

Appeals from a decision of the Anchorage District Office, Bureau of Land Management, waiving administration of airport leases describing lands conveyed to a Native corporation. F-19463, F-031560.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Absent a finding by the Secretary that retention is in the interest of the United States, a BLM decision waiving administration of a public airport lease pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. | 1613(g) (1982), with respect to land conveyed to a Native village corporation, will be affirmed as required by 43 CFR 2650.4-3.

APPEARANCES: Ray D. Gardner, Esq., Anchorage, Alaska, for Kuitsarak, Inc., and Calista Corporation; John M. Starkey, Esq., Bethel, Alaska, for the Goodnews Bay Traditional Council; Martha T. Mills, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; and John M. Allen, Esq., Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE KELLY

Kuitsarak, Inc., Calista Corporation, and the State of Alaska have appealed from a decision of the Anchorage District Office, Bureau of Land Management (BLM), dated May 2, 1986, waiving administration of airport leases F-19463 and F-031560 held by the State. The Goodnews Bay Traditional Council (GBTC) has filed a motion to intervene in these appeals. The airport leases describe lands that were conveyed to appellants Kuitsarak and Calista by interim conveyance of August 30, 1984. Pursuant to section 14(g) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. | 1613(g) (1982), this conveyance was expressly made subject to the airport leases.

On January 2, 1965, BLM issued airport lease F-031560 to the State of Alaska, Division of Aviation, for a term of 20 years under the Act of May 24, 1928, as amended, 49 U.S.C. || 211-14 (1982). Airport lease F-031560 initially described approximately 22.5 acres in sec. 28, T. 12 S.,

R. 73 W., Seward Meridian. On June 25, 1974, the original lease was amended to include an additional 66 acres. The amended lease included lands located in secs. 21 and 28, T. 12 S., R. 73 W., Seward Meridian. All terms of the lease remained the same, except the expiration date was extended to April 11, 1994.

On November 16, 1983, the State of Alaska, Department of Transportation and Public Facilities (the State) subleased parcel 1, consisting of 20,750 square feet, within airport lease F-031560, to Ronald Hyde, d/b/a Alaska River Safaris (Hyde). The sublease agreement covered a term of 10 years 5 months, from November 10, 1983, to April 10, 1994, and authorized the use of the parcel for:

Operation of a commercial guiding business including: construction, operation and maintenance of a building to be utilized for office space, customer waiting, storage and living quarters for one (1) employee for security purposes; tiedown for lessee's float aircraft and boat; outdoor storage of equipment and fuel for lessee's use only, \* \* \*.

On April 23, 1984, Kuitsarak filed a letter of protest with BLM challenging the State's sublease to Hyde, requesting that BLM terminate airport lease F-031560 for violation of its terms (Statement of Reasons (SOR), IBLA 85-221, Exh. E). Kuitsarak alleged that the sublease violated the terms and conditions of the airport lease because (1) BLM did not approve the sublease agreement; (2) the sublease agreement was not in harmony with the purposes of the lease; and (3) BLM did not authorize the construction of certain improvements. On July 9, 1984, Calista filed a letter with BLM supporting Kuitsarak's protest.

On August 30, 1984, Kuitsarak was granted interim conveyance of certain lands selected pursuant to section 12(a) of ANCSA, 43 U.S.C. | 1611(a) (1982). This interim conveyance included the lands where the Goodnews Bay Airport is located, and is expressly made subject to airport lease F-031560.

By decision dated November 29, 1984, BLM dismissed the protest filed by Kuitsarak, concluding that the sublease arrangement did not violate the terms of the airport lease, that the use by Hyde was not inconsistent with the purposes of the airport lease, and that it was not detrimental to the operation of the airport.

