



UNITED STATES FOREST SERVICE

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Decided January 13, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

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IBLA 2011-97

Decided January 13, 2012

Appeal from a decision of the Alaska State Office, Bureau of Land Management, that tentatively approved the State of Alaska's selection of certain lands within the Tongass National Forest, subject to U.S. Forest Service rights-of-way with only 30-year terms. AA 71685, AA 71685-MH.

Affirmed.

1. Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: State Selections--State Selections

The Alaska National Interests Lands Conservation Act authorizes the U.S. Forest Service to grant rights-of-way on national forest lands selected by the State under the Alaska Statehood Act after the State concurs in that grant and before that selection is tentatively approved by the Secretary of the Interior, but the authority of the State to concur in the granting of such a right-of-way and the validity of its concurrence are governed by State law.

2. Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: State Selections--State Selections

Where a right-of-way grant under the Federal Land Policy and Management Act of 1976 is recorded on lands selected by the State under the Alaska Statehood Act after that grant was concurred in by the State, but its concurrence is no longer valid under State law, the Bureau of Land Management may properly refuse to encumber those lands with that grant when tentatively approving their selection by the State under the Alaska National Interest Lands Conservation Act.

APPEARANCES: Dawn M. Collinsworth, Esq., U.S. Department of Agriculture, Office of the General Counsel, Juneau, Alaska, for the U.S. Forest Service; Colleen J. Moore, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for the State.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

The U.S. Forest Service, United States Department of Agriculture (USFS) appeals from a decision by the Alaska State Office, Bureau of Land Management (BLM), dated December 29, 2010 (Decision). The Decision tentatively approved the selection of lands within the Tongass National Forest that had been selected by the State of Alaska (State) under the Alaska Statehood Act, 72 Stat. 339 (July 7, 1958) (Statehood Act). The Decision also approved the future conveyance of those lands to the State, subject to five reserved rights-of-way (ROWs) that will expire on July 16, 2025. USFS asserts that these ROWs were granted in perpetuity for its benefit and that BLM erred by reserving only term-limited ROWs. For the reasons discussed below, we affirm BLM's Decision.¹

Background

The State, through the Alaska Department of Natural Resources (ADNR), applied to select lands in the Tongass National Forest under the Statehood Act on September 20, 1989 (Application); BLM then serialized that application as AA 71685. Section 6(a) of the Statehood Act entitles the State to select up to 400,000 acres of vacant, unappropriated, and unreserved national forest lands, provided its selections are approved by the Secretary of Agriculture and either "adjacent to established communities or suitable for prospective community centers and recreational areas." 72 Stat. at 340. The Application identified national forest lands on Kuiu Island, near No Name Bay, in T. 62 S., Rs. 73 and 74 E., Copper River Meridian, to which was attached an August 1989 approval letter by USFS. See 43 C.F.R. § 2627.1(b) (an application to select lands by the State must include "a statement of the Secretary of Agriculture or his delegate showing that he approves the selection").

USFS thereafter requested State concurrence to the granting of perpetual ROWs across its selected lands for access to other National Forest lands via Forest Development Roads (FDR) 6402, 6456, 6487, 6488, and 6493. Answer, Ex. 1. This request was made pursuant to Section 906(k) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(k) (2006), which requires State concurrence before an ROW may be granted on lands the State selected under the Statehood Act.² The Southeast Regional Office, Division of Land and Water

¹ The State of Alaska responded to this appeal on June 2, 2011 (Answer), with attached exhibits. Although BLM submitted its administrative record, neither it nor the Solicitor for the Department of the Interior entered an appearance or filed a responsive pleading.

² In pertinent part, Section 906(k) of ANILCA, 43 U.S.C. § 1635(k) (2006), states:
(continued...)

Management, ADNR, responded on February 13, 1990, by stating “no objection to the U.S. Forest Service reserving easements for [each FDR].” Answer, Ex. 2 at 1. After receiving that response, USFS granted itself these perpetual ROWs under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1767(a) (2006), which were recorded with the Petersburg Recording District in Petersburg, Alaska, on April 14, 1990; BLM then noted these ROWs on its Master Title Plats. Answer, Exs. 17, 18.

