

KUUGPIK CORP.

IBLA 82-1345

Decided March 26, 1985

Appeal from decision of the Alaska State Office, Bureau of Land Management, reserving a National Petroleum Reserve easement in Native land selections. F-14909-EE and F-14909-A.

Affirmed.

1. Regulations: Force and Effect as Law -- Regulations: Validity

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department.

2. Alaska Native Claims Settlement Act: Conveyances: Generally -- Mineral Lands: Generally

Where the subsurface mineral estate is severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent an expressed intent to the contrary in the document creating the severance. Since no such contrary intent was manifested in the Alaska Native Claims Settlement Act, insofar as lands in Naval Petroleum Reserve No. 4, now NPR-A, are concerned, the Department of the Interior, as the present owner of the mineral estate, is vested with such right of entry or access independent of any contractual grant of access rights.

APPEARANCES: Michael J. Schneider, Esq., Anchorage, Alaska, for appellant; Roger L. Hudson, Esq., Office of the Regional Solicitor, Anchorage, Alaska for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Kuugpik Corporation, Inc. (Kuugpik), 1/ has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 13, 1982, reserving certain public easements pursuant to section 17(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1616(b) (1982). In particular, Kuugpik objects to the following reservation which appears in both interim conveyance Nos. 109 and 113:

In addition to the foregoing, the United States incorporates by reference the agreement of May 14, 1974, between the United States Department of the Navy, Arctic Slope Regional Corporation, Kuugpik Corporation, Inc., and three other Arctic Slope corporations, and reserves those easements necessary to implement said agreement. A copy of the agreement is located in Bureau of Land Management file F-14909-EE.

Appellant contends that the referenced agreement was never valid and was void ab initio in that it was beyond the authority of the Secretary of the Navy to exercise jurisdiction over lands then under the exclusive jurisdiction of the Secretary of the Interior. Alternatively, Kuugpik contends that the 1974 agreement no longer has application to it or its lands because it was not intended by the parties to the agreement that commercial development take place upon the reserve. Finally, appellant asserts that the reservation of easements necessary to implement the 1974 agreement constitutes a reservation of "floating easements" by BLM in violation of the holding in Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), 43 CFR 2650.4-7(a)(4), and 43 CFR 2650.4-7(c)(1). Appellant requests that this Board find that the May 14, 1974, agreement between Kuugpik and the Department of the Navy is void and that the easements reserved in furtherance of that agreement are contrary to statute and regulation and were, therefore, improperly reserved in BLM's August 13, 1982, decision.

In its answer to appellant's statement of reasons, BLM argues that the incorporation by reference of the May 14, 1974, Navy-Native Agreement into interim conveyance Nos. 109 and 113, as well as the reservation of easements necessary to implement the agreement, were actions expressly mandated by the applicable regulations and are, therefore, binding upon the Board and are not issues properly within the Board's appellate jurisdiction. BLM further argues that, in any event, the Secretary of the Navy acted within his authority in entering into the May 14, 1974, agreement. In response to appellant's arguments that commercial development of the reserve was never intended under the 1974 agreement, and that the parties to the 1974 agreement never intended that it be assignable, BLM contends the May 14 agreement, by its own terms, had and continues to have valid prospective application and that the transfer to the Department of the Interior of the Navy's rights and obligations with

1/ Apparently, the spelling of appellant's name has changed from "Kuugpik" to "Kuukpik." For purposes of convenience, however, the Board will refer to Kuugpik throughout this decision, since BLM's decision was addressed in that manner and the 1974 agreement was entered into when appellant used the earlier spelling.

respect to the National Petroleum Reserve-Alaska, including the 1974 agreement, was clearly within Congress' power. ^{2/} Finally, BLM argues that the reservation of easements necessary to implement the agreement is both consistent with statutory and regulatory intent, and appropriate to effectuate that agreement. In order to examine the various arguments advanced, it is necessary to discuss the subsisting factual milieu.

By Exec. Order No. 3797A, dated February 27, 1923, Naval Petroleum Reserve No. 4 (PET-4) was established and placed under the administration of the Secretary of the Navy.

