

BERING STRAITS NATIVE CORP.
COUNCIL NATIVE CORP.

IBLA 82-1153

Decided October 25, 1984

Appeal from decision by Alaska State Office, Bureau of Land Management, approving interim conveyance of village land selections subject to a Federal aid highway right-of-way. F-19525.

Affirmed in part, set aside in part, and remanded.

1. Administrative Procedure: Generally -- Appeals -- Rules of Practice: Appeals: Generally -- Rules of Practice: Appeals: Failure to Appeal

Where a 1974 decision to issue a highway right-of-way is not challenged on appeal until 1980, the doctrine of administrative finality bars consideration of the legal basis for the 1974 right-of-way grant.

2. Alaska Native Claims Settlement Act: Easements: Review -- Rights-of-Way: Federal Highway Act

Interim conveyance of a village selection made subject to a right-of-way issued to the State of Alaska pursuant to the 1958 Federal Aid Highway Act does not convey to the village corporation the authority to cancel the right-of-way. A patent subsequently issued subject to the right-of-way will not operate to vest in the village corporation any such right, but will be subordinate to the right-of-way, which may only be terminated by act of an agency of the Federal Government.

3. Alaska Native Claims Settlement Act: Easements: Review -- Appeals -- Board of Land Appeals -- Patents of Public Lands: Reservations -- Rights-of-Way: Federal Highway Act -- Rules of Practice: Appeals: Generally

Where a village land selection conveyance under the Alaska Native Claims Settlement Act is made subject to a highway right-of-way for a maintenance site held by a state agency, the Department of the Interior retains jurisdiction to determine whether the right-of-way should continue or be canceled.

4. Attorneys Fees: Equal Access to Justice Act

Decision of appeal from an adverse determination concerning a Native land selection made pursuant to Alaska Native Claims Settlement Act is not an "adversary adjudication" so as to entitle Native corporations to payment of claimed attorneys fees and costs.

APPEARANCES: David M. Freeman, Esq., Anchorage, Alaska, for appellants Bering Straits Native Corporation and Council Native Corporation; Elizabeth J. Barry, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for appellee Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On September 30, 1980, the Alaska State Office, Bureau of Land Management (BLM), approved, pursuant to provision of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(a) (1982), for interim conveyance village land selection F-19525 filed by appellant Council Native Corporation (Council) on November 8, 1974. This village selection claimed all of sec. 23, T. 7 S., R. 25 W., Kateel River Meridian, Alaska, except for a mineral survey not relevant to this appeal. The BLM interim conveyance of sec. 23 was, however, made subject to a right-of-way to the Alaska Department of Highways described as "[a] right-of-way, F-20524, containing approximately 15 acres, located within sec. 23, T. 7 S., R. 25 W., Kateel River Meridian, for a Federal Aid Maintenance camp, stockpile site, and rest area. Act of August 27, 1958, (72 Stat. 885, 23 U.S.C. 317)." This right-of-way grant to the State made by BLM under provision of the Act of Aug. 27, 1958 (1958 Federal Aid Highway Act, 1958 Act), 23 U.S.C. § 317 (1982), became effective on November 18, 1974. It had been the subject of considerable prior consultation and study by appellant Bering Straits Native Corporation (Bering), which claims the subsurface estate of sec. 23, Council, which claims the surface estate, BLM, and employees of the Alaska State Department of Highways. There was no protest against or appeal from issuance of the highway right-of-way.

Copies of Departmental status maps from the BLM case file furnished on appeal show the 15-acre right-of-way site lying on both sides of the Nome-Council road about 70 miles from Nome, just south of the point where the road crosses Bear River. A November 5, 1974, BLM field report concerning the right-of-way grant contains murky Xeroxed photographs of the site. One of the pictures apparently is intended to portray a flooded gravel pit. The photo caption states the pit is in the "southeast portion" of the site. The narrative portion of the field report, however, states the gravel pit is on the "southwest side" of the Bear River site. Other site photos show what are reported to be state highway maintenance houses and fuel tanks in place on the Bear River right-of-way site, apparently located on the west side of the roadway shown in the pictures. However, an affidavit provided by appellants states that those facilities have not been used except for a brief time in 1977, and that no construction has taken place on the site (Affidavit of Carolyn Schubert dated February 9, 1981). Appellants' counsel also suggests that the Nome-Council highway itself has never been built (Response to answer at 14). The affidavit provided avers positively that the rest area has not been started. The road itself appears in the photocopied pictures to be a

single track, unpaved country lane. The field report indicates the portion of the right-of-way located west of the road is to be used for a materials and maintenance site, while the larger area to the east of the roadway is expected to become a "visitor rest area."