Kuitsarak and Calista appealed BLM's November 29, 1984, decision to the Board, arguing that it contravened "the unambiguous language set forth in the Federal lease," because the State "enter[ed] into an assignment without first obtaining the consent of the lessor [BLM] and by authorizing activities not in harmony with the proper use of the premises as an airport" (SOR, IBLA 85-221 at 12). Further, they argued that until administration of the lease has been waived, "BLM is legally obligated to continue managing the lands to protect and preserve the rights of the Native Corporation land owners. See generally, 43 CFR | 2650.1; P.L. 96-487 (Dec. 2, 1980), at | 1411" (SOR, IBLA 85-221 at 5-6).

On April 9, 1985, the Board issued an order directing BLM to determine whether the interest of the United States required continued administration of the leases or whether it was waiving administration pursuant to 43 CFR 2650.4-3 (Order, IBLA 85-221 (Apr. 9, 1986)). In response, BLM issued a decision dated May 2, 1986, waiving administration of the subject airport leases.

On May 30, 1986, Kuitsarak and Calista filed a timely notice of appeal from BLM's decision waiving administration of the airport leases. On the same date, the State of Alaska filed a notice of appeal from BLM's waiver decision. The Board consolidated the two appeals and docketed them as IBLA 86-1373.

By order dated June 25, 1986, the Board dismissed the appeal of Kuitsarak and Calista, docketed IBLA 85-221, stating that, in light of BLM's waiver decision, it had no jurisdiction to consider the appeal.

In its SOR, the State challenges BLM's decision to waive administration on the following bases: (1) 43 CFR 2650.4-3 exceeds the authority of the statute upon which it is based; (2) BLM's decision is not based upon a record that shows a reasoned analysis and due regard for the public interest; (3) BLM failed to follow the proper procedure before deciding to waive administration, since the Federal Aviation Administration, the Federal agency with an interest in the lease, was neither notified nor consulted about the decision; (4) BLM's waiver of administration causes substantial problems for the State of Alaska and diminishes the State's right to "complete enjoyment of all rights, privileges, and benefits" of its BLM airport lease under section 14(g) of ANCSA; (5) there is no substantial burden "on BLM in continuing to administer the airport lease"; and (6) a "waiver of administration" amounts to a "transfer of administration," and as such is not supported by a reasonable basis and is not shown to be in the public interest, adopting State of Alaska, 86 IBLA 268 (1985) (J. Arness dissenting).

In their SOR, Kuitsarak and Calista assert that the State's arguments in IBLA 86-1373 were considered and rejected by the Board in State of Alaska, 86 IBLA 268 (1985). The basis for the appeal filed by Kuitsarak and Calista is that BLM improperly waived administration of the airport lease before resolving the dispute concerning the sublease, and removing the "illegal encumbrance \* \* \* from the title to the native companies' land" (SOR of Kuitsarak and Calista at 5). According to Kuitsarak and Calista, "BLM is required under the terms of the airport leases and existing regulations to require that all subleases and assignments be presented to the agency for approval." Id. at 4. They maintain that BLM failed to fulfill its obligations regarding the airport lease, but instead "followed the IBLA's suggestion to waive administration without first resolving the problems created by the illegal sublease to Mr. Hyde." Id. In addition, they claim that under 43 CFR 2650.1(2)(i) BLM was required to obtain and consider the views of the concerned Native regional and village corporations prior to issuing the sublease to Hyde.

On March 24, 1987, the GBTC filed a petition for leave to intervene and an SOR in which it presented arguments in favor of its standing to inter-vene and as to why BLM's waiver decision is improper. GBTC argues that BLM failed to follow procedures mandated by the National Historic Preservation Act (NHPA), 16 U.S.C. | 470 (1982), 1/ and Executive Order 11593, 36 FR 8221 (May 13, 1971) (reprinted at 16 U.S.C. | 470 (1982)), by allowing the State to enter into the sublease with Hyde, which covers the "historic and reli- gious site of Mamteraq" (GBTC's SOR at 6). GBTC argues that "[t]he sublease of Mamteraq to Alaska River Safaris is a[n] 'undertaking' [under section 106 of NHPA, 16 U.S.C. | 470f (1982)] and triggers the BLM's responsibility to identify eligible historic sites and make a finding of no adverse effect before allowing the sublease" (GBTC's SOR at 15). In GBTC's view, BLM should have determined that Mamteraq was eligible for registration on the National Register prior to the sublease. Further, GBTC argues that under the regulations promulgated to implement the NHPA, BLM "must fulfill its duty to preserve and protect Mamteraq, and that it cannot waive this respon-sibility" (GBTC's SOR at 19).