The State’s concurrence in granting these ROWs was challenged in *Southeast Alaska Conservation Council v. Pekovich*, IJU-93-823 CI (Alaska Super. Ct. May 28, 1993) (SEAC).³ Plaintiffs claimed that lands selected under the Statehood Act must be classified and included in a land use plan pursuant to Alaska Statute (AS) 38.04.065 and that any disposal of an interest in those lands by the State requires prior public notice under Article VIII, section 10, Alaska State Constitution. *Id.* at 7-9. The State court granted cross motions for summary judgement, ruling in favor of the State and holding that AS 38.04.065 applies only to State-owned land and lands tentatively approved for transfer to the State under the Statehood Act, and ruling in favor of the plaintiffs by holding that the State Constitution requires prior public notice before the State can dispose of any interest in any State lands, including ANILCA concurrence for ROW grants over State-selected lands. SEAC Memorandum and Order (Feb. 11, 1994). The court subsequently found that the failure by ADNR to give prior public notice of its concurrences invalidated these ROW and directed the defendants to so inform USFS. SEAC Memorandum and Order (Mar. 25, 1994). In its entry of final judgement, the Superior Court noted that while the State’s motion to dismiss for failure to join an indispensable party was denied, it had ordered the

² (...continued)

Notwithstanding any other provisions 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 [ANILCA], 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 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.

³ The complaint, applicable court orders, and final judgement were attached to the State’s Answer. See Answer, Exs. 3-6.

defendants “to notify the Forest Service of the Court’s decision finding the defendants’ concurrence(s) invalid.” SEAC Judgment (Apr. 15, 1994). No appeal was taken by the parties or pursued by USFS.

Following the superior court’s decision, these lands were classified as wildlife habitat in State legislation dealing with its Mental Health Land Trust, and ADNR published public notice of its proposed concurrence in granting those ROWs. USFS responded on September 21, 1994, by questioning the legality of that legislative classification, asserting that these lands are “of minimal importance as wildlife habitat,” and claiming that the Forest Service Timber Sale Program would be “seriously hindered if [these ROWs] are not granted.” Answer, Ex. 7. By correspondence dated October 10, 1994, USFS urged ADNR to concur in both granting perpetual ROWs and the harvesting of timber on these State-selected lands.⁴ Answer, Ex. 8; see ANILCA, 43 U.S.C. § 1635(k)(1) (2006). After a conference call “to answer questions the ADNR had relating to the concurrences requested by the Forest Service,” USFS provided additional information January 25, 1995, stating that to meet its timber sale commitments and schedule, “both road and timber harvest units concurrences are needed by no later than March 1, 1995.” Answer, Ex. 9 at 1.

ADNR decided not to concur in granting perpetual ROWS or the harvesting of timber on State-selected lands in a February 28, 1995, record of decision (ROD). It did, however, concur in “a temporary road (for the life of [USFS] timber sale contracts),” subject to certain conditions, and noted this road would be made permanent if it could be maintained “without a significant long term impact on wildlife habitat.” ROD at 10. USFS responded by requesting reconsideration of that decision on March 17, 1995 (USFS Request). Answer, Ex. 12. Since these lands had been selected “for purposes of ‘remote settlement’” under the Statehood Act, USFS claimed their classification as wildlife habitat by the State legislature was “contrary to the intent of the Act” because it applies only to national forest lands that are “adjacent to established communities or suitable for prospective community centers and recreational areas.” USFS Request at 2 (quoting 72 Stat. at 340), 4. It also claimed that the conditions imposed by the ROD were unnecessary and that its failure to concur in the harvesting of timber on these State-selected lands could preclude the sale of that timber by USFS. *Id.* at 5-11.

The ADNR Commissioner decided the merits of the USFS Request on June 16, 1995 (Commissioner Decision). Answer, Ex. 14. He first rejected the USFS claim that classifying these lands as wildlife habitat placed its application in jeopardy under the Statehood Act: “The state selected the land in good faith for creation of a new

⁴ ANILCA provides that the State will receive 90% of all proceeds that USFS may receive for harvesting timber on these State-selected lands if and when their selection is tentatively approved. 43 U.S.C. § 1635(k)(2) (2006).

community (settlement). That the department altered its intent after selection is a condition of changing times and conditions.” Commissioner Decision at 8.⁵ The Commissioner upheld the decision not to concur in perpetual ROWs or the harvesting of timber on State-selected lands but modified its concurrence for a temporary road:

Our concern was with the Forest Service definition of permanent versus temporary roads. After further discussions, we feel a permanent road definition (a road that can be put to bed) makes more environment economic sense. The decision is hereby modified to grant concurrence to the Forest Service for a right-of-way for the roads for a period of 30 years. This concurrence is conditioned that the Forest Service, upon request of the department, shall during periods the road is not used for logging or forest administration, close the road. In addition, prior to final closure, or putting the road to bed, consult with the department to determine if it is the desire of the state to have the road closed permanently or left intact for management by the state.

Id. at 9. Rather than appeal the Commissioner Decision under AS 38.05.035, USFS submitted road plans to ADNR on July 21, 1995, “per the No Name Bay ANILCA 906(k) concurrence dated June 16, 1995.” Answer, Ex. 15. However, USFS did not amend its recorded ROWs to comport with the Commissioner’s concurrence in 30-year ROWs or request that BLM update its Master Title Plats, which continued to show these lands were encumbered by perpetual ROWs.

