

Editor's note: Reconsideration granted; decision modified -- See Order dated June 16, 1988 (See 99 IBLA 212A th 212H below); Reconsideration of June 16, 1988, order denied -- Order dated April 11, 1989; Reconsideration by Director granted -- reversed, See 9 OHA 143, 99 I.D. 31 (March 24, 1992).

NORTHWEST ALASKAN PIPELINE CO.

IBLA 85-434

Decided October 13, 1987

Appeal from a decision of the Alaska State Office, Bureau of Land Management, that a reservation for natural gas pipeline right-of-way F-24538 should not be included in a patent to the State of Alaska of lands in T. 12 S., R. 13 E., Fairbanks Meridian.

Affirmed as modified.

1. Administrative Authority: Estoppel--Appeals:
Jurisdiction--Board of Land Appeals--Public Lands:
Administration--Secretary of the Interior

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

2. Alaska National Interest Lands Conservation Act: Valid Existing Rights--Rights-of-Way: Act of February 25, 1920

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), all right, title, and interest to tentatively approved land was legislatively conveyed to the State of Alaska, effective from the date of tentative approval. BLM's decision not to include a reservation for the Alaska natural gas transportation system right-of-way grant in a patent to tentatively approved lands will be affirmed, where the right-of-way was granted Dec. 1, 1980, and the lands were tentatively approved Oct. 16, 1963. The applicant has no valid existing rights to such right-of-way through those lands under sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), since the right-of-way was not issued prior to the tentative approval.

APPEARANCES: William J. Moses, Esq., Fairbanks, Alaska, for appellant; M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Northwest Alaskan Pipeline Company (Northwest Alaskan), as agent and operator for the Alaskan Northwest Natural Gas Transportation Company, appeals from a decision dated January 18, 1985, by the Alaska State Office, Bureau of Land Management (BLM), which reads in its totality:

Right-of-Way of No Effect

Patent to lands in T. 12 S., R. 13 E., Fairbanks Meridian, described as Tract A, will be issued to the State in the near future. These lands are on the State's patent priority list C for FY-1985.

When patent is issued it will not contain a reservation for the Alaska Natural Gas Pipeline (F-24538) since the State's selection application predated the right-of-way application. [1\]

On June 23, 1961, the State of Alaska filed a selection application pursuant to section 6(b) of the Alaska Statehood Act of July 7, 1958, 48 U.S.C. ch. 2 note (1982), for a substantial portion of the lands in T. 12 S., R. 13 E., Fairbanks Meridian. On October 16, 1963, BLM tentatively approved the selection application.

In 1968 a significant discovery of oil and gas was made at Prudhoe Bay on the North Slope of Alaska. Thereafter, a number of companies applied to the Federal Power Commission for authority to build a pipeline to transport the natural gas. In July 1976, Alcan Pipeline Company (Alcan), the predecessor of Northwest Alaskan, proposed building a gas pipeline paralleling the Trans-Alaska oil pipeline corridor through Alaska and Canada with two branches entering the United States.

On October 22, 1976, Congress enacted the Alaska Natural Gas Transportation Act of 1976 (ANGTA), 15 U.S.C. § 719 (1982), in order "to provide the means for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas to the contiguous States * * * by providing the participation of the President and the Congress in the selection process * * *." Section 3 of ANGTA, 15 U.S.C. § 719a (1982). Congress established a five-part procedural framework for expediting a final

1/ The decision was actually styled as a "Notice," but it is clear that what BLM intended was to notify Northwest Alaskan of its decision not to reserve F-24538 in the patent. Regrettably, the "Notice" contained absolutely no rationale for the action taken.

decision on an Alaska natural gas transportation system (ANGIS). This selection process, as described in Midwestern Gas Transportation Co. v. FERC, 589 F.2d 603, 609-11 (D.C. Cir. 1978), resulted in the President issuing a decision and report to the Congress on the ANGIS, selecting the system proposed by Alcan. Prior to the President's September 1977 decision, Alcan, in July 1977, filed an application for the right-of-way in question. Congress approved the President's decision, and Alcan, or its successor, was designated to construct and operate the portion of the ANGIS project within the State of Alaska.

Beginning in early 1987, representatives of Northwest Alaskan participated in numerous meetings in Alaska and in Washington, D.C., with both Federal and State officials in drafting the provisions of the right-of-way. In 1980, the Project Manager-Gasline, Office of Special Projects, BLM, Alaska, sent a memorandum to the Agency Authorized Officer, ANGIS, Department of the Interior, concerning how State selections should be treated in the right-of-way. A major concern of the author seemed to be to protect unknown valid State selection which had not been recorded. The recommendation was to "[i]ssue the Grant with Acceptable provisions to protect [Northwest Alaskan's] rights through subsequent transfers of lands." To implement that recommendation, the Project Manager proposed inclusion of the following provision in the right-of-way grant:

There is hereby excepted from the Grant hereby made all lands tentatively approved to or subject to tentative approval to, the State of Alaska, pursuant to the Alaska Statehood Act, 72 Stat. 339, as amended, other than lands selected under Section 12 of the Alaska Native Claims Settlement Act, 85 Stat. 695, 43 U.S.C. § 1610, and all lands beneath the navigable rivers. [2/]

(Statement of Reasons (SOR), Exh. D.).

In the summer of 1980, Northwest Alaskan filed a supplement to its original application (Supplement), which set forth additional information to meet the requirements of 43 CFR Part 2880, which had been revised, effective November 8, 1979.

