. Reservation of a public easement for private use is prohibited by section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b) (1976), which authorizes the reservation of public easements for public access across Native lands. Petitioner characterizes the issue of the reservation of EIN 12 as whether there is a group of private holdings sufficient to constitute a public use

within the meaning of 43 CFR 2560.4-7(b)(1). However, it appears from exhibit B at page 7 that the issue is rather one of the appropriate means of reserving access to public lands in the mine area. Therefore, the question is whether this easement is reasonably necessary to secure access to the public lands rather than whether this easement is necessary to preserve a private right of access to a mine which private right of access (valid existing right) is protected under section 17(b)(2), 43 U.S.C. § 1616(b)(2) (1976).

The burden of proof at the hearing is upon petitioner to show that BLM's decision is erroneous. State of Alaska, supra; Northway Natives, Inc., supra. Following the hearing the Administrative Law Judge shall serve his recommended decision on the parties and allow each to respond with briefs to the Board within 30 days of receipt of the decision. After receipt of the briefs, this Board will issue a final decision for the Department on this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted and the Board's prior decision styled Doyon, Limited, 70 IBLA 302 (1983), is affirmed on the issue of identification of mining claims. That portion of the decision dealing with easements is set aside and the case referred to the Hearings Division.

Douglas E. Henriques
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

