

GOODNEWS BAY MINING CO. ET AL.

IBLA 83-19

Decided May 14, 1984

Appeal from decision of the Alaska State Office, Bureau of Land Management, dismissing an appeal of a decision to approve interim conveyances under the Alaska Native Claims Settlement Act. F-14920-A.

Dismissed as moot.

1. Alaska Native Claims Settlement Act: Conveyances: Generally -- Constitutional Law: Due Process -- Notice: Generally -- Notice: Constructive Notice -- Rules of Practice: Appeals: Timely Filing

With respect to a known party claiming a property interest adversely affected by a decision to issue conveyance under the Alaska Native Claims Settlement Act, both the regulations at 43 CFR 2650.7 and the requirements of due process mandate an effort to serve notice of the decision, coupled with a 30-day appeal period from date of service. Where such a party files a notice of appeal within 30 days of service of the decision, but not within 30 days of publication of that decision in the Federal Register, it is error for the Bureau of Land Management to dismiss the appeal as untimely.

2. Patents of Public Lands: Effect

The Department of the Interior loses jurisdiction over public land once it has been patented. Upon issuance of patent, jurisdiction to adjudicate interests in the land conveyed is lost and an appeal by a party asserting conflicting rights in the land is properly dismissed as moot.

APPEARANCES: Richard E. Monroe, Esq., Seattle, Washington, for appellants; John M. Allen, Esq., Regional Solicitor, Alaska Region, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

On June 30, 1982, the Alaska State Office, Bureau of Land Management (BLM), issued a decision to approve interim conveyances (DIC) to Arvig, Incorporated and Calista Corporation pursuant to their applications under the Alaska Native claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1976 &

Supp. V 1981). The decision was published in the Federal Register on July 1, 1982, at 47 FR 28828 and the opportunity to appeal was summarized therein as follows:

Any party claiming a property interest in lands affected by this decision, an agency of the Federal government, or regional corporation may appeal the decision to the Interior Board of Land Appeals, Office of Hearings and Appeals, in accordance with the attached regulations in Title 43 Code of Federal Regulations (CFR), Part 4, Subpart E, as revised. * * *

* * * * *

The time limits for filing an appeal are:

1. Parties receiving service of this decision shall have 30 days from the receipt of this decision to file an appeal.

2. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, and parties who failed or refused to sign the return receipt shall have until August 2, 1982, to file an appeal.

On August 11, 1982, BLM received a notice of appeal dated August 6, 1982, filed

on behalf of John E. Nelson, Frank E. Foster and Mike Emery, collectively and individually; on behalf of John E. Nelson, Frank E. Foster collectively and individually; on behalf of Platinum Land Company, a partnership; on behalf of Goodnews Bay Mining Company, a corporation; and on behalf of all parties who claim or may claim an interest in any of the affected lands by or through any of the above appellants.

In a decision dated August 24, 1982, BLM declared the appeal as untimely filed pursuant to 43 CFR 4.903(a) (1981) ^{1/} and dismissed it. On September 14, 1982, the parties collectively submitted an appeal of BLM's dismissal. In their statement of reasons, they assert that they received service of the decision on July 12, 1982, and timely filed their notice within the prescribed 30-day period. They argue the dismissal was improper because: (1) 43 CFR 4.903(a), belonging to the appeal procedures for the Alaska Native Claims Appeal Board (ANCAB), is not the appropriate regulation to apply in this instance; and (2) even if it were applicable, BLM was misleading in its publications and should be estopped from reliance on 43 CFR 4.903(a) to justify the dismissal.

^{1/} The former regulation defining the appeal procedure for ANCSA selections was found at 43 CFR 4.903(a) (1981) and read in part:

"Appellant shall file a written notice of appeal, signed by him or his authorized representative, with the Alaska Native Claims Appeal Board within 30 days after the date of receipt of the decision by appellant, or if publication of the decision in the Federal Register is made, within 30 days after publication of the decision in the Federal Register, whichever shall occur first * * *."

In their initial statement of reasons, appellants quote as follows the Department's procedural regulation which they apparently deemed applicable when they filed the appeal in question: "The notice of appeal * * * must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing." This version of 43 CFR 4.411, pertaining to appeals filed with this Board, last appeared in the 1981 edition of the Code of Federal Regulations. By Secretarial Order No. 3078, dated April 29, 1982, AN CAB was abolished and its functions transferred to this Board, effective June 30, 1982. As part of this action, 43 CFR Part 4, Subparts E and J were amended to "ensure uniform procedures apply to all appeals submitted to IBLA." 47 FR 26390 (June 18, 1982). These amendments were intended to create no substantive change in the basic right of appeal afforded to persons from decisions by Departmental officials concerning matters related to land selection under ANCSA. *Id.*

While 43 CFR Part 4, Subpart J was eliminated, 43 CFR 4.411 of Subpart E was accordingly amended to read:

The notice of appeal * * * must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing, or if publication of the decision in the Federal Register is made, within 30 days after publication of the decision in the Federal Register, whichever shall occur first.

47 FR 26392. Appellants infer in their statement of reasons they were not aware of this change in Subpart E when they filed their appeal. However, all persons dealing with the Government are presumed to have knowledge of duly promulgated regulations relevant to their situation. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); 44 U.S.C. §§ 1507, 1510 (1976).

Appellants argue that the procedures quoted by BLM for filing an appeal were misleading and therefore difficult to apply correctly. However, the confusion is resolved by reference to the regulations governing ANCSA selections and, in particular, notice of selections to adverse claimants. Thus, in order to determine whether there are adverse claimants to the land, the selection applicant shall publish notice of the application. 43 CFR 2650.7. Notice shall be published at least once a week for 4 consecutive weeks in a newspaper of general circulation advising all adverse claimants to file their objections in the appropriate land office. 43 CFR 2650.7(a). The applicant must file proof of publication. 43 CFR 2650.7(b). Any adverse claimant to the selected land is required to serve a copy of his objection on the applicant. 43 CFR 2650.7(c).

In accordance with this procedure, the regulation provides for personal service of a copy of the BLM decision adjudicating the selection application on those adverse claimants who have filed an objection with BLM. On the other hand, for those unknown adverse claimants who have not stated an objection before BLM, constructive notice by publication of the decision adjudicating the selection application is authorized. Thus, the regulation at 43 CFR 2650.7(d) provides:

(d) For all land selections made under the Act, in order to give actual notice of the decision of the Bureau of Land Management proposing to convey lands, the decision shall be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision, the appropriate regional corporation, and any Federal agency of record. In order to give constructive notice of the decision to any unknown parties, or to known parties who cannot be located after reasonable efforts have been expended to locate, who claim a property interest or other valid existing right in land affected by the decision, notice of the decision shall be published once in the Federal Register and, once a week, for four (4) consecutive weeks, in one or more newspapers of general circulation in the State of Alaska nearest the locality where the land affected by the decision is situated, if possible. Any decision or notice actually served on parties or constructively served on parties in accord with this subsection shall state that any party claiming a property interest in land affected by the decision may appeal the decision to the Board of Land Appeals. The decision or notice of decision shall also state that:

(1) Any party receiving actual notice of the decision shall have 30 days from the receipt of actual notice to file an appeal; and,

(2) That any unknown parties, any parties unable to be located after reasonable efforts have been expended to locate, and any parties who failed or refused to sign a receipt for actual notice, shall have 30 days from the date of publication in the Federal Register to file an appeal. Furthermore, the decision or notice of decision shall inform readers where further information on the manner of, and requirements for, filing appeal may be obtained, and shall also state that any party known or unknown who may claim a property interest which is adversely affected by the decision shall be deemed to have waived their rights which were adversely affected unless an appeal is filed with the Board of Land Appeals in accordance with the requirements stated in the decisions or notices provided for in this subsection and the regulations governing such appeals set out in 43 CFR Part 4, Subpart E. 2/

This is the authority relied upon by BLM when it set forth the appeal procedures in its June 30, 1982, decision.