2/ A second alternative was to issue the grant with provision which had been included in the right-of-way for the Trans-Alaska oil pipeline issued Jan. 23, 1974 (F-12505 and AA-5874). That right-of-way covered "Federal lands," as that term is defined in section 28(b) of the Mineral Leasing Act, 30 U.S.C. § 185(b) (1982). However, that right-of-way excepted from the grant "all lands selected and validly tentatively approved to the State of Alaska * * *". The Trans-Alaska pipeline approach involved the State issuing its right-of-way over tentatively approved lands, and the Department of the Interior issuing a right-of-way over Federal lands, so that the right-of-way holder would have either a Federal or a State authorization across lands along the proposed right-of-way route. The Trans-Alaska pipeline right-of-way provided that the permittees would "not challenge the validity of the State's right-of-way lease or other grant on the basis of the existence of the Federal Right-of-way and other authorizations of their interest therein."

See 44 FR 58129 (Oct. 29, 1979) (SOR, Exh. B). In section 4 of this Supplement, Northwest Alaskan stated that its right-of-way application was for the "construction and operation of a natural gas pipeline across Federal lands in the State of Alaska * * *. (Footnotes omitted) (SOR at 15; Exh. B at 4). In footnote 5 to this Supplement, Northwest Alaskan stated it used the term "Federal lands" as defined in section 28(b) of the Mineral Leasing Act (MLA), 30 U.S.C. § 185(b) (1982), as including "all lands owned by the United States or Indian tribe, and lands on the Outer Continental Shelf" (SOR at 15; Exh. B at 4). The Supplement referenced an "Enclosure C" which the Supplement stated "provide[d] a land schedule identifying the lands along the general route of the pipeline that Applicant currently understands have the status of 'Federal lands'" (SOR at 16; Exh. B at 6). The Supplement represented that Enclosure C included "certain lands which are in the process of transfer by the United States to third parties but which, at the time of preparation of the enclosure, appeared to be still in a status in which legal title was in the United States" (SOR at 16; Exh. B at 6). Of particular relevance to this appeal, Northwest Alaskan stated in the Supplement: "Lands selected by the State of Alaska may have progressed through the administrative process of Federal transfer to the point of tentative approval for conveyance; however, until a patent is issued, they are understood to have the status of 'Federal lands'" (SOR at 16; Exh. B at 16).

The State of Alaska disagreed with Northwest Alaskan's assertion that tentatively approved lands should be included in the right-of-way grant, as evidenced by a letter to BLM dated July 24, 1989, in which the State argued that inclusion of such lands would preclude the basis bargaining power of the State, and recommended "the expeditious conveyance of these lands, or, at a minimum, in the Right-of-Way Grant, the prior rights of potential owners be completely protected" (SOR at 20; Exh. C at 5-6).

By memorandum dated July 24, 1980, the Alaska State Director, BLM transmitted a report to the Director, BLM, on Northwest Alaskan's proposed right-of-way. The report recommended that the language of the grant should accommodate "ongoing and potential [land] status changes," particularly with regard to lands tentatively approved to the State of Alaska. To this end, the report recommended the inclusion of a provision excepting from the grant all lands tentatively approved to the State of Alaska (SOR, Exh. F, Report at 2).

On December 1, 1980, right-of-way grant G-24538 was executed by the Secretary of the Interior and Northwest Alaskan. That document describes the Federal lands affected by the grant as those "identified in Enclosure C of the COMPANY'S supplemental application * * *." Again, Enclosure C identifies those lands located in T. 12 S., R. 13 E., Fairbanks Meridian, which had been tentatively approved to the State of Alaska on October 16, 1963 (SOR, Exh. G).

On January 18, 1985, the Alaska State Office, BLM, issued the decision involved in this appeal, informing Northwest Alaskan that, when BLM issued a patent to the State of Alaska for T. 12 S., R. 13 E., Fairbanks Meridian, the patent would not contain a reservation for Northwest Alaskan's right-of-way.

Northwest Alaskan challenges BLM's decision on a number of bases. First, according to Northwest Alaskan, certain provisions of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601-1628 (1982), demonstrate that the lands involved in this appeal, although tentatively approved to the State, are Federally-owned lands and thus within the jurisdiction of the Secretary. Specifically, Northwest Alaskan asserts that, under ANCSA, Native corporations could select lands already selected and tentatively approved to the State of Alaska, and concludes from this that such lands remain subject to the administration of the Secretary to issue a right-of-way across lands not yet patented to the State of Alaska is, in Northwest Alaskan's view, "tantamount to a challenge * * * of the legality of the ANCSA" which should have been made with one year of its enactment in accordance with section 10 of ANCSA, and adjudication of which is beyond the jurisdiction of this Board (SOR at 41). Northwest Alaskan's position that lands tentatively approved to the State of Alaska remain Federally-owned lands until actually conveyed, reflected in its Supplement to the right-of-way application, is expanded in its statement of reasons. Again, Northwest Alaskan posits that all lands not meeting the exceptions set forth in section 28 of the MLA remain subject to the authority of the Secretary to issue a right-of-way across those lands.