In addition, GBTC argues that BLM has failed to fulfill legal duties imposed by the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. | 1996 (1982). 2/ GBTC asserts that "[b]eneath the ancient site of Mamteraq lie the graves of the ancestors of the current Yupiit resident[s] of Goodnews Bay." According to GBTC, "[t]he presence of these graves, and their potential religious significance to the Yupiits of Goodnews Bay, trigger duties on the part of the BLM" (GBTC's SOR at 21). GBTC argues that it was error for BLM to sublease the Mamteraq without first consulting with the Yupiits of Goodnews Bay in accordance with AIRFA.

In its Supplemental Answer, the State argues that GBTC lacks standing to intervene in this appeal, since GBTC has failed to establish "either an

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1/ Section 106 of NHPA, 16 U.S.C. | 470f (1982), provides in relevant part:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."

2/ The American Indian Religious Freedom Act, 42 U.S.C. | 1996 (1982), provides:

"On and after August 11, 1978 it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

economic interest or active engagement in the administrative process" citing South Hill Neighborhood Association v. Romney, 421 F.2d 454 (6th Cir. 1969) (State's Supplemental Answer at 3). The State asserts that prior to the construction of the second runway on the airport lease acreage, "the State requested, and the village of Goodnews Bay agreed, that all graves would be removed from the runway construction area," and that "[a]s a result, the graves of close relatives described in the affidavits submitted by GBTC should not be on the airport but should have been removed" (State's Supplemental Answer at 4). In addition, the State contends that GBTC is barred by laches from arguing that BLM violated NHPA and AIRFA in allowing the State to enter into the sublease with Hyde. In the State's view, (1) GBTC should have responded to the public notice of the Hyde sublease rather than waiting 4 years to raise its concerns; (2) this delay is not excusable since the members of GBTC are also shareholders in Kuitsarak and Calista; and (3) the State will be unduly prejudiced if GBTC is allowed to challenge the sublease at this time. Finally, the State responds that BLM did not violate NHPA and that AIRFA does not apply to the sublease.

[1] The State's arguments that BLM improperly waived administration of the subject airport lease are the same arguments considered and rejected by the Board in State of Alaska (State of Alaska I), 86 IBLA 268 (1985). In State of Alaska (State of Alaska II), 97 IBLA 229 (1987), which concerned BLM decisions to waive administration of a material site right-of-way and a highway right-of-way, the Board stated:

Section 14(g) of ANCSA does not require waiver of administration, but grants discretionary authority to do so. By promulgating 43 CFR 2650.4-3, the Secretary exercised his discretionary authority under section 14(g) of ANCSA. Generally, when a conveyance includes all the land underlying a right-of-way, the Secretary has concluded it to be in the interest of the United States to waive administration. This Board has found this policy determination to be well supported. State of Alaska, 86 IBLA at 274. The exception arises only when the Secretary makes a contrary finding. It is not necessary to make a finding that the interest of the United States does not require continuation of the administration by the United States whenever a waiver of administration occurs. This finding is necessary only if some interest of the United States requires it to retain administration. 43 CFR 2650.4-3. A finding that no exceptional circumstances exist is implicit in every waiver. The rights-of-way at issue were entirely included in conveyances to Native corporations. There have been no contrary findings. Absent a finding by the Secretary that retention of administration was in "the interest of the United States" (not the State), BLM was obliged by the regulation to waive.