The 1974 BLM field report indicates the right-of-way site has previously been used under permit for gravel with which to maintain the Nome-Council road. The report clearly considers the site to be subject to two distinct uses: recreation and road maintenance. Thus, the report recites: "The state plans to construct campgrounds on the east side of the road for casual visitors. This is very much needed as this area has a high recreation use by vehicles from Nome." The report then goes on to address both aspects of the right-of-way:

This right-of-way will have no adverse effect on present or potential users. The present users are the Highway Department and the potential users are recreationists.

* * * This right-of-way is not consistent with BLM Resource Management programs. However, since it is located within the core township for the Village of Council, the BLM will not have management responsibilities for the area very much longer. No long range planning for the area can be made by BLM.

The potential use of the site for road maintenance is described:

This right-of-way is consistent with local planning for the Village of Council. It will provide road maintenance from Council that has been provided from Big Hurrah maintenance camp in the past, and has proved to be inadequate. This is especially true during the spring when they are attempting to clear snow from Skookum Pass. This camp will allow the Highway Department to work from both ends and increase their efficiency.

(BLM Field Report at 1).

The report concludes: "This right-of-way application can be approved as proposed in the application. The Village of Council has been certified as an eligible village under ANCSA and will receive title to this area. The village has agreed with the Highway Department that they could use this area" (BLM Field Report at 2).

Correspondence included in the record on appeal indicates that appellants, BLM, and State highway officials expected that Council would apply to acquire title to the Bear River right-of-way site when it applied for other lands in the vicinity. With this probable property transfer in view, negotiations concerning use of the 15-acre Bear River site took place among appellants and the State highway office. BLM was aware of this negotiation at the time the Bear River grant was made. A letter in the BLM case file dated June 25, 1973, from the Pre-Construction Engineer to Bering concerning a "9 1/2 acre rest area" states:

It is our request that we obtain a written statement that when the land is allocated to the Village of Council that this

9-1/2 acre rest area be deeded to the Department of Highways in fee with no associated charges. Our portion of the agreement would be to construct the facility and maintain same for the convenience of all the residents and traveling public which utilize this recreational area. In view of the vast number of people who are presently utilizing the Niukluk recreational sites, we feel that this action would be beneficial to the village as well as the Department of Highways.

(Letter of June 25, 1973, Friend (Spruce) to Longley).

On July 5, 1973, the registered agent of the Village of Council, in apparent response to the June 25, 1973, State proposal, wrote:

At the Council Native Village meeting on June 25, 1973, a unanimous resolution was passed to allow your agency to construct a rest area facility near the Niukluk River along the existing road to Council.

Final selection of the 10 acres will be made after a joint study by your people and ours, at your earliest convenience.

Although title to the land will not change hands, our group did agree to a long-term renewable, no cost lease between the Council Village Corporation and the Department of Highways.

Please proceed with writing up a lease agreement which we in turn can review and sign.

(Letter of July 5, 1973, Longley to Spruce). On January 17, 1974, a reply was sent to Council concerning the rest area, as follows:

For your information and review, attached are two black line prints of the proposed rest area and maintenance camp site on the Nome-Council Road FAS-0130. The total acreage is indicated as 21 acres but this includes our present existing highway right of way of approximately 4.6 acres.

The proposed site for the rest area was selected so that the existing trees would complement the final development. It is our intent to do as little clearing as possible and thereby provide a facility which is compatible with nature.

At the present time we are constructing the toilet facilities and it is our intent to install these units as a first order of business next summer. This would provide accommodations for the traveling as well as the resident population.

We are also proposing to relocate the existing Big Hurrah Maintenance Camp to the new Council site this winter and this action should improve the maintenance operation in this area. In order for us to expedite and meet our proposed time schedules, it will be necessary for us to make direct application to the Federal Bureau of Lands Office to acquire this property. This

would in essence be the same as a no cost lease between the Council Village Corporation and this Department because in the event that the area is no longer needed, it would be deeded back to the interested property owners.

In order for us to expedite our transaction it will be necessary to receive a simple letter of non-objection to our proposed maintenance camp site and rest area. Thank you for your past consideration and cooperation.