Second, Northwest Alaskan contends that the doctrine of segregation, as embodied in Departmental regulations 43 CFR 2627.4(b) and 43 CFR 2091.6-4, does not preclude the Secretary from including selected and tentatively approved lands in right-of-way F-24538. State selection applications segregate selected lands from "all appropriations based upon application or settlement and location, including locations under the mining laws * * *." 43 CFR 2627.4(b); 43 CFR 2091.6-4. A right-of-way does not amount to an "appropriation" of land, argues Northwest Alaskan, citing 43 CFR 2880.0-5(m), which defines "right-of-way grant" to mean a "document authorizing a nonpossessory, nonexclusive right to use Federal lands for the limited purpose of construction, operation, maintenance, and termination of a pipeline." In addition, Northwest Alaskan maintains that both section 22(i) of ANCSA, 43 U.S.C. § 1621(i) (1982), and section 906(k) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(k) (1982), provide for interim management of "selected" lands by the Secretary so that the doctrine of segregation does not prevent uses of "selected" lands which do not affect title, such as right-of-way grants. Thus, Northwest Alaskan argues, the Secretary had the authority to issue right-of-way F-24538 since the right-of-way would "in no way jeopardize the title that would eventually pass to the State" (SOR at 53).

Third, Northwest Alaskan argues that the passage of ANILCA did not affect the rights of Northwest Alaskan under right-of-way grant F-24538. Northwest Alaskan bases this argument upon section 1327 of ANILCA, 16 U.S.C. § 3214 (1982), which provides:

Nothing in this Act shall be construed as imposing any additional requirements in connection with the construction and operation of the transportation system designated by the President and approved by the Congress pursuant to the Alaska

Natural Gas Transportation Act of 1976 (Public Law 94-586; 90 Stat. 2903), or as imposing any limitations upon the authority of the Secretary concerning such system.

In Northwest Alaskan's view, this "savings provision" places its right-of-way beyond the reach of the legislative conveyance effected by section 906(c) of ANILCA, 43 U.S.C. § 1635(c) (1982).

Northwest Alaskan's fourth argument is that this Board is not the proper forum to entertain a challenge to the action of the Secretary in granting the right-of-way in question across selected and tentatively approved lands. According to Northwest Alaskan, since right-of-way F-24538 was issued pursuant to section 9 of ANGTA, 15 U.S.C. § 719(g) (1982), a challenge to its issuance could only be brought in accordance with section 10 of ANGTA, which provides that action of Federal officers or agencies taken pursuant to section 9 "shall not be subject to judicial review except as provided in [section 10]." Northwest Alaskan concludes that section 10 of ANGRA "divest[s] this Board of any jurisdiction to entertain a challenge to the action of the Secretary [of the Interior] on any of the basis specified in the ANGTA * * *" (SOR at 63).

[1] We will first address Northwest Alaskan's fourth argument. In its appeal in this case, it seeks reversal of BLM's determination not to reserve the right-of-way in the patent to the State for lands in T. 12 S., R. 13 E. In essence, Northwest Alaskan is asserting that this Board cannot entertain arguments in support of the action taken. We disagree. As the State of Alaska emphasizes in its Response to Northwest Alaskan's Reply Brief, "[t]he appellant cannot seriously argue that the Department can only make decisions in its favor, but lacks jurisdiction to make decisions adverse to it" (State's Response at 2).

In our view, Northwest Alaskan ignores the key phrasing in section 9 of ANGTA relating to the Secretary's authority to issue a natural gas pipeline right-of-way. Section 9 of the ANGTA did, in fact, mandate that Federal officers and agencies "grant authorizations necessary or related to construction of ANGTS at the earliest practicable date and to the fullest extent permitted by laws administered by such officer or agency * * *" 15 U.S.C. § 719g (1982). However, the critical determination for our purposes is whether the law administered by the Secretary of the Interior permit Secretarial authorization of this natural gas pipeline right-of-way across the lands in question. The Secretary issued right-of-way F-24538 pursuant to section 28(a) of the MLA, 30 U.S.C. § 185(a) (1982), which provides that "[r]ights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom * * *." Section 28(b) of the MLA defines "Federal lands" to mean "all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." 30 U.S.C. § 185(b) (1982).

Whether the tentatively approved lands in question are Federal lands and therefore subject to the Department's jurisdiction is a matter which the

Board of Land Appeals may decide by virtue of 43 CFR 4.1 and 43 CFR 4.1(b)(3). The former regulation provides generally that "[t]he Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering, and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." Under 43 CFR 4.1(b)(3), the Board of Land Appeals has the authority to decide finally for the Department appeals concerning the use and disposition of public lands. The Ninth Circuit has ruled that the Secretary, acting principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest." Ideal Basis Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); see Peabody Coal Co., 93 IBLA 317, 93 I.D. 394 (1986) and cases cited therein. BLM's decision not to reserve the right-of-way is reviewable by this Board.

While section 9 of the ANGTA reflects the Congressional view that construction of the ANGTS was in the national interest, and thus, of high priority, that section did not limit or expand the authority of the Secretary or his subordinates to issue a right-of-way under the MLA. Nothing in section 10 of ANGTA, 15 U.S.C. § 719h (1982), suggests that a question arising under section 28 of the MLA or other pertinent laws administrative by the Department must be resolved only in accordance with the judicial review procedures set forth in section 10 of ANGTA. That section merely prescribes the exclusive jurisdiction and limited grounds under which judicial review of agency action may be initiated; it does not preclude the agency from reexamining the validity of its prior action.

[2] In briefs submitted to this Board, Northwest Alaskan, the State of Alaska, and BLM each address, as the pivotal issue, whether lands tentatively approved to the State of Alaska fall within the definition of "Federal lands" provided in section 28(b) of the MLA. Counsel for BLM asserts that all right, title, and interest of the United States in the lands in question vested in the State of Alaska as of the date of tentative approval pursuant to section 906(c)(1) of ANILCA, thereby "cut[ting] off all intervening claimants," including Northwest Alaskan. (BLM Answer at 14, quoting Shepley v. Cowan, 91 U.S. 330, 337 (1876)). For the reasons discussed below, we agree, fundamentally, with BLM's assessment of the effect of section 906(c)(1) of ANILCA in this case.

Section 906(c) of ANILCA, 43 U.S.C. § 1635(c) (1982), provides:

(1) All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act, and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval; except that this subsection shall not apply to tentative approvals which, prior to December 2, 1980, have been relinquished by the

State, or have been finally revoked by the United States under authority other than authority under section 11(a)(2), 12(a), or 12(b) of the Alaska Native Claims Settlement Act. [Emphasis added.]

In State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 244, 249, 253, 91 I.D. 331, 335, 338, 340 (1984), the Director, Office of Hearing and Appeals, held that subsection 906(c)(1) of ANILCA constituted an "immediate legislative conveyance of all previously [tentatively approved] lands," so that legal title was conveyed "the same as the effect of a conveyance by patent," and "the Department no longer possesses jurisdiction over such lands and has no authority on its own to affect title thereto." Congress intended this "immediate legislative conveyance" to confirm all right, title, and interest in and to such lands in the State of Alaska, as of the date of tentative approval. In this case tentative approval occurred on October 16, 1963; therefore, the legislative conveyance relates back to that date and thereby cuts off any rights to the use of that land under F-24538 which may have been granted by the Secretary on December 1, 1980.

The confirmation of "[a]ll tentative approvals of State of Alaska land selections" is "subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act, * * *." Section 906(c)(1) of ANILCA. The question which now arises is whether Northwest Alaskan's pipeline right-of-way across the previously tentatively approved lands qualifies as a valid existing right within section 906(c)(1) of ANILCA. The answer is no.

In Thorson (On Reconsideration), the Director considered the scope of the "valid existing rights" clause, concluding that it concluded rights-of-way. However, in this case, in order to be a valid existing rights, right-of-way F-24538 would have to have been granted prior to October 16, 1963. Since section 906(c)(1) confirmed all outstanding tentative approvals as of the date of tentative approval, thereby vesting legal title in the State retroactive to that date, the term "valid existing rights" in that section, as it relates to this case, can only be referring to those rights created prior to October 16, 1963. Right-of-way F-24538 was granted December 1, 1980. With regard to the October 16, 1963, tentative approval, that right-of-way is not a valid existing right.

This analysis also frustrates appellant's argument that, at the time of the right-of-way grant, the lands in question were Federally-owned lands within the jurisdiction of the Secretary, and, therefore, subject to including in a right-of-way issued pursuant to section 28 of the MLA, 30 U.S.C. § 185 (1982). The lands were not Federally-owned on December 1, 1980, because ANILCA vested legal title in the State retroactive to October 12, 1963. Moreover, even without the passage of ANILCA the result would be the same. Both BLM and the State argue vigorously that tentatively approved lands are not "Federal lands" through which a section 28 MLA right-of-way may be granted. 3/

3/ This is apparently the theory under which BLM operated in issuing the Trans-Alaska pipeline right-of-way. See note 2, supra.

"Federal lands" are defined in section 28(b) of the MLA as "all lands owned by the United States," except certain classes of lands not relevant in this case. 30 U.S.C. § 185(b) (1982). Counsel for BLM points out that in many instances a person who holds legal title is not considered the owner of the legal title is held for security purposes. In such instances the equitable titleholder is considered the "owner."

In the public land context it has long been held that "[w]hen one becomes entitled to a patent, he is treated as the beneficial owner of the land, and the United States is regarded as holding the naked legal title in trust for him * * *." Leonard v. Lennox, 181 F. 760, 762-63 (8th Cir. 1910). See State of Wyoming v. United States, 255 U.S. 489, 501-02 (1921).

The tentatively approved lands in this case were not "owned by the United States" within the meaning of section 28(b) of the MLA. Upon tentative approval the State became vested with the rights and obligations of ownership. The rights included the use and control of the land. To the extent the right-of-way grant on December 1, 1980, might have purported to include tentatively approved lands, it was an important abrogation of the State's right to use and control of lands held by it in equitable ownership and, thus, void.

We reject Northwest Alaskan's argument that the Secretary's interim management authority granted under section 906(k) of ANILCA, 43 U.S.C. § 1635(k) (1982), validates right-of-way F-24538. Section 906(k) provides:

Notwithstanding any other provision of law, on lands selected by, or granted or conveyed to, the State of Alaska under section 6 of the Alaska Statehood Act or this Act, but not yet tentatively approved to the State:

(1) The Secretary is authorized to make contracts and grant leases, licenses, permits, rights-of-way, or easements, and any tentative approval or patent shall be subject to such contract, lease, license, permit, right-of-way, or easement; except that (A) the authority granted the Secretary by this subsection is that authority the Secretary otherwise would have had under existing laws and regulations had the lands not been selected by the State, and (B) the State has concurred prior to such action by the Secretary. [Emphasis added].

Notably, this section provides interim management authority with regard to lands selected by, but not yet tentatively approved to the State of Alaska. This section does not authorize the Secretary to issue rights-of-way upon lands tentatively approved, but not yet patented, to the State of Alaska. It does not authorize the granting of right-of-way across selected lands, but only with the concurrence of the State prior to such granting. See S. Rep. No. 96-413, 96th Cong., 1st Sess. 289, reprinted in 1980 U.S. Code Cong & Ad. News at 5233.

