State of Alaska
Department of Natural Resources
DIVISION OF GEOLOGICAL AND GEOPHYSICAL SURVEYS
Box 80007, College, Alaska 99701

INFORMATION CIRCULAR
NO. 19

April 5, 1974

# The Status of Mining Claims Located on Native Lands

by
John W. Katz, Cocounsel,
Joint Federal-State Land Use Planning Commission for Alaska

## Statutory Basis

The status of unpatented mining claims located on lands subsequently conveyed to Native village and regional corporations pursuant to the Alaska Native Claims Settlement Act (Public Law 92-203, 85 Stat. 688) is governed by Section 22(c) of this legislation. Section 22(c) provides:

> On any lands conveyed to Village and Regional Corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location under the general mining laws and recorded notice of said location with the appropriate State or local office shall be protected in his possessory rights, if all requirements of the general mining laws are complied with, for a period of five years and may, if all requirements of the general mining laws are complied with, proceed to patent.

## Implementing Regulations

The section quoted above has been implemented and interpreted in regulations published by the Bureau of Land Management in the Federal Register of May 30, 1973 (Volume 38, No. 103, pages 14218-14227). These regulations, which became effective on July 6, 1973, provide in relevant part:

> Section 2650.3-2 Mining claims.
>
> (a) Possessory rights.--Pursuant to section 22(c) of the act, on any lands to be conveyed to village or regional corporations, any person who prior to August 31, 1971, initiated a valid mining claim or location, including millsites, under the general mining laws and recorded notice thereof with the appropriate State or local office, shall not be challenged by the United States as to his possessory rights, if all requirements of the general mining laws are met. However, the validity of any claim may be challenged by the United States or by the grantee or his successor in interest at any time.
>
> (b) Patent requirements met.--An acceptable mineral patent application must be filed with the appropriate Bureau of Land Management office not later than December 18, 1976, on lands conveyed to village or regional corporations.
>
> (1) Upon a showing that a mineral survey cannot be completed by December 18, 1976, the filing of an application for a mineral survey, which states on its face that it was filed for the purpose of proceeding to patent, will constitute an acceptable mineral patent application, provided all applicable requirements under the general mining laws have been met.

(2) The failure of an applicant to prosecute diligently his application for mineral patent to completion will result in the loss of benefits afforded by section 22(c) of the act.

(3) The appropriate office of the Bureau of Land Management shall give notice of the filing of an application under this section to the village or regional corporation which has selection rights in the land covered by the application.

(c) Patent requirements not met.--Any mineral patent application filed after December 18, 1976, on land conveyed to any village or regional corporation pursuant to this act, will be rejected for lack of departmental jurisdiction. After that date, patent applications may continue to be filed on land not conveyed to village or regional corporations until such land is conveyed.

Other Directly Relevant Regulations

The following regulations, while not germane to the interpretation of Section 22(c) of the Settlement Act, provide additional information which should be of interest to persons holding mining claims located on lands which are available for possible Native selection.

Section 2650.7 Publication.

In order to determine whether there are any adverse claimants to the land, the applicant (Native corporation) should publish notice of his (selection) application. If the applicant decides to avail himself of the privilege of publishing a notice to all adverse claimants and requests it, the authorized officer will prepare a notice for publicati... ...e publication will be in accordance with the following procedure: (a) The applicant will have the notice published allowing all persons claiming the land adversely to file in the appropriate land office their objections to the issuance of any conveyance... (c) Any adverse claimant must serve on the applicant a copy of his objections and furnish evidence of service thereof to the appropriate land office.

Section 2651.4(e)

Village or regional corporations are not required to select lands within an unpatented mining claim or millsite. Unpatented mining claims and millsites shall be deemed to be selected, unless they are excluded from the selection by metes and bounds or other suitable description and there is attached to the selection application a copy of the notice of location and any amendments thereto. If the village or regional corporation selection omits lands within an unpatented mining claim or millsite, this will not be construed as violating the requirements for compactness and continguity. If, during the selection period, the excepted mining claims or millsites are declared invalid, or under the State of Alaska mining laws are determined to be abandoned, the selection will no longer be considered as compact and contiguous. The corporation shall be required to amend the selection, upon notice from the authorized officer of the Bureau of Land Management, to include the lands formerly included in the mining claim or millsite. If a corporation fails to amend its selection to include such lands, the selection may be rejected.