On December 18, 1971, Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1982). Pursuant to subsection 11(a)(1) of ANCSA, 43 U.S.C. § 1610(a)(1), certain public lands, including lands within PET-4, were withdrawn for selection by Native Village Corporations listed in subsection 11(b)(1) of said Act. The village of Nooiksut ^{3/} was listed in this latter subsection. The ultimate right of villages enumerated in subsection 11(b)(1) of ANCSA, *supra*, to select and receive conveyance of the surface estate of lands within PET-4 was qualified by the required recognition of valid existing rights and reservation of public easements provided for by ANCSA, as well as the precondition that the Secretary of the Interior initially determine the eligibility of the Native village based on its 1970 Native population and character in accordance with ANCSA subsection 11(b)(2), without regard to whether it was a village named in subsection 11(b)(1) of the Act. It should also be noted that where the Native village was located within PET-4, subsection 12(a)(1) of ANCSA allowed the Regional Corporation to select subsurface rights in lieu of that acreage since the mineral estate of the reserve was not subject to selection.

On October 3, 1973, the Juneau Area Director, Bureau of Indian Affairs (BIA), published notice in the Federal Register of a proposed decision determining the eligibility of 30 Alaskan Native villages, including Atkasook and Nooiksut. On October 26, 1973, Navy filed its protests of the proposed decision determining the eligibility of Atkasook and Nooiksut for land and other benefits under the Act. On November 15, 1973, Kuugpik Corporation, the corporation established for the village of Nooiksut, filed land selections with the Fairbanks Office, BLM, pursuant to section 12(a) and (b) of ANCSA, *supra*, which included land withdrawn in PET-4. On December 12, 1973, BIA published in the Federal Register a final decision which ruled against the Navy's protest and determined that the village of Nooiksut was eligible under ANCSA. This decision was appealed by the Navy to the Alaska Native Claims Appeals Board. However, prior to a determination by the Alaska Native Claims Appeals Board, negotiations were undertaken among the concerned parties, and on May 14, 1974, an agreement was entered into between the Navy, the Arctic

^{2/} To the extent that appellant argued that the 1974 agreement did not contemplate the grant of access rights to third parties, e.g., oil and gas lessees, BLM argues that this issue is not ripe for review since no such transfer has yet to occur.

^{3/} The spelling of the village of Nooiksut has also been changed, and it now often appears as Nuigsut.

Slope Regional Corporation, Kuugpiik and the three other village corporations located in PET-4. Under the terms of the agreement Navy dropped its appeal challenging Nooiksut's eligibility under ANCSA in exchange for the express grant of certain rights to use the surface estate selected by and ultimately to be conveyed to Kuugpiik in PET-4.

In 1976, by virtue of section 102 of the Naval Petroleum Reserve Production Act, 90 Stat. 303, 42 U.S.C. § 6501 (1982), PET-4 was redesignated the National Petroleum Reserve-Alaska (NPR-A). Pursuant to section 103(a), 42 U.S.C. § 6503(a) (1982), jurisdiction over the reserve was transferred from the Secretary of the Navy to the Secretary of the Interior on June 1, 1977. Section 103(c), 42 U.S.C. § 6503(c) (1982), provided that the Secretary of the Interior would, upon transfer, "assume the responsibilities and functions of the Secretary of the Navy under any contracts which may be in effect with respect to activities within the reserve." On December 12, 1980, the Naval Petroleum Production Act was amended by the Department of the Interior Appropriations Act, P.L. 96-514, 94 Stat. 2957, 42 U.S.C. § 6508 (1982), which directed that the Secretary of the Interior conduct, "notwithstanding any other provision of law and pursuant to such rules and regulations as the Secretary may prescribe, an expeditious program of competitive leasing of oil and gas in the National Petroleum Reserve in Alaska." Thus, as of the present time Interior has sole jurisdiction over the subsurface mineral estate within NPR-A.

[1] Initially, we must examine BLM's argument that the reservation complained of is expressly required by a validly promulgated regulation. The regulations relating to reservation of various easements in conveyancing documents, codified at 43 CFR 2650.4-7(c), provides in relevant part:

(3) Public easements may be reserved to guarantee international treaty obligations or to implement any agreement entered into between the United States and the Native Corporation receiving the conveyance. For example, the agreement of May 14, 1974, related to Naval Petroleum Reserve Number Four (redesignated June 1, 1977, as the National Petroleum Reserve-Alaska) between the United States Department of the Navy and the Arctic Slope Regional Corporation and four Native village corporations, shall be incorporated in the appropriate conveyances and the easements necessary to implement the agreement shall be reserved.

We recognize, of course, that the reference to the 1974 agreement is by way of example. However, it must be noted that while the first sentence of the regulation merely provides that public easements "may be reserved" the regulation drafters very carefully altered the permissive "may" to the directory "shall" in discussing the 1974 agreement. We are aware that the actual language used is not conclusive as to whether a provision is discretionary or mandatory and that the ultimate determination must be based on the intent of the drafters. See Authority to Determine Eligibility of Native Village After June 18, 1974, 81 I.D. 316, 320 (1974). But, where, as here, the terms are alternated between the permissive "may" and the directory "shall" the conclusion is inescapable that the drafters meant to distinguish between the two concepts. Thus, for whatever reason, the authors of the regulation clearly directed that the 1974 agreement be referenced in the

appropriate conveyancing documents and that the easements be expressly reserved therein.

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid regulations of this Department duly promulgated pursuant to lawful authority. Such regulations have the force and effect of law and are binding on the Department. Sam P. Jones, 71 IBLA 42 (1983); Enserch Exploration, Inc., 70 IBLA 25 (1983). Where the rule exists as a Departmental regulation, we cannot depart from its clearly expressed meaning, and we must apply it to appellant's situation. In any event, even were we not compelled by the regulation to affirm BLM's action, our independent review of the issues raised would lead us to the same conclusion.

Appellant seeks to avoid imposition of the terms of the agreement which it freely signed by challenging the authority of the Secretary of the Navy to administer the surface estate of lands within PET-4. Appellant argues:

The Agreement, regarding virtually all surface activities related to exploration, development, and extraction of oil and gas and operation of associated facilities, purports to fully determine the rights to develop the surface estate. The power to grant such rights, however, was at the time the Agreement was executed, a power belonging exclusively to the Secretary of the Interior pursuant to Federal Statute.

(Statement of Reasons at 6). In support of this assertion, appellant cites subsection 22(i) of ANCSA, supra, which states:

(i) Prior to a conveyance pursuant to section 14, lands withdrawn by or pursuant to sections 11, 14 and 16 shall be subject to administration by the Secretary [of the Interior], or by the Secretary of Agriculture in the case of National Forest lands, under applicable laws and regulations, and their authority to make contracts and to grant leases, permits, rights-of-way, or easements shall not be impaired by the withdrawal.

Appellant's argument is flawed on two separate bases. First of all, it was not the Secretary of the Navy who purported to grant surface rights in PET-4; it was Kuugpik, itself. The Secretary of the Navy merely sought to acquire the permission of the eventual surface owner to enter upon the lands which were ultimately conveyed to the village corporation. Section 22(i) of ANCSA is simply not germane since it applied only to the grant of leases and rights-of-way by the United States, not to their acquisition.

Secondly, while Kuugpik was unable to alienate or otherwise encumber the surface of the lands selected prior to conveyance, the agreement did, as BLM suggests, have valid prospective application looking to the time when Kuugpik was conveyed the surface estate. ^{4/} Thus, in exchange for the Navy's

^{4/} In this regard, we note that, consistent with 43 U.S.C. § 1613(c)(5) (1982), the Regional Corporation was a signatory to the agreement.

surrender of its pending appeal challenging Nooiksut's eligibility, appellant, together with the other village corporations and the Regional Corporation, assented to the grant of easements to allow the Navy to develop the oil resources of PET-4.

[2] Indeed, it is an open question whether the agreement granted the Navy any rights which it did not already possess. As we have noted above, the subsurface mineral estate of lands within PET-4 selected by eligible village corporations was not granted to the Regional Corporation. In effect, ANCSA effected a severance of mineral estate from the surface estate. This condition is, by no means, unusual in American real property law.

It may be taken as a general proposition that where the mineral estate has been severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance effecting the severance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent an expressed intent to the contrary in the document creating the severance. See generally Santa Fe Pacific Railroad Co., 64 IBLA 27 (1982), and cases cited. Such implied rights of entry and development are based on the logical assumption that the mineral estate was reserved for the purpose of retaining the rights to develop the mineral in the grantor. Thus, to the extent that entry on the surface of the land is necessary to effectuate the removal of minerals it is assumed that such right was impliedly reserved in the grantor as a necessary incident of the reserved mineral estate. Therefore, absent an expression of congressional intent to the contrary, it would be legally presumed that the Navy, or its successor-in-interest to the mineral estate (BLM), its lessees, licensees and permittees, are vested with the right to enter the surface of the lands conveyed to remove the reserved mineral deposits as a necessary appurtenant of its ownership of the mineral estate.

The only statutory provision touching on this question is section 14(f) of ANCSA, 43 U.S.C. § 1613(f) (1982). That section provides as follows:

When the Secretary issues a patent to a Village Corporation for the surface estate in lands pursuant to subsections (a) and (b) of this section, he shall issue to the Regional Corporation for the region in which the lands are located a patent to the subsurface estate in such lands, except lands located in the National Wildlife Refuge System and lands withdrawn or reserved for national defense purposes, including Naval Petroleum Reserve Numbered 4, for which in lieu rights are provided for in section 1611(a)(1) of this title: Provided, That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation. [Italics in original.]

BLM notes that this provision was the subject of a specific colloquy on the floor of the House of Representatives between Congressman Stratton of New York and Congressman Aspinall of Colorado, Chairman of the Committee on

Interior and Insular Affairs. The relevant parts of the exchange are as follows:

Mr. STRATTON. Mr. Chairman, the gentleman from Colorado, the distinguished chairman of the committee has just been referring to the fact that certain lands will be excluded from this turnover including certain lands related to the national defense.

I want on behalf of the Committee on Armed Services to ask a particular question of the gentleman with regard to the effect of this legislation on petroleum reserve No. 4 in Alaska.

There are at least three Native villages located on that reserve.

As the gentleman knows, on page 34, subsection 11(h) of this bill, there is a requirement that village approval would be needed to explore, develop, and remove subsurface minerals from within the boundaries of these villages.

My question is whether that provision means that such villages would have to approve the exploration, development or removal of these subsurface minerals within their boundaries insofar as those boundaries are located within naval petroleum reserve No. 4?

In other words, does this village approval proviso of subsection 11(h) apply to the Government's subsurface estate in petroleum reserve No. 4?

Mr. ASPINALL. My answer is "No."

Let me explain. Subsection 11(h) was not intended to apply to the subsurface estate in petroleum 4 lands, and I believe that it does not. The subsection provides that when the surface estate in land selected by a village is conveyed to the village, the subsurface estate in that land shall be conveyed to the regional corporation, except in the case of petroleum 4 land where the subsurface estate is reserved to the United States. Only the subsurface estate conveyed to the regional corporation is subject to the proviso requiring village consent to the removal of minerals. The proviso does not apply to the subsurface estate in petroleum 4 land that is reserved to the United States.

Mr. STRATTON. I appreciate the gentleman's statement with regard to this matter and am glad to have it included in the Record and the legislative history of this bill. [Emphasis supplied.]

117 Cong. Rec. 36,854 (1971). The proviso found in section 14(f) of ANCSA, therefore, cannot be said to constitute a specific limitation on the implied right of entry which the United States retained by virtue of the severing of the mineral from the surface estate. It must be concluded, therefore, that

to the extent that the Navy acquired future easements necessary to remove its oil and gas, the Navy merely obtained the formal acquiescence of the village in rights of which it was already possessed, and which have by the Naval Petroleum Reserve Production Act of 1976, *supra*, been vested in the Department of the Interior.

Finally, appellant's argument that the reservation involved herein constitutes a "floating easement" and, as such, must be viewed as inconsistent with the decision in Alaska Public Easement Defense Fund v. Andrus, *supra*, must be rejected. That case involved the use of so-called "floating easements" under section 17(b) of ANCSA whose exact situs was undefined for the future transportation of fuel and natural resources. In rejecting such "floating easements," the court noted that while they might be a convenient mechanism from the perspective of the Department, the cloud on all Native titles effectuated by such easements was inimicable to the purpose of ANCSA, and the Department's authority under section 17(b) was limited to reserving fixed, specific easements of the type contemplated by ANCSA.

In the instant case, however, the reservations are not derived from an interpretation or application of section 17(b) of ANCSA, but rather arise out of the mutual agreement of the Native village corporation, the Native regional corporation, and the Department of the Navy. Thus, what is involved is not a question of statutory interpretation but of contract implementation. In this regard, the decision in Alaska Public Easement Defense Fund v. Andrus, *supra*, is simply inapposite. Appellant's arguments must be rejected.

Therefore, 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.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Gail M. Frazier
Administrative Judge