The obvious question raised by section 906(k) is whether Congress intended it to be a complete statement of the Secretary's authority to issue rights-of-way over lands selected by the State of Alaska, *i.e.*, whether by not providing the express authority to issue rights-of-way over tentatively approved land, but prior to actual patent, such authority is foreclosed. The statute, designating the date of tentative approval as the critical cut-off date for the Secretary's interim management, indicates an affirmative answer. Granting such authority would have been inconsistent with the concept of immediate legislative conveyance from the time of tentative approval.

Section 906(1) of ANILCA relates to existing rights and provides at subsection (1):

All conveyances to the State under section 6 of the Alaska Statehood Act, this Act, or any other law, shall be subject to valid existing rights, to Native selection rights under the Alaska Native Claims Settlement Act, and to any right-of-way or easement reserved for or appropriated by the United States prior to the selection of the underlying lands by the State of Alaska.

43 U.S.C. § 1635(1)(1) (1982). Thus, under this subsection all conveyances to the State are subject to three general categories of interest in the land: valid existing rights, Native selection rights, and right-of-way reserved for or appropriated by the United States prior to selection of the underlying land. In this case the right-of-way was not reserved for or appropriated by the United States, and even if it was, it was not granted prior to selection. As we previously stated, it is not a valid existing right, since it was not created prior to October 16, 1963.

Section 906(1)(2) provides that "[w]here, prior to conveyance to the State," a right-of-way has been issued, the conveyance will be subject to the right-of-way, and "[u]pon issuance of tentative approval," the State shall become entitled to all interests of the grantor, except those reserved to the United States in the tentative approval. Although "[w]here, prior to conveyance to the State," at first blush might be construed to apply to Northwest Alaskan's situation, since patent has not issued, the remaining language in section 906(1)(2) clearly indicates that Congress was addressing rights-of-way granted prior to tentative approval. Thus, the right-of-way, in order to fall within the purview of section 906(1)(2), must predate tentative approval, in this case, October 16, 1963.

Neither section 906(k) nor section 906(1) of ANILCA provide any relief for Northwest Alaskan from the effects of section 906(c). Under that section tentative approval and legislative conveyance took place on October 16, 1963, more than 17 years prior to the granting of the right-of-way in this case.

Further, we disagree with Northwest Alaskan's interpretation of section 1327 of ANILCA, 16 U.S.C. § 3214 (1982), which provides:

Nothing in this Act shall be construed as imposing any additional requirements in connection with the construction

and operation of the transportation system designated by the President and approved by the Congress pursuant to the Alaska Natural Gas Transportation Act of 1976 (Public Law 94-586; 90 Stat. 2903), or as imposing any limitations upon the authority of the Secretary concerning such system. [Emphasis added].

Northwest Alaskan agrees that section 906(c) effects a retroactive vesting of title to tentatively approved lands in the State of Alaska, but argues that section 1327 is a savings provision which is designed to remove any doubt that ANILCA was not affect its right-of-way. However, the language of section 1327, and the legislative history of that provision, indicate simply that ANILCA shall not be construed as imposing any additional requirements in connection with the ANGTS, or as imposing any limitations upon the Secretary's authority concerning such system. Section 1327 does not except right-of-way F-24538 from application of the provisions of section 906(c).

Our determination that Northwest Alaskan has no valid existing rights in this case does not impose any additional requirements or limitations upon the Secretary's authority regarding tentatively approved lands. In fact, Congressman Seiberling, who introduced the provision which became section 1327 as an amendment to H.R. 39, explained that the amendment was introduced "to make it clear that neither that [Tetline wildlife] refuge nor any other area created by this bill would change the existing law approving the route or the right-of-way * * *." 24 Cong. Rec. H 14674 (May 19, 1978). This amendment as not intended to confer valid existing rights if none existed.

Our conclusion is supported by discussion in the Senate regarding the general authority of the Secretary to issue a right-of-way, permit, lease, or other authorization made necessary by or related to the ANGTS. Thus, Senator Stevens stated:

I interpret this bill and previous administrative action as not affecting the authority of the Secretary of the Interior with respect to the System. Following enactment of this bill, the Secretary would have, with respect to Federal land remaining under his jurisdiction, the same authority that he had on the date of enactment of Public Law 95-185, to issue any right-of-way permit, lease, or other authorization which is necessary or related to the construction and initial operation of the System. Let me emphasize that I am not referring to lands that may, be provisions of this bill, be transferred out of Federal ownership.

126 Cong. Rec. S 11195 (Aug. 19, 1980). This understanding is consistent with the language of section 906(c)(1), that tentative approvals are confirmed with "all right, title, and interest of the United States in and to such lands * * * vested in the State of Alaska from the date of tentative approval * * *."

We conclude, consistent with Thorson (On Reconsideration), that with the legislative conveyance of these tentatively approved lands effected by

section 906(c)(1) of ANILCA, this Department lost jurisdiction to affect "all right, title, and interest" to such lands. ^{4/} Thus, the lands in question were not Federal lands on December 1, 1980, because ANILCA vested legal title retroactively to October 16, 1963, and because tentatively approved lands are not Federal lands. Section 28 of the MLA does not authorize the issuance of rights-of-way across non-Federal lands. For these reasons, we affirm BLM's decision not to include a reservation for right-of-way F-24538 when it issues a patent to the State of Alaska for the lands in T. 12 S., R. 13 E., Fairbanks Meridian, tentatively approved on October 16, 1963. ^{5/}

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 as modified.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

R. W. Mullen
Administrative Judge

^{4/} Consequently, this Department has no authority to affect title to tentatively approved lands claimed by Natives, except detailed in Thorson (On Reconsideration), supra; to adjudicate the validity of mining claims located on tentatively approved lands (e.g., Charles Renfro, 96 IBLA 311 (1987); Mary Lou Redmond, 95 IBLA 379 (1987)); or to adjudicate the validity of a homestead entryman's claim to tentatively approved land (Terry L. Wilson, 85 IBLA 206, 92 I.D. 109 (1985)).