Discussion

The language of Section 22(c) has posed certain interpretive problems since its enactment. Some of these problems have been resolved by the implementing regulations

set out above; others may still exist. The following analysis will seek to rationalize the language of Section 22(c) and the implementing regulations in light of the explicit language of these provisions and other relevant sources.

At the outset, it should be noted that Section 22(c) does not apply to mining claims which were patented prior to the enactment of the Settlement Act. These claims, like patented homesteads and other such interests, are so clearly beyond the ambit of possible Native selection that there was no reason for Congress to make special reference to them. Second, Section 22(c) applies only to lands conveyed to Native village and regional corporations formed pursuant to the Settlement Act. Thus, it does not affect claims located on Federal lands in general nor, although it may have been an oversight, does it apply to lands selected by Native groups and certain other entities which are given selection rights in the Act. For this reason, claims located on lands not specifically referred to in Section 22(c) will continue to be governed by the general statutory and regulatory regime which now exists.

Because the language of Section 22(c) is susceptible to more than one interpretation, and because the relevant legislative history is extremely sparse, the following conclusions cannot be stated with quite the same certainty as those which preceded. However, they do appear to constitute a reasonable extrapolation from the sources cited above. First, in establishing the August 31, 1971 cut-off date referred to in Section 22(c), Congress did not intend to diminish or impair the possessory rights of persons who made valid locations between that date and December 18, 1971, the date of enactment of the Settlement Act. Rather, this deadline was intended to differentiate between mining claimants who were entitled to the special privileges described below and those who were not. These privileges were referred to in an October 14, 1972 letter written to Senator Ted Stevens by Mitchell Mellich, then Solicitor of the Department of the Interior:

> Second, the special privileges of the Section 22(c) inure to the benefit of mining claimants who have made a valid discovery of a valuable mineral deposit and who have recorded notice of their location on or before August 31, 1971. These mining claimants may continue in their possession for a period of 5 years commencing December 18, 1971, and ending December 18, 1976, if they comply with all the requirements of the mining laws. This means, in effect, that the mining claimants must do their annual assessment work. The claimants will not be disturbed in their possession by the United States for failure to have performed assessment work prior to December 18, 1971, but individuals asserting the benefit of this act may be challenged on the basis of not having initiated a valid mining claim or not having properly recorded a notice of their location. (Emphasis supplied.)

Thus, Section 22(c) is, in essence, a "forgiveness" clause in that it allowed claimants who made a valid discovery and recorded notice of their location on or before August 31, 1971 to reactivate claims otherwise subject to challenge for failure to comply with the assessment work requirement. (Under State law, which in this instance also applies to Federal mining claims, a claimant must record a certificate of location within 90 days after the posting of his notice of location. Since Section 22(c) probably will be construed to require that both location and recording have taken place prior to August 31, 1971, persons who located before this date but recorded thereafter would have a valid location (if other relevant requirements are met) but would not appear entitled to the special protection referred to in this paragraph.) Of course, since this forgiveness is not prospective--Section 22(c) requires future compliance with the requirements of the general mining laws--a claimant would have had to perform his annual work by September 1, 1972 in order to avail himself of the protection which is provided. This reading of Section 22(c) would reconcile the seemingly conflicting language contained in Section 2650.3-2(a) of the regulations set out above. Thus, according to the Mellich letter, the United States is free to challenge the validity of a claim by showing that a valuable dis-

covery has not been made or that the notice of location was defective, but may not challenge a claimant's possessory rights on the ground that assessment work which should have been performed prior to December 18, 1971, was not. Moreover, since claimants who made locations after August 31, 1971 would continue to receive the usual protections afforded by the general mining laws, no constitutional problems would arise. In other words, pre-August 31 locators who recorded within the time frame specified in the Act would receive an additional privilege clearly within the power of Congress to grant while post-August locators would be entitled to receive only that protection usually afforded by the general mining laws.