Appellants argue in essence that they were entitled to service of a copy of the decision and an opportunity to contest the decision, that they

2/ Since it is the Department's intention that any person served with the decision have a full 30 days to appeal and not be restricted by publication in the Federal Register, 43 CFR 4.411(a) was revised recently to eliminate the phrase "whichever shall occur first" and to provide separate requirements for persons receiving notice of a decision by personal service and those receiving constructive notice through Federal Register publication. 49 FR 6371 (Feb. 21, 1984).

were served with a copy of the decision, and that dismissing their appeal filed within 30 days of service of the decision, because it was not filed within 30 days of constructive notice, violates due process. Further, appellants contend a patent issued in these circumstances is void and that the Board must entertain the appeal on the merits. The Solicitor has responded to appellants' brief and explained that BLM treated appellants as unknown parties bound by constructive notice. The Solicitor concedes that, under the circumstances, this notice was probably insufficient to comport with due process and, thus, would not preclude judicial review of the DIC, citing Kodiak-Aleutian Chapter of Alaska v. Kleppe, 423 F. Supp. 544 (D. Alaska 1976). However, the Solicitor points out that patent has issued since the decision to issue conveyance and argues that, hence, the administrative appeal must be dismissed as moot. Thus, the issue raised by this appeal is whether BLM's treatment of appellants was violative of due process.

[1] Although it does not appear that appellants filed any written adverse claim regarding the selection prior to the DIC, the file does reflect communications between counsel for appellants and BLM personnel predating the DIC. Thus, a written report of a telephone conversation dated April 27, 1982, prepared by a BLM official reflects that counsel was "concerned with easements crossing his client's properties." Further, the record reflects that a followup letter dated May 3, 1982, was sent to appellants' counsel informing him that copies of the draft conveyance decision, as well as copies of master title plats, would be forwarded to him. Whether a property interest is known, easily ascertainable, or unascertainable is important with regard to the type of notice the holder of the interest is entitled to. The due process clause of the Fourteenth Amendment to the United States Constitution requires that, prior to an action which will affect an interest in property, notice reasonably calculated under the circumstances to apprise interested parties of the pendency of the action must be provided and an opportunity to present objections must be afforded. Schroeder v. City of New York, 371 U.S. 208, 211 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In Kodiak-Aleutian Chapter of Alaska v. Kleppe, supra, the district court held that where BLM considers an application under ANCSA, notice of any adverse action by publication in the Federal Register was legally insufficient with respect to parties holding valuable property rights whose names and addresses were known or could have been easily ascertained.

In order to satisfy this due process notice requirement, BLM searched the relevant documents and prepared reports on the known property interests located within the selected lands. Its efforts produced no data which indicated that appellants possessed adversely affected property interests. ^{3/} However, given the communications in the record between BLM and counsel for appellants reflecting concern for affected property rights, appellants cannot properly be regarded as unknown parties unable to be located after reasonable effort. Accordingly, we find that both the regulation at 43 CFR 2650.7(d) and the requirements of due process mandate an effort to serve notice of the decision upon appellants, coupled with a 30-day period for appeal commencing with

^{3/} Section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1976), protects all valid existing rights and makes lands patented to the various Native groups subject to those rights. Moreover, section 22(c) of ANCSA, 43 U.S.C. § 1621(c) (1976), protects certain qualifying mining claims. Therefore, many interests in lands selected under ANCSA will not be adversely affected.

the date of service, rather than barring appeal 30 days after constructive notice. Thus, the refusal of BLM to recognize the appeal filed by appellants within 30 days of service of a copy of the decision was in error. Further, issuance of patent during the period in which a decision might timely be appealed or during the pendency of any timely filed appeal was in error. 43 CFR 4.21(a).

[2] Once public land has been patented, this Department has no further jurisdiction over such land. Germania Iron Co. v. United States, 165 U.S. 379 (1897). Thus, upon issuance of patent the Department loses jurisdiction to adjudicate interests in the land conveyed and an appeal by a party asserting conflicting rights in the land is properly dismissed as moot. See Matanuska-Susitna Borough, Inc., 38 IBLA 382 (1978). Although the error of BLM in issuing patent during the appeal period renders the appeal moot, judicial review has been held not to be precluded where failure to exhaust administrative review is caused by notice which fails to meet due process requirements. Kodiak-Aleutian Chapter of Alaska v. Kleppe, *supra* at 547.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed as moot.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Franklin D. Arness
Administrative Judge