^{5/} Our decision deals only with the lands tentatively approved Oct. 16, 1963. BLM in its answer indicates that the right-of-way traverse certain other lands in T. 12 S., R. 13 E., namely 72 acres formerly in trade and manufacturing site F-027801, which were selected by the State on Apr. 18, 1967, and tentatively approved on July 19, 1984, and 60 acres formerly included in the withdrawal under Pub. L. No. 386 (12 FR 5387 (July 31, 1947)), which were selected by the State on June 16, 1972, and tentatively approved on July 19, 1984.

JUN 16 1988

IBLA 85-434 : F-24538
: :
99 IBLA 201 (1987) : Right-of-Way
: :
NORTHWEST ALASKAN PIPELINE CO. : Petition for Reconsideration
(ON RECONSIDERATION) : Granted; 99 IBLA 201 (1987)
: modified; decision of Alaska
: State Office, BLM, affirmed
: as modified in part, reversed
: in part.

ORDER

On December 15, 1987, Northwest Alaskan Pipeline Company (Northwest Alaskan), as agent and operator for the Alaskan Northwest Natural Gas Transportation Company (Alaskan Northwest), filed a petition for reconsideration of the Board's October 13, 1987, decision in Northwest Alaskan Pipeline Co., 99 IBLA 201 (1987). In that decision, the Board had affirmed as modified a January 18, 1985, decision of the Alaska State Office, Bureau of Land Management (BLM), which had declared that certain lands situated in T. 12 S., R. 13 E., Fairbanks Meridian, Alaska, would be patented to the State of Alaska without a reservation for Alaskan Northwest's natural gas pipeline right-of-way (F-24538) "since the State's selection application [F-027984] predated the right-of-way application [F-24538]." 1/ The relevant facts, relied upon by BLM and the Board, were that the State had filed selection applications (F-027984 and F-027985) for all of the lands in T. 12 S., R. 13 E., Fairbanks Meridian, Alaska, on June 23, 1961. These selection applications had then been tentatively approved by BLM on

1/ In its January 1985 decision, BLM had stated that the patent to the State would encompass the "lands, in T. 12 S., R. 13 E., Fairbanks Meridian, described as Tract A." The record indicates that, prior to issuance of its January 1985 decision, BLM had issued a July 19, 1984, decision tentatively approving State selection application F-027984 with respect to certain land situated in T. 12 S., R. 13 E., Fairbanks Meridian, described as Tract A." The record indicates that, prior to issuance of its January 1985 decision, BLM had issued a July 19, 1984, decision tentatively approving State selection application F-027984 with respect to certain lands situated in T. 12 S., R. 13 E., Fairbanks Meridian, Alaska, described as 72 acres of land situated in protracted secs. 13 and 24, formerly included in trade and manufacturing site application F-027801, and 60 acres of land situated in protracted sec. 9, formerly included in Public Land Order (PLO) No. 386. BLM stated that these lands, together with lands in T. 12 S., R. 13 E., Fairbanks Meridian, Alaska, previously tentatively approved to the State on Oct. 16, 1963, totalling 21,266.67 acres of land, were now considered to be tentatively approved. BLM referred to the entire tract of tentatively approved lands as "Tract A."

October 16, 1963. ^{2/} Subsequent thereto, the Alcan Pipeline Company, Alaskan Northwest's predecessor-in-interest, filed on July 5, 1977, an application for a right-of-way for a natural gas pipeline (F-24538), pursuant to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1982). On December 1, 1980, BLM issued right-of-way grant F-24538 to Alaskan Northwest. In the grant, BLM stated that the lands included in the right-of-way grant were "Federal Lands * * * as such lands are identified in Enclosure C, submitted with Alaskan Northwest's supplemental right-of-way application, identified the relevant Federal lands by reference to attached alignment sheets depicting the general pipeline route.

In issuing right-of-way F-24538, BLM did not define what was meant by the grant of "Federal Lands." In particular, BLM neither expressly included nor excluded land which had been either selected by or tentatively approved to the State at the time of issuance of the grant. However, in its January 1985 decision, BLM made it clear that the right-of-way grant would not be excepted from the subsequent patent of land previously selected by the State pursuant to State selection application F-027984. That decision applied with equal force to selected land which had been tentatively approved to the State prior to issuance of the right-of-way grant, as well as selected land which had been tentatively approved after issuance of the grant. On appeal, Northwest Alaskan objected to BLM's decision not to reserve right-of-way F-24538, contending principally that BLM had authority to issue a right-of-way grant for land tentatively approved but not yet patented to the State. In essence, Northwest Alaskan argued that such land constituted "Federal Lands" subject to the grant.

In our October 1987 decision, we concluded, in accordance with State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984), that land selected by and tentatively approved to the State prior to the December 1, 1980, issuance of right-of-way grant F-24538 could not be considered "Federal Lands" subject to the grant where section 906(c)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. S 1635(c)(1)(1982), enacted December 2, 1980, had vested legal title to that land in the State, retroactive to the date of the tentative approval (October 16, 1963). We also concluded that, because of the retroactive

^{2/} In tentatively approving State selection application F-027984 and F-027985, BLM had "administratively combined [the two selections] into one selection covering one township which will be identified from this date as State selection S-787, Fairbanks 027984" (Decision, dated Oct. 16, 1963, at 1). Specifically excluded from the tentative approval of the selection application were "trade and manufacturing site F-027801" and "PLO 386." Id. at 2. As noted supra, this land was eventually tentatively approved to the State on July 19, 1984, as part of F-027984.

nature of the statute, Alaskan Northwest's right-of-way could not be considered a valid existing right to which tentative approval of the State selection was subject, pursuant to section 906(c) of ANILCA. In effect, we held that section 906(c)(1) of ANILCA invalidated any rights Alaskan Northwest had under right-of-way F-24538, which rights, thus could not be reserved in a subsequent patent to the State. However, in rendering our decision, we noted that it dealt "only with the lands tentatively approved Oct. 16, 1963." Northwest Alaskan Pipeline Co., *supra* at 212 n.5.

In its petition for reconsideration, Northwest Alaskan does not challenge the result of the Board's October 1987 decision. Rather, Northwest Alaskan requests the Board to now render a final agency decision on whether Alaskan Northwest's right-of-way should properly be reserved in a subsequent patent to the State of those lands tentatively approved to the State after issuance of the right-of-way grant. Northwest Alaskan states that this land is "traversed by Northwest Alaskan's right-of-way" (Petition for Reconsideration at 2).

Although the propriety of BLM's decision not to reverse right-of-way F-24538 with respect to land tentatively approved to the State following issuance of the right-of-way grant was an issue presented in Northwest Alaskan's appeal from the January 1985 BLM decision, at the time we rendered our decision it was unclear whether right-of-way F-24538 encompassed land in trade and manufacturing site F-027801 and PLO 386. As we noted in Northwest Alaskan Pipeline Co., *supra* at 212 n.5, BLM had indicated in its answer only that the right-of-way "may" traverse that land. On reconsideration, Northwest Alaskan affirmatively asserts that the right-of-way does cross the land in question. BLM has not come forward to dispute that claim. Thus, we hereby grant reconsideration and review the correctness of BLM's decision as it relates to land tentatively approved to the State following issuance of the right-of-way grant.

In Golden Valley Electric Association, 100 IBLA 318, 320 (1987), decided subsequent to our decision in Northwest Alaskan, we considered the case of right-of-way issued prior to the tentative approval of State selections. Therein, we expressly distinguished rights-of-way issued after tentative approval of a State selection, referring to Northwest Alaskan, and those issued prior to tentative approval. In the latter instance, we reversed BLM decisions holding such rights-of-way issue prior to tentative approval, the "State selection is subject to these valid existing rights." *Id.* In particular, we relied on section 906(1)(2) of ANILCA, 43 U.S.C. § 1635(1)(2) (1982), to the extent it provides that:

Where, prior to a conveyance to the State, a * * * right-of-way * * * has been issued for the lands, the conveyance shall contain provisions making it subject to the * * * right-of-way * * * issued * * *. Upon issuance of tentative approval, the State

shall succeed and become entitled to any and all interests of the United States as * * * grantor * * * in any such * * * rights-of-way.

See Golden Valley Electric Association, supra at 320; Northwest Alaskan Pipeline Co., supra at 210 ("right-of-way, in order to fall within the purview of section 906(1)(2), must predate tentative approval").

The January 1985 BLM decision contains a heading which states: "Right-of-Way of No Effect." This heading suggests that BLM regards Alaskan Northwest's right-of-way as null and void. This portion of the January 1985 BLM decision, as it relates to land tentatively approved to the State after issuance of the right-of-way, is plainly contrary to our decision in Golden Valley. The right-of-way must be considered a valid existing right to which tentative approval of the State selection is subject, pursuant to section 906(c) of ANILCA. We, therefore, reverse the January 1985 BLM decision in that regard.

To the extent that Alaskan Northwest's right-of-way embraces land tentatively approved to the State after issuance of the right-of-way, the text of the January 1985 decision is also in error. That decision states that BLM will not reserve the right-of-way in a patent to the State. That is at odds with the logical extension of our decision in Golden Valley. Even though the land included in the July 1984 tentative approval of the State selection passed out of Federal ownership, subject to valid existing rights, pursuant to section 906(c)(4) of ANILCA, 43 U.S.C. § 1635(c)(4) (1982), (see Jennie A. Wasey, 92 IBLA 228 (1986)) that fact does not preclude BLM from reserving the right-of-way in the patent, since issuance of the patent is merely a ministerial act, and reservation represents recognition of the right which existed at the time of tentative approval. 3/ Thus, BLM has the authority to reserve Alaskan Northwest's right-of-way in a subsequent patent to the State. Its decision to the contrary must be reversed.

Accordingly, 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 our decision in 99 IBLA 201 (1987) is modified to reverse that part of the January 1985 BLM decision related to land tentatively approved to the State following issuance of the right-of-way.

3/ In its petition for reconsideration, Northwest Alaskan requests the Board to stay the effectiveness of the Board's October 1987 petition, pending action on the petition. Because of our action on that petition, there is no need to stay the effectiveness of the Board's October 1987 decision. The request is denied.