Another series of questions is generated by Section 2650.3-2(c), which stipulates that any mineral patent application will be rejected for lack of Departmental jurisdiction after December 18, 1976 or the date when subject lands are conveyed, whichever occurs later. (Since Section 22(c) does not specify a date from which the five-year period should commence, some persons have argued that either August 31, 1971 or the date when subject lands are actually conveyed to Native ownership should be used. While there is some ambiguity in the statute, it is submitted that the Department's choice of the date of enactment (December 18, 1971) is a reasonable interpretation of the relevant language, especially since this date is used by Congress as a reference point in many other provisions. Therefore, the present regulation is probably not subject to challenge on this ground. The term "conveyed", as used in the first sentence of Section 2650.3-2(c), refers to the transfer of legal title to a village or regional corporation. Pursuant to Section 2650.0-5(h) and other relevant provisions of the regulations, this will occur within a relatively short time after selection and not when subject lands are actually surveyed, which may occur much later.) Questions have been raised about how this provision affects a claimant's possessory rights and his right to obtain a patent. In my opinion, Section 2650.3-2(c) was not intended to, nor could it constitutionally, impair a claimant's right of possession. In other words, [illegible]ual rules regarding unpatented claims will continue to apply after the Department of the Interior loses jurisdiction for the purpose of granting patent. Thus, under the doctrine of pedis possessio, a claimant who is able to show due diligence in seeking a mineral discovery would prevail against a third party challenge to his possessory rights. However, since this doctrine does not apply to the Federal government, a claimant would be required to prove a valid discovery in order to prevail against the United States. (In situations where a claim is challenged by a Native corporation which has selected the lands encompassed within it, the corporation, as the possible successor in title to property interests previously owned by the United States, might well have the same latitude in challenging the claim as does the Federal government. In other words, the doctrine of pedis possessio might not be an adequate defense to such a challenge.) In short, the holder of an unpatented claim would continue to be subject to the uncertainties regarding tenure which are an historic aspect of the general mining laws. These conclusions are premised on this writer's opinion that a less favorable treatment of a claimant's possessory rights would constitute a deprivation of property rights without due process.

The next question arises out of the patent requirement specified in Section 2650.3-2(c). At the outset, it should be noted that this regulation does not require a claimant to proceed to patent. (Since there is no current requirement that a patent be obtained as a prerequisite to mineral extraction, and since the process of patent acquisition is often very expensive, it would seem that such a requirement would be unconstitutional.) Rather, Section 2650.3-2(c) mandates a time frame within which a patent must be applied for, if at all. This requirement, in turn, gives the claimant two options. First, he can apply for a patent in accordance with the procedures specified in the regulations. Pursuant to Section 2650.3-2(b) (3), the filing of such an application will put the appropriate Native corporation on notice of its existence. That corporation will then be presented with the choice of selecting the lands encompassed by the claim and in-

itiating a challenge of its validity, or of omitting the claim from its selection application. If the first option is chosen, and the claimant elects to defend, an administrative contest will ensue. If the Native corporation involved does not select the lands in question, they will remain in Federal ownership, and the claimant will have the right to apply for patent at any time prior to conveyance.

If the claimant elects not to apply for a patent prior to conveyance of the lands encompassed within his claim, he runs the risk that they will be patented to a Native corporation which does not have notice of his prior interest. (An application for patent is the best and sometimes the only mechanism for giving notice to the Bureau of Land Management that a claim exists.) The claimant would then be required to initiate suit in state court to enforce a constructive trust on the ground that the patent was erroneously issued in the first place. This type of suit is well recognized (see, for example, 30 United States Code § 29, Note 272). However, the judicial alternative is quite likely to be expensive and time consuming. Therefore, a claimant who entertains the thought of proceeding to patent at some point should seriously consider doing so within the time frames specified in the regulations. It is worth noting in this regard that since publication of a pending Native selection application, as referenced in Section 2650.7 of the regulations, is discretionary with the Native corporation involved, and since the place of publication may be far removed from the claimant's residence, he cannot rely on this procedure to give him notice of the pendency of such an application.

Some persons have argued that the holder of an unpatented claim may not constitutionally be required to proceed to patent within the time frames specified in the regulations at the risk of losing his right to do so if he does not. As support for their position, they contend that the right to obtain a patent from the United States, as provided in the general mining laws, cannot be cut off in subsequent legislation. To do so, they argue, would be a denial of due process. It is my opinion that this argument is not sustainable in the situation under discussion here. Thus, it appears to me that Section 2650.3-2(c) of the regulations is, in essence, a "statute of limitations" which cuts off a substantive right after the allowance of a reasonable period to assert it. If so, past precedents abstracted from other areas of the law indicate that a court would probably uphold its validity. It should be noted, however, that the precedents just referred to do not deal with the general mining laws. [One of the more interesting possible analogies is the old 167 proceedings initiated by the Forest Service to challenge assertions of surface jurisdiction by persons holding claims within units of the National Forest System. However, because of the many dissimilarities between these proceedings and the instant situation, the anology does not assist very much in ascertaining how a court would view the limitations period specified in Section 22(c)]. Therefore, it is at least possible that a court would declare the time frames specified in Section 22(c) and the implementing regulations unconstitutional on the ground that a diligent miner could not reasonably be expected to satisfy all the requirements necessitated by a patent application within the limitations period. Given the short working seasons and other unique aspects of claims development in Alaska, this argument would appear to have greater strength here than elsewhere. Of course, even if the mandated time frames are upheld, a claimant would still be protected in his possessory rights per the discussion above. Moreover, it is worth noting once again that the limitations periods become operative only if the lands encompassed within a claim are conveyed out of Federal ownership. If this does not occur, the right to obtain a patent from the United States will not be impaired.

Access Rights Across Native Lands

Historically, the right to locate mining claims on the public lands has carried with it a nonexclusive right to access across such lands for the purpose of maintaining

claims and removing minerals therefrom. In re Alfred E. Koenig [Dept. of the Interior, Board of Land Appeals (IBLA 71-205, October 26, 1972)]. Pursuant to the Settlement Act, certain lands will soon be conveyed out of Federal ownership. Thus, the question arises as to how the right of access to mining claims will be impacted by this transfe to private ownership.

At the outset, it should be noted that Section 17(b)(2) of the Act protects pre-existing rights of access:

> ...Provided, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law...

Thus, mining claimants must look to existing law to ascertain whether antecedent access rights have been created. One of the most important sources of such law is 43 U.S.C. § 923, which has been construed to constitute a Federal grant to the public rights-of-way for highway purposes where prior public use has been sufficient to establish a highway under State law or where the grant has been accepted by a positive act on the part of the appropriate governmental authorities. See Hagerly v Denton 359 P. 2 d 121 (Alaska, 1961). In the recent case of United States v Dann (No. 24,380, March 23, 1973), the Ninth Circuit Court of Appeals, apparently contradicting a long line of precedents, stated in a footnote that this provision does not authorize the present construction of highways across public lands but merely validates road use which existed at the date of the law's enactment in 1866. The future effect of this decision is not yet known . Pursuant to this provision, many public rights-of-way have been created in mineralized areas, and by virtue of legislative action, certain section-line easements have been reserved for public use. (The scope and effect of the Legislature's acceptance of certain section-line easements, especially on unsurveyed lands, has yet to be completely settled.)

Another possible source of Federal law is referred to in the case of Superior Oil Company v United States, 353 F. 2d 34 (9th Cir. 1965) in the Dann decision cited above. Both of these cases, again in possible contravention of previous precedents, state that the common law doctrine of easement by necessity is applicable to Federal lands. If this doctrine is deemed applicable to the lands soon to be conveyed to Native ownership under the Settlement Act, a mining claimant whose holdings will be surrounded in their entirety by such lands would appear to be in a position to assert a right of access by necessity. (The conveyance of subject lands to private ownership will divest the United States of any interest in or jurisdiction over questions of access. Therefore, even if the doctrine of easement by necessity is deemed applicable, complications will arise if access routes have not been clearly delineated prior to conveyance. After conveyance, mining claimants will be required to assert their rights in State court, and their remedies will be defined by State law, including the constitutional and statutory provisions referred to below.) Similarly, other mechanisms provided in Federal and State laws which predated the Settlement Act have also resulted in the creation of rights-of-way usable for mining purposes.

In situations where access rights are not obtainable through the mechanisms previously alluded to, the Settlement Act itself may afford some relief. Thus, Section 22(i) of this legislation vests the Secretaries of Interior and Agriculture with the interim responsibility for managing lands withdrawn for possible Native selection and specifically provides "that their authority to make contracts and to grant leases, permits, rights-of-way, or easements shall not be impaired by the withdrawal." In turn, these officers are required by the implementing regulations to obtain and consider the views of appropriate Native corporations prior to creating such interests in land withdrawn pursuant to Section 11, 14, and 16 of the Act and to obtain the consent of such corporations with respect to lands encompassed within former reservations. While

the regulations give the Secretaries of Interior and Agriculture the right to establish access in areas withdrawn for possible Native selection, this authority has and probably will continue to be used sparingly, especially in situations where the public interest, as opposed to the interest of a particular individual or firm, is not an important factor. (Past experience also indicates that the possibility of permanent damage to lands available for selection is another determinant of administrative decision making in this area.)

Section 17(b) of the Settlement Act provides another mechanism for acquiring access rights across Native lands. This section directs the Secretary of the Interior to reserve needed public easements in patents conveyed to Native corporations. Because the rights-of-way which are identified pursuant to this section must be for a public purpose or use and must meet certain other criteria specified in the Act and implementing regulations, it is unlikely that the access needs of an individual miner could be satisfied through this mechanism.

In situations where none of the sources of law previously referred to are deemed applicable, a mining claimant whose holdings are completely surrounded by Native owned lands will have the opportunity to obtain access through mechanisms provided in State law. Thus, both the Constitution of the State of Alaska (Article viii, Section 18) and the Alaska Statutes (Section 09.55.240) provide that proceedings in eminent domain may be instituted to obtain private ways of necessity essential for access to areas used for resource extraction.

State Selected and Tentatively Approved Lands

Under the Settlement Act, Native village corporations (but not regional corporations) are entitled to select up to three townships of State selected and tentatively approved lands if such lands fall within the 25 townships withdrawn around villages pursuant to Sections 11(a)(1) and (2). Because much of the land previously selected by or tentatively approved to the State has been open to mining activity under State law, and because this law differs in certain important respects from its Federal counterpart, some of the principles discussed in previous sections will not necessarily apply to mineral-related interests previously created pursuant to State law.

While most issues regarding State mining law are beyond the scope of this article, the following general information is provided. Section 6(g) of the Alaska Statehood Act specifically authorizes the State to execute conditional leases and to make conditional sales on tentatively approved lands. In turn, Section 14(g) of the Settlement Act mandates the protection of leases, including those issued pursuant to Section 6(g), contracts, permits, rights-of-way and certain other interests created on lands subsequently conveyed to Native corporations. The type of protection which is afforded to leases issued under Section 6(g) is indicated in the following excerpt from Section 14(g):

> ...a lease issued under Section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent has been issued to the State.

Implementing Section 14(g), Section 2650.4-3 of the regulations states that the State of Alaska will continue to administer leases, contracts, permits, rights-of-way, and easements after the conveyance of subject lands unless the responsible agency waives jurisdiction. However, pursuant to Section 2650.4-2, the appropriate Native corporation will become entitled to any benefits which now flow to the State from the interests just mentioned.

Since Section 6(g) does not give the State the right to create property interests in lands which have not been tentatively approved, the rights of persons who located claims on selected lands which are subsequently conveyed to Native ownership appear much less certain. (Many attorneys believe that persons who locate claims on state selected lands which have not received tentative approval do so essentially at their own risk.) Moreover, some questions have been raised about whether the term "lease", as used in Section 6(g) and in Section 14(g) of the Settlement Act, includes mining claims located under State law. For a number of reasons, including the apparent Congressional intent, as expressed in Section 14(g) and other provisions of the Settlement Act relating to valid existing rights, and the basic similarity of many features of State created mining leases to claims located under State law, it is the opinion of this writer that mining claims located on tentatively approved lands should be protected as valid third party interests. (It should be noted that under State law, a mining claim may be converted to a mining lease by application to the Director of the Division of Lands. Accordingly, it may be possible for the holder of a claim located on tentatively approved lands which are subject to Native selection to avail himself of this remedy. A conceivable impediment to such an approach arises out of the language of Section 11(a)(2) of the Settlement Act, which withdraws certain State selected and tentatively approved lands from appropriation under the mining laws and from the creation of third party interests under the Statehood Act.) The precise operation of these and other aspects of the relevant legal matrix, as it operated with respect to various mineral-related interests previously created on State selected and tentatively approved lands, should be carefully examined by interested parties prior to their choice of a particular course of action among possible alternatives.

## Conclusion

This article has dealt with certain questions arising out of the implementation of Section 22(c) of the Settlement Act. Space limitations have prevented an exhaustive discussion of these questions, and certain problems of lesser significance have not been discussed at all. Because of this, and because only the Department of the Interior, which administers the Settlement Act and the federal mining laws, can provide definitive answers, persons confronted with the types of problems discussed above should make appropriate inquiries and take other steps to protect the interests which they assert. This is really the central message of this article. That is, mining claimants should not sit on their rights until it is too late to take constructive action. Rather, using the comparatively simple and inexpensive mechanisms now available, they should begin working with government agencies and Native corporations in an effort to find acceptable solutions.