(Letter of January 17, 1974, Spruce to Longley). The Council chairman responded on January 25, 1974:

The Council Native Corporation has no objection to the Department of Highways receiving fee simple title to the 21 acres as requested in the Bear Creek area along the current road system.

An agreement has been reached between you and I that in the event that Council village becomes eligible under the Claims Act and selects the land in question, the State will withdraw its selection and enter into a long term no cost lease.

(Letter of January 25, 1974, Dickson to Spruce). On February 27, 1974, the Alaska Department of Highways applied for the Bear River right-of-way, for use within 7 years from the time of application for "Bear River Maintenance Camp, Stockpile Site and Rest Area" (Feb. 27, 1974, right-of-way application, at 1). The 15-acre right-of-way which issued on November 18, 1974, is for a "maintenance camp, stockpile site and rest area" for an indefinite period, subject to numerous exceptions and conditions. The grant is made subject to "all valid rights existing" and requires filing "proof of construction within 10 years from the date of grant." It is also made subject to continued application of Departmental regulations appearing at "43 CFR 2800-2802.5 and 2821" (right-of-way F-20524). The decision to grant the right-of-way was not disputed until November 5, 1980, when, after the right-of-way site was excepted from appellants' Native land conveyance, appeal was taken to the Alaska Native Claims Appeals Board. That Board, on January 22, 1981, segregated the 15-acre tract in dispute from the selected lands to permit conveyance of the remainder of the selected land to appellants. 1/

Appellants urge six issues on appeal. They contend that, in issuing the Bear River highway right-of-way to the State, (1) BLM failed to consider the views of the Natives concerned, contrary to 43 CFR 2650.1(a)(2)(i), and 43 U.S.C. § 1601(b) (1982); (2) failed to comply with 43 U.S.C. § 1616(b)(1) (1982) requiring Land Use Planning Commission action in certain cases; and that (3) Departmental regulations requiring Native comment prior to agency action were ignored; (4) BLM failed to permit Bering to advise Council concerning the right-of-way grant as it was required to do by

1/ The Alaska Native Claims Appeals Board was abolished and all Board functions were transferred to the Interior Board of Land Appeals (IBLA) by Secretarial Order No. 3078 (Apr. 29, 1982). Authority to decide appeals before IBLA concerning land selections made under ANCSA is now provided at 43 CFR 4.1(b)(3)(i).

43 U.S.C. § 1613(c)(5) (1982); (5) BLM violated 43 U.S.C. § 1616(b)(1) (1976) and 43 CFR 2650.4-7(a)(1) by granting a right-of-way for public recreational use on Native lands; and (6) the right-of-way grant for an indefinite period was an abuse of Secretarial discretion which permits "speculative use" of the land. In their "Response to Answer" appellants further contend that the rest area portion of the right-of-way is subject to cancellation for failure to construct the proposed facilities within the period allowed by law. Bering's contentions on appeal are summarized thus at page 15 of its "Response": "[Bering] concedes that the right-of-way was an easement, and perhaps subject to the provisions of 23 U.S.C. § 317 and the pertinent regulations of 43 CFR 2801.1-1. However, [Bering] protests the granting of such an easement when the Village only consented to the creation of a leasehold interest." Finally, appellants seek an order awarding costs and attorney's fees.

This appeal concerns only the 15-acre right-of-way tract on Bear River. The portion of the tract west of the highway apparently contains the highway construction materials site: the gravel pit and associated works. East of the highway, a larger tract is proposed for development for a tourist campground. BLM disputes this characterization, arguing that the area east of the road is needed for highway safety considerations. The nature of the use to which this site is to be put is by no means clearly defined by the existing record. But clearly, the "rest area" is not functionally part of the materials and maintenance site, although reservation of both parts of this right-of-way was accomplished under authority of the 1958 Federal Aid Highway Act.

BLM denies generally all the stated contentions by appellants and takes the position that the interim conveyance to Council should not be affected by whatever agreements may have been made between Council and the State, which BLM construes to be an agreement to later substitute a lease for the right-of-way grant. BLM's brief argues that consultation by BLM with the Land Use Planning Commission before granting the Bear River right-of-way was not required because the grant was made under the 1958 Federal Aid Highway Act rather than ANCSA, a circumstance which BLM concludes should obviate consultation, since BLM contends the requirement for consultation imposed by section 17(b) of ANCSA ought only to apply to easements reserved under provision of ANCSA. Concerning the stated objection that Native wishes concerning the matter were not considered, BLM answers that they were considered, and that the grant was made based in part upon the agreement reached by Council and BLM concerning the right-of-way site.