The remainder of our decision affirming, as modified, the January 1985 BLM decision is not disturbed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

R. W. Mullen
Administrative Judge

APPEARANCES:

William J. Moses, Esq.
General Counsel
Northwest Alaskan Pipeline Co.
3111 C Street, Suite 200
Anchorage, Alaska 99503

James R. Mothershead, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior
701 C Street, Box 34
Anchorage, Alaska 99513

M. Francis Neville, Esq.
Office of Attorney General
State of Alaska
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501

IBLA 85-434 : F-24538
99 IBLA 201 (1987) :
: :
NORTHWEST ALASKAN PIPELINE :
(ON RECONSIDERATION II) :
: Right-of-Way
: :
: Motion for Reconsideration of
: June 16, 1988, Order Denied

ORDER

On August 15, 1988, the State of Alaska filed a motion for reconsideration of the Board's order, dated June 16, 1988, in Northwest Alaskan Pipeline Co., (On Reconsideration). The Board issued that order following receipt of a petition filed by Northwest Alaskan Pipeline Company (Northwest Alaskan) seeking reconsideration of the Board's decision in Northwest Alaskan Pipeline Co., 99 IBLA 201 (1987). In that decision, we concluded that the Bureau of Land Management's (BLM) December 1, 1980, grant of natural gas pipeline right-of-way F-24538 across lands selected by the State and tentatively approved to it on October 6, 1963, did not create a right to have the right-of-way reserved in a patent to the State because section 906(c)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c)(1) (1982), enacted on December 2, 1980, had vested legal title in the State, retroactive to the date of tentative approval (October 16, 1963). We limited our conclusion only to those lands tentatively approved October 16, 1963.

In its petition for reconsideration, Northwest Alaskan did not challenge that conclusion. Rather, it requested that we consider whether its right-of-way could be reserved in a subsequent patent of certain lands to the State, where those lands had been tentatively approved to the State on July 19, 1984, after issuance of F-24538.

We granted Northwest Alaskan's petition for reconsideration and stated:

Even though the land included in the July 1984 tentative approval of the State selection passed out of Federal ownership, subject to valid existing rights, pursuant to section 906(c)(4) of ANILCA, 43 U.S.C. § 1635(c)(4) (1982), (see Jennie A. Wasey, 92 IBLA 228 (1986)), that fact does not preclude BLM from reserving

the right-of-way in the patent, since issuance of the patent is merely a ministerial act, and reservation represents recognition of the right which existed at the time of tentative approval. (Footnote omitted).

It is that statement with which the State takes exception in its motion for reconsideration. The State argues that, since the lands in question were tentatively approved to the State in 1984 without reservation of the right-of-way, the Department of the Interior has no jurisdiction "to unilaterally amend or correct the terms of the conveyance to Alaska." Motion at 4. The State's argument is based on its assertion that tentative approvals to the State have the same force and effect as patents. The State claims that the Board's order requires BLM to correct the omission of the tentative approval without the State's consent and ignores Departmental decisions and regulations, citing Appeal of the Alaska Railroad (On Reconsideration), 3 ANCAB 351, 86 I.D. 452 (1979), and 43 CFR 1865.3. Although the State agrees that issuing a patent is a ministerial act, it contends that BLM may not include therein a reservation which does not appear in the tentative approval. Neither BLM nor Northwest Alaskan has responded to the State's motion.

We deny the State's motion for the following reasons. In our June 16, 1988, order, we recognized that the right-of-way in question was a valid existing right at the time of the 1984 tentative approval. The State has not challenged the validity of the right-of-way. Moreover, the State acknowledges that, in accordance with Secretarial Order No. 3029, 43 F.R. 55287, 55291 (Nov. 27, 1978), amended, 45 F.R. 1692, 1693 (Jan. 8, 1980), the administrative act of listing or failing to list the right-of-way in the tentative approval cannot operate to create or extinguish the right. The State's position is that regardless of whether the right-of-way should have been reserved in the tentative approval, since it was not, it cannot be reserved in the patent and that we erred in concluding otherwise. We disagree.

The case cited by the State stands for the well-recognized principle that the Department loses jurisdiction to adjudicate interests in land once the United States has issued a patent for such land. Therein, following a review of section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (1982), the Alaska Native Claims Appeal Board held that section 316 did not allow the Secretary to unilaterally revise patents to a Native village corporation and a Native regional corporation to include a reservation for a right-of-way for the Alaska Railroad. The regulations at 43 CFR Subpart 1865, which implement section 316 of FLPMA, also make clear that the Secretary may not unilaterally correct a patent or other conveyancing document, including a tentative approval.

What distinguished the present case from the precedents cited by the State is that the patent, which the State argues in this case may not be corrected, has not issued. We did not direct BLM to correct the tentative approval. Clearly, the regulations at 43 CFR Subpart 1865 would preclude that action, unless the State were to agree, since the surrender of the tentative approval would be a prerequisite to correction. 43 CFR 1865.1-3. Under the State's theory, even if the Department realizes that a

reservation has erroneously been excluded from a tentative approval, it must perpetuate that mistake by excluding the reservation from the patent. 1/ We believe that because BLM's inclusion or exclusion of a reservation in a conveyancing document cannot create or extinguish a right, the State's interests are unaffected by reservation of the right-of-way in the patent.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

R. W. Mullen
Administrative Judge

1/ Thus, had BLM inadvertently failed to include the statutory reservation for ditches and canals (43 U.S.C. § 945 (1982)) in the tentative approval, the State would apparently argue that BLM could not correct that error in the patent.

APPEARANCES:

William J. Moses, Esq.
General Counsel
Northwest Alaskan Pipeline Co.
3111 C Street, Suite 200
Anchorage, Alaska 99503

James R. Mothershead, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior
701 C Street, Box 34
Anchorage, Alaska 99513

M. Francis Neville, Esq.
Office of Attorney General
State of Alaska
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501