97 IBLA at 231. See also State of Alaska, Department of Transportation and Public Facilities, 98 IBLA 88 (1987). There has been no Secretarial finding in this case that retention of administration of the airport leases is in the interest of the United States.

Moreover, we reject the argument advanced by Kuitsarak and Calista that BLM should not waive administration of the airport lease until the dispute over the sublease has been resolved. In its April 9, 1985, order directing BLM to determine whether the interest of the United States required continued administration of the leases under 43 CFR 2650.4-3 (Order, IBLA 85-221, Apr. 9, 1986), the Board quoted the following portion of State of Alaska I:

[W]aiver of administration is mandated by 43 CFR 2650.4-3, at least in those cases where the conveyance covers all the land on which the outstanding third-party interest is situated. In pertinent part, that regulation states:

| 2650.4-3 Administration.

Leases, contracts, permits, rights-of-way, or easements granted prior to the issuance of any conveyance under this authority shall continue to be administered by the State of Alaska or by the United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease, contract, permit, right-of-way or easement, unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States.

Thus, in those cases where the entire lease or right-of-way was on land conveyed to a Native corporation, BLM had no discretion to exercise. Absent a finding by the Secretary that retention of administration was in "the interest of the United States" (not the State), BLM was obliged by the regulation to waive. \* \* \* In light of the mandatory tenor of the regulation, only BLM's refusal to waive would constitute arbitrary and capricious conduct. [Emphasis in original.]

Id. at 272-73.

In its April 9, 1986, order, the Board concluded, based upon State of Alaska I, supra, "that in the absence of the required finding under 43 CFR 2650.4-3, BLM is mandated to waive administration of the lease. If BLM waives administration, the Board will have no jurisdiction and the appeal will have to be dismissed" (Order, IBLA 85-221 (Apr. 9, 1986), at 2). By decision dated May 5, 1986, BLM waived administration of the subject airport leases, and subsequently, by order dated June 25, 1986, the Board dismissed IBLA 85-221 on the basis that it was without jurisdiction to consider the appeal.

As noted in the April 9, 1986, order, the record indicates that BLM may have delayed action under 43 CFR 2650.4-3 until the Board disposed of

IBLA 85-221. Such an approach is inconsistent with this Board's interpretation of 14(g) of ANCSA, 43 U.S.C. | 1613(g) (1982), and the regulations under 43 CFR 2560.4. In this case, the entire lease was on land conveyed to a Native corporation, and there was no Secretarial finding that retention of administration was in the interest of the United States. Thus, "BLM had no discretion to exercise" and "BLM was obliged by the regulation to waive." State of Alaska I, supra at 272-73.

GBTC's contention that BLM lacks authority to waive administration of the airport lease until it determines whether Mamteraq is subject to the NHPA and AIRFA is subject to the same analysis and disposition. By the time GBTC raised questions relating to the applicability of the NHPA and AIRFA to Mamteraq, BLM had already waived administration of the airport lease, which was no longer subject to the Department's jurisdiction. Thus, the Board lack's jurisdiction to consider the questions raised by GBTC. 3/

Therefore, we conclude that under 43 CFR 2650.4-3, BLM was mandated to waive administration of the airport leases, since there was no finding by the Secretary that retention of administration is in the interest of the United States. We also conclude that, upon waiver of administration, BLM lost jurisdiction to resolve questions regarding the propriety of the Hyde sublease, including the questions of whether the sublease is consistent with the primary lease and whether the sublease was issued in violation of NHPA and AIRFA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision waiving administration of airport leases F-19463 and F-031560 is affirmed.

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John H. Kelly  
Administrative Judge

We concur:

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Bruce R. Harris Gail M. Frazier  
Administrative Judge

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Administrative Judge

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3/ Given our ruling that the Board lacks jurisdiction to resolve the questions raised by GBTC, we make no finding as to whether GBTC has standing to intervene in this appeal.