The record next shows that pursuant to the Alaska Land Transfer Acceleration Act, 118 Stat. 3575 (Dec. 10, 2004), the State and the Department of the Interior entered into an agreement on May 20, 2008, entitled “Agreement to Settle Remaining Entitlement Under the Alaska Mental Health Enabling Act [70 Stat. 709 (July 18, 1956) (MHA)]” (Agreement). The parties agreed the State was to receive 37,855 acres remaining under its MHA entitlement but that some of its MHA-selected lands were no longer available due to the Alaska Native Claims Settlement Act, 85 Stat. 688 (Dec. 18, 1971). Agreement at 1-2. To make up for that “unintended result,” the Department agreed that the lands here at issue would be charged to the State’s MHA entitlement, ADNR agreed to reconvey them to the Mental Health Land Trust, and all parties agreed that once the Agreement’s requirements were met,

⁵ The response of the ADNR Commissioner to the concern raised by USFS appears grounded on Supreme Court precedent that the Department must approve State selections if they “were lawful at the time they were made” and may not disapprove a selection based on a subsequent change in circumstances. *State of Wyoming v. United States*, 255 U.S. 489, 503-04 (1921) (quoting *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 388 (1911)).

federal obligations under the MHA “shall be deemed satisfied and considered complete.” *Id.* at 2, 3.⁶

By correspondence dated November 23, 2009, BLM requested USFS to identify ROWs “the Forest Service wishes to reserve to itself” and those that it granted to third parties. USFS responded on January 7, 2010, provided BLM with copies of the perpetual ROWs for FDRs 6402, 6456, 6487, 6488, and 6493 it recorded on April 11, 1990, plus an amended ROW for FDR 6456 that was concurred in by the State and recorded on November 4, 1993, but it made no mention of the State superior court decision invalidating the State’s ANILCA concurrences or the subsequent decision by the ADNR Commissioner concurring only in term-limited ROWs. The Alaska Mental Health Trust Land Office provided that information on April 8, 2010, stated these ROWs will therefore “expire 15 June 2025,” and sent a copy of that correspondence to USFS. USFS did not directly respond to that filing, but on October 6, 2010, it provided recently amended and recorded ROWs for FDR 6456 and FDR 6493 and stated that the remainder of its January 2010 response “remains as is.”

BLM tentatively approved the State’s selection of certain lands within the Tongass National Forest on December 29, 2010, subject to ROWs reserved for FDRs 6402, 6456, 6487, 6488, and 6493 that “will expire midnight July 16, 2025.” Decision at 2; *see id.* at 6-7 (BLM’s Proposed Patent states each ROW is “subject to the terms of the Sec. 906(k) concurrence dated June 16, 1995, for a period of 30 years, and will expire on July 16, 2025”). USFS has timely appealed from that decision.

Discussion

USFS asserts its perpetual ROWs were properly granted under ANILCA because ADNR stated no objection to those grants on February 13, 1990. USFS claims that when those ROWs were recorded on April 11, 1990, they became final and binding on the State under Federal law because ANILCA does not authorize the State to withdraw its concurrence or for a State court to invalidate an ANILCA concurrence. SOR at 6-7 (citing U.S. Constitution, Art. IV, § 3, cl. 2 (Property Clause)). USFS also claims BLM cannot limit the term of a recorded ROW without its consent under FLPMA. SOR at 8 (quoting 43 U.S.C. § 1767(b) (2006)). The State counters that since its earlier concurrences had been invalidated by the State superior court under the Alaska State Constitution, the only valid concurrence it granted to USFS was the one issued by the ADNR Commissioner on June 15, 1995, after prior

⁶ BLM thereafter also serialized the State’s then pending application to select lands under Statehood Act, AA 71685, as AA 71685-MH.

notice to the public, which concurred only in ROWs with 30-year terms. *See Answer at 8-12.*⁷

BLM correctly asserts this appeal must be decided under Federal law. FLPMA authorizes USFS to grant itself ROWs on National Forest lands, but ANILCA specifies that such authority may be exercised on State-selected lands only if “the State has concurred prior to such action by the Secretary [of Agriculture].” 43 U.S.C. §§ 1635(k), 1767(a) (2006). ADNR concurred in the grant of perpetual ROWs by correspondence from its Southeast Regional Office on February 13, 1990, but that concurrence was later invalidated by the State superior court. Thus, the question to be answered here under Federal law is whether a ROW grant under ANILCA is or remains valid after a State court invalidates the State’s concurrence under the State constitution.

[1] ANILCA makes clear that the Secretary of Agriculture retains his authority to grant leases, licences, permits, rights-of-way, and easements after National Forest lands are selected under the Statehood Act but before their selection is tentatively approved by the Secretary of the Interior.⁸ 43 U.S.C. § 1635(k). However, ANILCA provides that any ROW (or other identified action) granted or taken during that interim period must first be concurred in by the State. ANILCA does not, however, identify criteria upon which the State may properly concur or refuse to concur in a proposed action; nor does it specify the effect of a substantive or procedural error by the State in making that decision. In considering whether Congress intended such matters under ANILCA to be governed by State law, we take note of the fact that Section 6(g) of the Statehood Act requires that “all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act *shall be selected in such manner as the laws of the State may provide.*” 72 Stat. 341 (emphasis added); *see also* 43 C.F.R. Subpart 2627 (State Grants - Alaska). Because State selections must be in accord with State law, we believe it necessarily and logically follows that an ANILCA concurrence directly affecting State-selected lands should also be governed by State law, particularly since ANILCA does not preempt that State law and is otherwise silent on this issue.

⁷ Since there was a 30-day period within which to appeal from the Commissioner Decision, the State does not object to these ROWs expiring on July 16, 2025. Answer at 12 n.3.

⁸ Once its selection is tentatively approved by BLM, the State is “vested with the rights and obligations of ownership” and has the right to control and use those lands, including the exclusive right to grant ROWs. *Northwest Alaskan Pipeline Co.*, 99 IBLA 201, 209 (1987), *rev’d on other grounds*, 9 OHA 143, 99 I.D. 31 (1992); *see* 43 U.S.C. § 1635(l)(2) (2006); *Golden Valley Electric Association*, 100 IBLA 318, 318-19 (1987).

The authority of a state to act is grounded in its constitution, statutes, and applicable rules, and a state court is undoubtedly a proper forum for deciding whether a particular state action was within the state's authority to take or is otherwise proper under state law. Article VIII, Section 10, of the Alaska State Constitution states: "No disposal or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law." The State superior court ruled this provision applies to concurrences under ANILCA, found ADNR had not complied with that provision, and then invalidated the State's concurrence in granting perpetual ROWs to USFS. We accept that court's well-reasoned analysis as a proper interpretation and application of the Alaska State Constitution to the circumstances here presented.⁹ *See Estate of Arthur C. W. Bowen, Deceased*, 14 IBLA 201, 209-10, 81 I.D. 30, 33-34 (1974). Since the process for and validity of an ANILCA concurrence are governed by State law, we conclude that the concurrences relied on by USFS to grant itself these perpetual ROWs are no longer valid under Federal law.

[2] USFS urges the Board to disregard the State court ruling that the State's concurrences were invalid because its perpetual ROWs were valid when they were recorded on April 11, 1990. But even if they were valid when recorded (*i.e.*, not void *ab initio*), this does not preclude a correction of those recorded instruments under state law or preclude BLM from giving effect to the concurrence issued by the ADNR Commissioner on June 16, 1995. The issue here decided by BLM was whether to subject the lands tentatively approved for selection by the State to perpetual or term-limited ROWs under ANILCA. *See* 43 U.S.C. § 1635(k)(2) (2006) ("any tentative approval or patent shall be subject to . . . rights of way" that were concurred in by the State).¹⁰ We believe BLM may properly consider whether the State's concurrence in a ROW grant on State-selected lands was deemed invalid under State law when tentatively approving the selection of those lands and encumbering them with ROWs under ANILCA. So considered, we find no error in BLM not encumbering these lands with perpetual ROWs and reserving only the 30-year ROWs for USFS that were concurred in by the State on June 16, 1995.¹¹

⁹ The State court limited its ruling to the concurrences at issue and future concurrences, stating it would not be applied in "cases that are subsequently brought on earlier concurrences that might not have been in accordance with the constitutional requirements for public notice." Answer, Ex. 5 at 2.

¹⁰ Had BLM tentatively approved the State's selection *before* the State court invalidated its concurrences, the USFS claims here presented would be on a firmer footing, but such is not this case. *See Northwest Alaskan Pipeline*, 99 IBLA at 207-210; *accord Golden Valley Electric Association*, 100 IBLA at 320.

¹¹ The State also claims USFS is bound by *res judicata* and equitably estopped from
(continued...)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the December 29, 2010, decision by the Alaska State Office is affirmed.

_____/s/
James K. Jackson
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge

¹¹ (...continued)

claiming that we should disregard its June 1995 concurrence, but we need not decide these claims in this case. Answer at 12-19; *but see* SOR at 8-9. We note, however, that both of these claims are based on a State decision in a State proceeding under State law that USFS failed to appeal to a State court, whereas this appeal is from a BLM decision in a proceeding under Federal law that may be reviewed in a Federal District Court.