HERBERT I. STEWART
DONALD J. FERGUSON

IBLA 84-148 Decided September 7, 1984

Appeal from decisions of Alaska State Office, Bureau of Land Management, in part approving the surface estate of certain land for interim conveyance to Native regional corporation. F-14935-A through F-14935-I and F-14877-A through F-14877-D.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally -- Alaska Native Claims Settlement Act: Easements: Access -- Alaska Native Claims Settlement Act: Easements: Decision to Reserve -- Mining Claims: Generally

With respect to an interim conveyance of land to a Native corporation pursuant to sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), the statute does not provide for the reservation of a private right of access to a mining claim, but such right of access is protected as a valid existing right under sec. 17(b)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1616(b)(2) (1976).

APPEARANCES: Stephen M. Ellis, Esq., Anchorage, Alaska, for appellant Herbert I. Stewart; Donald J. Ferguson, pro se; Jacquelyne R. Luke, Esq., Anchorage, Alaska, for the NANA Regional Corporation, Inc.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Herbert I. Stewart and Donald J. Ferguson have appealed from decisions of the Alaska State Office, Bureau of Land Management (BLM), dated September 29, 1983, in part approving the surface estate of certain land, subject to valid existing rights, for interim conveyance to the NANA Regional Corporation, Inc., a Native regional corporation, in accordance with selection applications F-14935-A through F-14935-I and F-14877-A through F-14877-D,

pursuant to section 14(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(a) (1982). 1/

In his statement of reasons for appeal, appellant Stewart 2/ contends that, in approving the land for interim conveyance to the Native regional corporation, BLM should expressly reserve an easement for access over an existing trail to his various mining claims. 3/ Appellant states that he maintains a base camp in connection with 16 mining claims (Dahl Creek Claims) F-65276 through F-65290, located along the Dahl Creek, from which he hauls supplies to another 6 mining claims (Promise Creek Claims) F-65270 through F-65275, located on Bismark Mountain. Appellant notes that in its September 1983 decisions, BLM excluded his mining claims from the land subject to the interim conveyance, i.e., Mineral Survey applications F-23122 (Bismark), and F-23123 (Dahl Creek). In addition, appellant notes, BLM reserved a portion of the trail as part of a public easement (EIN 2Dl). 4/

Appellant contends that Congress in enacting the general mining laws intended that a mining claimant have a right of access to his claim and that this right should be expressly reserved in a conveyance of the underlying land by BLM. Appellant argues that this right of access will not be "fully protected" if it is not expressly reserved and that the partial public easement, which is and may be subject to restrictions on use, is or may be inconsistent with use of the trail for "mining purposes." Appellant states that, absent an express reservation, BLM, after the conveyance, would not be able to amend the conveyance and appellant would have the "onus of establishing his entitlement to access" with respect to the regional corporation, possibly through litigation. Moreover, appellant notes that section 1110(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3170(b) (1982), enacted December 2, 1980, sets forth a policy of protecting access to mining claims where the claims are surrounded by certain categories of public land which, appellant argues, is "just as applicable where the Department

1/ The NANA Regional Corporation, Inc., is the successor in interest to various Native village corporations, including Isingnakmeut, Inc., and Koovukmeut, Inc., which originally filed the identified selection applications.

2/ Appellant Ferguson did not file a statement of reasons. Therefore, pursuant to 43 CFR 4.402, his appeal is hereby summarily dismissed.

3/ Appellant states that the trail, to the extent it was not excluded from the interim conveyance, is situated in secs. 7, 17 through 20, and 30, T. 19 N., R. 8 E., and secs. 3, 10, 15, 16, and 21, T. 18 N., R. 9 E., Kateel River Meridian, Alaska. Appellant submits a map depicting the location of the trail.

4/ The September 1983 BLM decisions state that the easement is permitted to have only the following uses: Travel by foot, dogsled, animals, snowmobiles, two- and three-wheel vehicles, small and large all-terrain vehicles, track vehicles, and four-wheel drive vehicles. In addition, the easement is "subject to applicable Federal, State, or Municipal corporation regulation." In a Jan. 13, 1981, memorandum from the State Director, Alaska State Office, to the Chief, Division of ANCSA Operations, regarding final easement recommendations, EIN 2Dl is described as an "existing tractor trail provid[ing] access to public lands and an area of known mineralization."

elects to surround the miner's claims by land owned by a native regional corporation." Appellant also notes that, in section 201(b) of ANILCA, 16 U.S.C. § 410hh(b) (1982), the Secretary is directed to permit access "across * * * the Gates of the Arctic National Preserve (from the Ambler Mining District to the Alaska Pipeline Haul Road)" and that, because his claims are situated in that mining district, access to the claims should be protected under this statutory provision.

In its answer to appellant's statement of reasons, BLM contends that appellant is seeking a private right of access over the existing trail rather than a public easement and that, as such, he does not have standing to bring an appeal under 43 CFR 4.410(b). BLM further argues that, in any case, an appeal is unnecessary because section 17(b)(2) of ANCSA, as amended, 43 U.S.C. § 1616(b)(2) (1976), provides that valid existing rights, e.g., appellant's mining claims, "shall continue to have whatever right of access as is now provided for under existing law." BLM notes that mining claims are recognized as having private rights of access and contends that this would be protected in a conveyance under ANCSA under 43 U.S.C. § 1616(b)(2) (1976). BLM concludes that ANCSA simply does not provide for the reservation by the United States of private rights of access. BLM states that appellant's "reference to the General Mining Laws and to the Alaska National Interest Lands Conservation Act supports his undisputed claim to a private right of access but provides no authority for reserving such easements in an ANCSA conveyance." Finally, BLM states that, regardless of the standing question, appellant has failed to demonstrate any error in its September 1983 decisions.