[1] Appellants' challenge to the 1974 grant of right-of-way to the State is untimely. The decision to grant the right-of-way in 1974 was, of course, known to both appellants, who had commented upon the application as proposed by the State. If the grant was flawed, as appellants now contend it was, the errors in the grant should have been reviewed immediately following the 1974 decision to issue the grant under the Department's review procedures. The doctrine of administrative finality now bars consideration of the defects claimed to exist in the highway right-of-way grant. See State of Alaska, 62 IBLA 187, 195-96 (1982). Thus, regardless whether appellants did not consent, in fact, to issuance of the right-of-way, as they now claim, and despite the possibility that they may have been able, on sound factual grounds, to challenge the rest-area portion of the site as an improper recreational use of Native land contrary to Departmental regulation, these arguments may not

now be considered. Clearly, the reservation of valid existing rights from conveyance is contemplated by ANCSA. See 43 U.S.C. § 1613(g) (1982). The time to challenge the validity of the material site was at the time of issuance, not 6 years later on appeal from another Departmental decision only collaterally related to the right-of-way grant. See State of Alaska, supra at 195, 196. Cf. also Duncan Miller, 16 IBLA 51 (1974). ANCSA provides at 43 U.S.C. § 1621(i) (1982) the authority for issuance of rights-of-way prior to Native conveyance in certain cases. Departmental regulations at 43 CFR 2650.1(a)(2)(i) require consultation in such cases with the Native corporations affected. The procedures authorized by statute and required by regulation were followed here. While appellants challenge the adequacy of the factual analysis made, and the legality of the subsequent decision taken, no appeal was taken at the time the errors complained of allegedly occurred. Appellants' arguments concerning the legality of the basis for issuance of the 1974 right-of-way may not, therefore, be considered. They are now dismissed as beyond the jurisdiction of this Board to review.

[2] This does not entirely dispose of appellants' arguments, however, for, contrary to arguments advanced by BLM during appeal, the right-of-way is a substantial right which may outlast the road project for which it was issued. See Southern Idaho Conference Association of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969). At least one court has found a right-of-way granted under the predecessor statute to the 1958 Federal Aid Highway Act to be the "equivalent" of a patent. See Allison v. State, 420 P.2d 289, 294 (Ariz. 1966), construing the Act of November 9, 1921, 42 Stat. 212. The effect of a right-of-way grant is at least different than the rights which would be conveyed by a fixed term, renewable lease of lands owned without other encumbrance by the village corporation. This is so, if for no other reason than that the village would, at the end of the lease term, without intervention by any other person or agency, be free to impose whatever conditions the parties might agree upon, or could terminate the lease according to its terms. Council is without authority, however, to terminate the right-of-way grant under any circumstance. See 23 U.S.C. § 317(c) (1982); Southern Idaho Conference Association of Seventh Day Adventists v. United States, supra.

The present record establishes that BLM granted the Bear River right-of-way in the apparent belief that commencement of work on the highway was imminent, and that the right-of-way grant would permit commencement of work which Council desired but lacked the authority to authorize, since no patent had yet been issued to the Native corporation. Thus, despite some indication by Council that there may have been no agreement to the grant of the Bear River site to the State, further review of the right-of-way grant was not undertaken because of the stated belief the result so far as the village was concerned would be the same whether the right-of-way was granted or a lease arranged between Council and the State. BLM reasoned that the right-of-way grant was the "equivalent" of a lease by the Native corporation. This belief was based, in part, on the notion that Council would succeed to all the rights of the United States when patent was issued. This reasoning, however, overlooked the legal effect of the right-of-way grant and the subsequent issuance of a patent subject to the Federal Aid Highway right-of-way grant.

[3] Clearly, the Bear River right-of-way issued pursuant to the 1958 Federal Aid Highway Act will, unless canceled by the Secretary, continue

indefinitely to prevent Council's use and control of the site. See 23 U.S.C. § 317 (1982); Southern Idaho Conference Association of Seventh Day Adventists, supra; State of Alaska Department of Highways, 20 IBLA 261, 82 I.D. 242 (1975). Indeed, section 317(c) of the 1958 Act does not appear to permit cancellation or administration of the right-of-way grant by anyone but the Secretary of Commerce. Thus, the statute provides at (c):

If at any time the need for any such lands or materials for such purposes shall no longer exist notice of the fact shall be given by the State highway department to the Secretary [of Commerce] and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

23 U.S.C. § 317(c) (1982). Despite this provision, however, State of Alaska Department of Highways, supra, found in the right-of-way grant itself (which contained limiting language apparently similar to that used in the Bear River right-of-way), a reservation of authority in this Department under Departmental regulation to review the right-of-way after issuance, in order to determine whether there had been compliance with terms of the grant. Id. at 267, 82 I.D. at 245. And in Northway Natives, Inc., 5 AN CAB 147, 88 I.D. 14 (1981), prior grants made pursuant to 23 U.S.C. § 317 (1982) were found to be reviewable during decisionmaking later initiated pursuant to section 14(g) of ANCSA, in order to enable BLM to properly determine whether they constituted valid existing rights to which the conveyance is subject. The Bear River right-of-way is, therefore, concluded to be properly subject to continuing review by the authorized BLM officer where substantial questions concerning compliance with the right-of-way grant terms have been raised by the Native corporation concerned.

The affidavit presented by appellants with their brief recites that there has been no construction on the rest-area right-of-way located on the east side of the roadway. The affidavit states that, except for some unspecified activity in the summer of 1977, the area on the west side of the road also has not been constructed. The response indicates that the road construction planned for the Nome-Council highway did not occur. On this showing, appellants seek a vacation of the right-of-way grant, for failure by the State to comply with the provisions of the grant requiring construction within a limited time. The statement of facts set out by appellants' affidavit is not denied by BLM, which has opposed the appeal entirely upon legal grounds, and upon the premise that the village had previously consented, in law if not in fact, to the issuance of the right-of-way. The record now indicates that the questions raised by appellants are entitled to consideration by BLM but have not yet been fully considered upon their merits. In such case, remand to BLM for adjudication of the issues raised concerning the right-of-way by appellants is required. Northway Natives, Inc., supra.

Although the 10-year period of the right-of-way grant has not yet run, the record indicates that whatever construction will be done by November 1984 may be already in place, owing to the short construction season in Alaska. Commencement of review of the status of this project appears timely under the circumstances of this case, therefore, although the full 10-year period set by the right-of-way grant has not yet ended. On remand, BLM shall consider whether the right-of-way for a maintenance site or for a rest area has been

constructed. The construction of either site may be considered separately and the views of the parties concerning present need may be considered. ^{2/} The authorized officer may consider, whether, in view of the opposition to issuance of the right-of-way expressed by appellants, continuance of the right-of-way in whole or in part is in the best interest of the United States, the Native corporations concerned, and the State.

[4] Finally, appellants seek award of attorneys' fees and costs of this appeal. The amount claimed is not specified. Although not so stated by appellants, this claim is apparently based upon the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), which provides for payment of attorneys' fees and expenses in "adversary adjudications" before Federal agencies. The Equal Access to Justice Act allows payment of such expenses only in those cases involving "adversary adjudication." 5 U.S.C. § 504(b)(1)(C) (1982); Madelon Blum, 9 IBIA 281, 89 I.D. 241 (1982). "Adversary adjudication" refers to cases "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1982); Madelon Blum, *supra*. This case arises from an adverse determination concerning a grant of lands selected by Native corporations pursuant to section 14 of ANCSA. No provision for "adversary adjudication" of such determinations appears in ANCSA, nor was such an adjudication held in this case. Other provisions of the Act limiting its application to corporations having demonstrated net worth under \$5 million may also apply to appellants in this case. 5 U.S.C. § 504(b)(1)(B) (1982). And *see generally* Kaycee Bentonite Corp., 79 IBLA 182, 91 I.D. 138 (1984), for a discussion concerning when payments can be made by the Department under the Equal Access to Justice Act. Since appellants' claim for expenses is not shown to be cognizable under the Act, it is denied. *See* Kaycee Bentonite Corp., *supra*.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part and the case file remanded to BLM for further action consistent with this opinion.

Franklin D. Arness
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

^{2/} In the event grounds for cancellation of the right-of-way are found, we note that such action is discretionary. Northway Natives, Inc., *supra*.