[1] Appellant's statement of reasons is couched in language which clearly indicates that appellant is seeking a reservation of a private right of access, rather than the reservation of a public easement pursuant to section 17(b)(1) of ANCSA, supra. 5/ Indeed, appellant states that the restrictions on use inherent in a public easement might be inconsistent with his use of the existing trail for "mining purposes." There is no allegation that the right-of-way sought is actually used by himself or others in a manner which would support a determination that an amendment of the public right-of-way reservation is warranted. We, therefore, find it unnecessary to address public easement questions.

In Henry W. Waterfield, 77 IBLA 270, 273 (1983), we held that, with respect to a BLM decision approving land for interim conveyance to Native corporations, "whatever private access appellant enjoys to his mining claims is unaffected by BLM's decision," even where that access would be across land conveyed to the Native corporations. Id. (Emphasis in original.)

There is no mechanism in ANCSA, supra, for the express reservation of a private right of access in a conveyance to a Native corporation. As BLM correctly points out, such rights of access are not overlooked by ANCSA but are protected by section 17(b)(2) of ANCSA, supra, which provides that

5/ A public easement is considered, in part, to be that which provides a full right of public use and access for recreation, hunting, transportation, utilities, docks, and other important public uses. 43 U.S.C. § 1616(b)(1) (1976); 43 CFR 2650.4-7.

"any valid existing right recognized by this chapter shall continue to have whatever right of access as is now provided for under existing law" and section 22(c) of ANCSA, as amended, 43 U.S.C. § 1621(c) (1982), which recognizes valid mining claims as valid existing rights, with all of their "possessory rights." See Theodore J. Almasy, 69 IBLA 160, 89 I.D. 618 (1982). We note that the September 1983 BLM decisions reiterate the language of section 17(b)(2) of ANCSA, supra, thus subjecting the land to valid existing private rights-of-way.

Both appellant and BLM agree that a mining claimant has a right of access under the general mining laws. That right of access, impliedly granted by Congress under the general mining laws, for mining purposes across public land is well recognized by both the Department and the courts. See, e.g., United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963); "Rights of Mining Claimants to Access Over Public Lands to Their Claims," Solicitor's Opinion, 66 I.D. 361 (1959). However, with the conveyance of such public land into private ownership, if the right of access is not somehow preserved, it would be lost. Thus, section 17(b)(2) of ANCSA, supra, expressly stated that valid existing rights would "continue." This includes the right of access provided for under the 1872 mining law. In the present case, appellant not only has this right of access to his claims but the record indicates that appellant's use of the existing trail serves to define the location of his private easement evidencing this right of access. We acknowledge that maintenance of this right of access may, subsequent to conveyance, necessitate dealing with the Native regional corporation, the owner of the underlying land. We cannot say, however, that this will result in conflict necessitating court action. Nevertheless, section 17(b)(2) of ANCSA, supra, serves to protect appellant's private right of access which he can defend in the proper court, if necessary.

Appellant also refers to sections 1110(b) and 201(b) of ANILCA, supra, as indicative of a congressional policy to protect access to mining claims. Neither statutory provision is applicable in the present instance. Section 1110(b) of ANILCA, supra, provides that the Secretary shall give access rights to State and private owners or occupiers of land, including owners of valid mining claims, where the land "is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study." The present case does not involve mining claims surrounded by such land." Section 201(b) of ANILCA, supra, provides that the Secretary shall permit access across the Gates of the Arctic National Preserve from the Ambler Mining District to the Alaska pipeline haul road. There is nothing in the record to cause us to conclude that this right of access across the national preserve has not been protected. Nevertheless, we agree that both statutory provisions indicate a congressional policy to protect access to mining claims. That policy is also inherent in section 17(b)(2) of ANCSA, supra, and, as noted above, we conclude that the latter statutory provision fully protects appellant's right of access.

Appellant has expressed concern that the easement reservation for easement EIN 2Dl is not sufficiently broad to allow use of this easement for access to his Bismark Mountain claims for mining purposes. We cannot reach this conclusion. The easement is 50 feet wide, and the allowable traffic

includes two- and three-wheel vehicles, small and large all-terrain vehicles, track vehicles and four-wheel drive vehicles. There is no weight limitation or limitation on the time, frequency or purpose of use. Since a purpose for this easement, specifically recognized in the preselection studies, is the development of mineralized lands, there is no question that to the extent described above public easement EIN 2Dl can be used for "mining purposes." Further, while appellant can use public easement EIN 2Dl in the manner provided in the reservation thereof as a member of the public, additional uses reasonably incidental to his mining purposes would be available by reason of his continuing private right of access. The reservation of a public easement does not, per se, destroy or diminish the private rights he now possesses.

In addition, we note that, while it is impossible to precisely locate the appellant's Dahl Creek claims from the map submitted with appellant's statement of reasons, it would appear that the claims abut the boundary of airport lease No. F-033415. If this is the case, appellant may have direct access from this leased ground to his claims, eliminating the necessity for reserving any easement. If they do not, appellant still retains his private easement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge.