



DOYON, LIMITED

181 IBLA 148

Decided May 31, 2011



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

DOYON, LIMITED

IBLA 2009-203

Decided May 31, 2011

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reserving public easements in a conveyance of land to Doyon, Limited. F-21901-24, *et al.*

Affirmed in part; set aside and remanded in part.

1. Alaska Native Claims Settlement Act: Conveyances:
Easements--Alaska Native Claims Settlement Act:
Easements: Public Easements

When the Secretary conveys land to an Alaska Native Regional Corporation under section 12(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(c) (2006), he is required to reserve public easements under section 17(b) and (c), 43 U.S.C. § 1616(b), (c). The easements he is required to reserve are not limited to those which were *strictly* necessary for a *limited* use of public land, but those which are *reasonably* necessary to guarantee international treaty obligations, *a full right of public use and access* for recreation, hunting, transportation, utilities, docks, and such other public uses as the planning Commission determines to be important.” 43 U.S.C. § 1616(b)(1) (1976). Although the primary standard for determining whether an easement is necessary is “present existing use,” an easement may also be reserved “if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land,” but BLM may not reserve an easement for recreating, hunting, or fishing “on or from lands conveyed pursuant to [ANCSA].” 43 C.F.R. § 2650.4-7(a)(3), (7).

2. Administrative Procedure: Burden of Proof--Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Decision to Reserve

A party challenging a BLM easement decision with respect to a conveyance to a Native Regional Corporation bears the burden of proving that the decision is in error. That showing can be accomplished by demonstrating that BLM's action is not consistent with statutory and regulatory principles established for reservation of easements in conveyances to Native corporations.

APPEARANCES: James D. Linxwiler, Esq., Anchorage, Alaska, for appellant; Dennis 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 ROBERTS

By decision dated March 16, 2009, the Alaska State Office, Bureau of Land Management (BLM), approved 161,266 acres of land for conveyance to Doyon, Limited (Doyon), pursuant to section 12(c) of the Alaska Native Claims Settlement Act (ANCSA or the Act), 43 U.S.C. § 1611(c) (2006).¹ Doyon, a Native regional corporation, has appealed BLM's decision to the extent the conveyance is made subject to certain public easements for trails and a campsite. Doyon contends that the easements are not reasonably necessary to provide access to public land as required by 43 U.S.C. § 1616(b)(1) (1976)² and 43 C.F.R. § 2650.4-7(b).³ In

¹ BLM's decision involved the following selection applications filed by Doyon on Dec. 18, 1975: F-21901-24; F-21901-25; F-21904-49; F-21904-64; F-21904-85; F-21904-86; F-21905-19; F-21905-20; F-21905-21; F-21905-25; F-21905-26; F-21905-27; F-21905-33; F-21905-36; and F-21905-75. The acreage approved by BLM involves more than 250 sections spread across 12 townships.

By order dated Dec. 1, 2009, the Board set aside and remanded BLM's decision in part with respect to 136,554 acres not affected by the easements in controversy herein. The Board's order responded to a joint stipulation of the parties calling for conveyance of those lands to Doyon.

² Subsections 17(a) and (b) of ANCSA, formerly codified at 43 U.S.C. § 1616(a) and (b) (1976), established the Land Use Planning Commission (LUPC or Commission) and defined its mission with respect to easements. These subsections were omitted from later editions of the U.S. Code after the LUPC

(continued...)

order to place Doyon's challenge to BLM's decision into legal and factual perspective, we will begin with a review of the legal principles that govern the reservation of easements as well as the general geographic setting in which the easements are to be reserved.

LEGAL BACKGROUND

In 1971, Congress enacted ANCSA, 43 U.S.C. §§ 1601-1629a (2006), to provide a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims. 43 U.S.C. § 1601(a) (2006). The settlement provided the Natives with nearly one billion dollars and 40 million acres of land in Alaska. *See* 43 U.S.C. §§ 1605, 1607, 1613 (2006). Under the Act, 13 Regional Corporations and numerous Village Corporations were given the right to select land from the public domain. 43 U.S.C. §§ 1611, 1613(h) (2006). As part of this land selection and conveyancing process, the Act requires the Secretary of the Interior to reserve public easements as he deems necessary upon the lands selected prior to granting the patents. 43 U.S.C. § 1616(b)(3) (1976).

[1] In *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 674 (D. Alaska 1977), the court noted: "Congress was justifiably concerned that certain portions of the State which were to remain in the public domain would become inaccessible, or landlocked by Native lands." To remedy this concern, the Act established the LUPC and required it to identify easements to be included in the conveyances. *See* 43 U.S.C. § 1616(a) (1976). The easements that the LUPC was required to identify were not limited to those which were *strictly* necessary for a *limited* use of public land, but those which "are *reasonably necessary* to guarantee international treaty obligations, *a full right of public use and access* for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important." 43 U.S.C. § 1616(b)(1) (1976) (emphasis added); *see* 43 C.F.R. § 2650.4-7(b). Although the primary standard for determining

² (...continued)

ceased to exist in June 1979, but rules implementing ANCSA have nonetheless retained their substantive requirements. *State of Alaska*, 168 IBLA 334, 335 n.2 (2006); *see Mendas Cha-Ag Native Corp.*, 93 IBLA 250, 254 (1986); 43 C.F.R. § 2650.4-7(a)(1) ("Only public easements which are reasonably necessary to guarantee access to publicly owned lands . . . shall be reserved.").

³ The subject decision is one of a series of decisions approving 604,962 acres for conveyance to Doyon. BLM Answer at 2. Additional conveyances are pending. The land subject to the decision under appeal is in the vicinity of the towns of Chicken and Eagle, in eastern Alaska, in the watershed of the Fortymile Wild and Scenic River, to the west of the Taylor Highway.

whether an easement is necessary is “present existing use,”⁴ an easement may also be reserved “if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land,” but BLM may not reserve an easement for recreating, hunting, or fishing “on or from lands conveyed pursuant to [ANCSA].” 43 C.F.R. § 2650.4-7(a)(3), (7); *see State of Alaska*, 137 IBLA 288, 293 (1997); *State of Alaska*, 132 IBLA 197, 204 (1995).

The parties disagree as to the breadth of the Secretary’s authority to reserve easements under this provision, with Doyon emphasizing a narrow interpretation of “reasonably necessary.” Statement of Reasons (SOR) at 4-23; Reply at 2-3. BLM argues that Doyon fails to give effect to the requirement that easements provide a full right of public access. Answer at 4-5. Doyon asserts that a broad approach was rejected by the court in *Alaska Public Easement Defense Fund*, “which adopted a much narrower construction of ANCSA § 17(b)(1), and restricted the Secretary’s discretion to reserve easements to the purposes stated in that provision.” SOR at 6. A closer examination of that decision, however, shows that the issue was not so much the breadth or narrowness of the term “reasonably necessary” in subsection (b)(1) of ANCSA § 17, but whether the Secretary had authority to reserve easements under subsection (b)(3) without adhering to the criteria in subsection (b)(1).

Subsections 17(b)(1) and (b)(2) of ANCSA referred to the work of the LUPC. Subsection (b)(1) required the LUPC to identify “reasonably necessary” public easements across lands selected by Native Corporations, and subsection (b)(2) required the LUPC “to consult with appropriate agencies and interested persons on the need for and location of easements, . . . review proposed transportation plans, and . . . receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements.”

Subsection (b)(3) required the Secretary to consult with the LUPC and “reserve such public easements *as he determines are necessary*.” Although the Native

⁴ The regulations define “present existing use” as use by either the general public or a governmental entity on or before Dec. 18, 1976, “or the date of selection, whichever is later.” 43 C.F.R. § 2650.0-5(p). However, the Secretary is not limited to reserving easements for uses that existed at that time. The statutory provision requiring reservation of easements

was intended to preserve the right of public access to lands remaining in the public domain after Native selection. It is entirely possible that such lands may not have been used at all prior to December 18, 1976, and that it would still be appropriate to reserve an easement to them for future use.

Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp at 678.

Corporations argued that the Secretary was limited to selecting easements recommended by the LUPC, the Department maintained that while subsection (b)(1) established criteria to be used by the LUPC, which was to act in an advisory capacity, the Secretary operated independently under subsection (b)(3) and was not restricted to choose only the easements identified by the LUPC or the criteria in subsection (b)(1). *See* Sol. Op., “Easement Reservations in Conveyances to Alaska Native Corporations Under ANCSA,” M-36880, 82 I.D. 325 (1975). The court rejected the argument by the Native Corporations that the Secretary was limited to choosing from the easements recommended by the LUPC, but the court held that in exercising his authority under (b)(3), the Secretary was bound by the criteria in subsection (b)(1). 435 F. Supp. at 674-75. Although the court held that the Secretary could not reserve “floating” easements and that easements had to be “specifically located,” 435 F. Supp. at 679-80, it also recognized that the Secretary was not limited to reserving easements to ensure access only for present use of the public lands but should consider their future use as well. *Id.* at 678.

After the court ruled that the Secretary was bound to apply the criteria in subsection 17(b)(1), the Department issued new regulations applicable to easements. In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), which included a provision that made clear that the Secretary was required to reserve only those easements described in subsection 17(b)(1) of ANCSA and be guided by the following principles: (1) all easements should be designed so as to minimize their impact on Native life styles, and on subsistence uses; and (2) each easement should be specifically located and described and should include only such areas as are necessary for the purpose or purposes for which the easement is reserved. *See State of Alaska*, 153 IBLA 303, 306 (2000); *State of Alaska*, 137 IBLA at 291. Congress, however, did not amend section 17(b)(1) to narrow the scope or purposes for which an easement is to be reserved.

Doyon points to several regulatory provisions that implement these constraints on easement reservation. SOR at 8-22. Easements must be subject to “present existing use,” *i.e.*, the use as of December 18, 1976, or the date of selection, whichever is later, unless there is no alternative route available or the easement is necessary to access an isolated tract of public lands. 43 C.F.R. § 2650.4-7(a)(3). Easements are not to be reserved for public recreation on land conveyed under ANCSA. 43 C.F.R. § 2650.4-7(a)(7). Under 43 C.F.R. § 2650.4-7(b)(1)(i), transportation easements may be reserved “if there is no reasonable alternative route across publicly owned lands.” Under subsection (b)(1)(ii), easements may not be “duplicative.” Site easements must be related to transportation to publicly owned lands, not for recreational use of ANCSA lands, and BLM must make a reasonable effort to locate sites for camping on publicly owned lands. 43 C.F.R. § 2650.4-7(b)(3).

THE SETTING

One cannot properly evaluate the reasonable necessity of reserving easements when large blocks of land will be passed from Federal to private ownership without some understanding of the broad geographic setting in which those conveyances will occur. As stated above, the lands to be conveyed are in eastern Alaska in the vicinity of the towns of Chicken and Eagle in the watershed of the Fortymile Wild and Scenic River to the west of the Taylor Highway. The Fortymile River flows northeasterly into Canada where it joins the Yukon River. See River Management Plan, Fortymile River (1983), Ex. A (River Plan) at 3. The Fortymile River and its tributaries are part of the wild and scenic river system. 16 U.S.C. § 1274(a)(48) (2006).⁵ The Wild and Scenic Rivers Act establishes a policy to protect and preserve rivers and their immediate environments that “possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values . . . for the benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271 (2006). Thus, before conveying land to Doyon, it is BLM’s duty to reserve easements that are reasonably necessary to guarantee a full right of public use and access for these purposes. Because the land remaining in Federal ownership is part of the wild and scenic river system, it will be used for recreation by hikers, rafters, hunters, trappers, snowmobilers, and off-highway vehicle (OHV) enthusiasts.

Motorists have access to the area from the Taylor Highway which links the Alaska Highway to the towns of Chicken and Eagle. River Plan at 3. The land in the conveyance separates the Taylor Highway from the North Fork of the Fortymile River and Champion Creek. The River Plan provides the following description of the Champion Creek area:

Champion Creek flows from the alpine tundra of the Glacier Mountain area through the subalpine zone to its confluence with Little Champion Creek. From this point, it meanders through the gravelly bottom of a

⁵ That provision of the Wild and Scenic Rivers Act describes the designated river as including:

The main stem within the State of Alaska; O’Brien Creek; South Fork; Napoleon Creek, Franklin Creek, Uhler Creek, Walker Fork downstream from the confluence of Liberty Creek; Wade Creek; Mosquito Fork downstream from the vicinity of Kechumstuk; West Fork Dennison Fork downstream from the confluence of Logging Cabin Creek; Dennison Fork downstream from the confluence of West Fork Dennison Fork; Logging Cabin Creek; North Fork; Hutchison Creek; Champion Creek; the Middle Fork downstream from the confluence of Joseph Creek; and Joseph Creek; to be administered by the Secretary of the Interior.

16 U.S.C. § 1274(a)(48) (2006).

“U” shaped drainage to the spruce forested banks of the North Fork. It is very difficult to gain access to the upper area of the Champion Creek drainage in summer, and summer use at this time is limited to a few walk-in hunters and geologic exploration personnel. During the winter the area is used by trappers who travel primarily by snowmobile. Although the creek is at times floatable below Little Champion Creek, recreational use is probably limited to hikers starting from the North Fork or the Glacier Mountain trail.

River Plan at 8.

EXISTING TRAILS

The identification of existing trails is important because the primary standard for determining whether an easement is necessary is “present existing use.” 43 C.F.R. § 2650.4-7(a)(3). Although BLM may designate a new route as an easement, it can only do so “if there is no reasonable alternative route or site available.” *Id.*

Maps in the record show that the land to be conveyed and surrounding land is crossed by existing trails that the State of Alaska considers to be public highways established under R.S. 2477.⁶ See SOR Exs. 3, 4. Portions of those trails overlap the easements reserved by BLM. Doyon argues that there are R.S. 2477 trails on public land that provide reasonable alternatives that make the reservation of some easements unnecessary. SOR at 39, 44-47; Reply at 14-15. Proper consideration of this argument requires an understanding of the State’s R.S. 2477 assertions and their relationship to the easements reserved by BLM.

R.S. 2477 simply provided: “[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” The Tenth Circuit Court of Appeals recently noted: “[T]he establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.”

⁶ R.S. 2477 is formally known as the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253; was codified as section 2477 of the 1875 *Revised Statutes*; and subsequently became 43 U.S.C. § 932 (1970). The statute was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, 90 Stat. 2743, 2793, effective Oct. 21, 1976, but valid existing rights were preserved. 90 Stat. at 2786; see 43 U.S.C. § 1701 note (a) (2006).

The Alaska Department of Natural Resources, Division of Mining, Land and Water, maintains a website providing information on the State’s R.S. 2477 assertions: <http://dnr.alaska.gov/mlw/trails/rs2477/>.

Southern Utah Wilderness Alliance v. Bureau of Land Management (SUWA v. BLM), 425 F.3d 735, 741 (10th Cir. 2005). Although that statute was repealed only shortly before the earliest date for establishing present existing use for a 17(b) easement, the opportunity to establish an R.S. 2477 ROW in Alaska was effectively ended in 1969 when Secretary Hickel issued Public Land Order (PLO) 4582 which placed all public lands in Alaska in a reserved status. 34 Fed. Reg. 1025 (1969).⁷

BLM has no authority to make binding determinations on the validity of the ROWs under R.S. 2477, but it may consider the validity of asserted R.S. 2477 ROWs for its own purposes of planning and administration. *SUWA v. BLM*, 425 F.3d at 750-57; see *County of San Bernardino*, 181 IBLA 1, 4-19 (2011) (discussing history of Departmental policy on R.S. 2477 claims). Whether an R.S. 2477 ROW was actually established prior to repeal of the statute, and has not been abandoned, is a matter to be decided by a court under Federal law, “borrowing” appropriate portions of state law. *SUWA v. BLM*, 425 F.3d at 757, 762-63; *id.* at 768; see *Kane County v. Kempthorne*, 495 F. Supp. 2d 1143, 1154-55 (D. Utah 2007), *aff’d sub nom. Kane County v. Salazar*, 562 F.3d 1077 (10th Cir. 2009); see also *Shultz v. Dep’t of Army*, 10 F.3d 649, 655 n.8 (9th Cir. 1993), *withdrawn*, 96 F.3d 1222 (1996)⁸; *Adams v. United States*, 687 F. Supp. 1479, 1490 (D. Nev. 1988), *affirmed in part, reversed in part on other grounds*, 3 F.3d 1254 (9th Cir. 1993); see generally *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463 (1932); *United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411, 1413 (9th Cir.1984) (quoting *United States v. Oregon*, 295 U.S. 1, 28 (1935) (“The scope of a grant of federal land is, of course, a question of federal law. . . . But in some instances ‘it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances.’”)).

Accordingly, the Department has had a longstanding policy of declining to expressly reserve asserted R.S. 2477 ROWs in patents for land grants. *SUWA v. BLM*, 425 F. 3d at 766 n.17 (citing *Douglas County, Washington*, 26 L.D. 446, 447 (1898)). Courts in Alaska have recognized that even if BLM does not identify an easement or other interest in a conveyance to a Native corporation, the interest is not extinguished. *Tetlin Native Corp. v. State of Alaska*, 759 P.2d 528, 533 (Alaska 1988);

⁷ We know that PLO 4582 precluded establishment of R.S. 2477 ROWs because it was subsequently amended by PLO 4676 to specifically allow for the establishment of an R.S. 2477 ROW from Livengood to the Yukon River. 34 Fed. Reg. 13,415 (1969).

⁸ Although the opinion in *Schultz* was withdrawn because the claimant had “not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law” and is not controlling authority, it is cited for its persuasive value. *E.g.*, *SUWA v. BLM*, 425 F.3d at 767 n.18.

see *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996); *State of Alaska v. Alaska Land Title Ass'n.*, 667 P.2d 714, 726-27 (Alaska 1983).

When BLM began to reserve easements in ANCSA conveyances that overlapped what the State of Alaska believed to be ROWs established under R.S. 2477, the State argued that there was no ROW interest remaining for BLM to reserve. However, in *State of Alaska*, 5 ANCAB 307, 88 I.D. 629 (1981), the Alaska Native Claims Appeal Board (ANCAB)⁹ held that the existence of an R.S. 2477 ROW precluded neither the reservation of an overlapping section 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing ROW which exists independently of a section 17(b) easement. 5 ANCAB at 322, 88 I.D. at 635. The Board referred to 43 U.S.C. § 1613(g) which calls for identification of valid existing rights to which ANCSA conveyances are subject, and held that where BLM reserves a section 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 ROW, if valid. *Id.* This Board has followed that precedent. See, e.g., *City of Tanana*, 98 IBLA 378, 383-84 (1987); *Alaska Department of Transportation*, 88 IBLA 106, 109 (1985). Because a previously existing R.S. 2477 ROW exists independently of an over-lapping section 17(b) easement, neither easement will enlarge or diminish the other. See *State of Alaska v. Alaska Land Title Ass'n.*, 667 P.2d at 726-27. Thus, the existence of an overlapping R.S. 2477 ROW does not control the propriety of BLM's issuance of a section 17(b) easement. See *id.*

We begin with the Mini-cup Trail, also known as the American Summit-Glacier Mountain Trail, because this appeal involves reserved easements for a site along that trail and for other trails that branch from it. The Mini-cup Trail starts from the Taylor Highway at the southern boundary of sec. 32, T. 3 S., R. 32 E., Fairbanks Meridian. Although an existing trail, it does not appear to be among the State's R.S. 2477 assertions. It proceeds southwesterly, then west and northwest along ridges across land to be conveyed to Doyon, to Glacier Mountain through the northern tier of sections in T. 4 S., R. 32 E., and then northwesterly to public lands to the central area of T. 3 S., R. 30 E. See SOR, Ex. 3; Answer, Ex. D at 9. The trail has been in use since the mid-1960s by caribou hunters to access the Fortymile Caribou herd, and by moose and bear hunters to access local populations of those animals. Answer, Ex. D at 9. Sheep hunters also use the trail to access the sheep population on Glacier Mountain, as do local trappers. *Id.* Recreational backpackers

⁹ ANCAB was abolished in 1982 by Secretarial Order, and the authority of the Board was transferred to the Interior Board of Land Appeals. See 47 Fed. Reg. 26392 (June 18, 1982).

use the trail throughout the summer to reach State and Federal lands to the west of the highway. BLM reserved the 25-foot-wide easement for the Mini-cup Trail identified as EIN 58 C5, D9, L¹⁰ in the subject conveyance. Decision at 9. Other portions of that trail have been reserved in other conveyances. Doyon does not appeal the reservation of this easement.

The Fortymile Station-Eagle Trail is part of the old Washington-Alaska Military Cable and Telegraph System (WAMCATS). Pursuant to an R.S. 2477 project initiated in 1993, the State has designated the WAMCATS trail as RST 1594.¹¹ It intersects the Taylor Highway in T. 3 S., R. 32 E., and heads southerly, meeting the Mini-cup Trail on land to be conveyed to Doyon in sec. 10, T. 4 S., R. 31 E., and crossing southerly through the township, turning to the west in secs. 33, 32, and 31, where it reaches Champion Creek at its confluence with Little Champion Creek on public land and then follows along the Champion Creek through the townships to the west to the North Fork of the Fortymile River, where it runs southward along the river and terminates at the historic site of Fortymile Station. A spur of this trail heads southward in secs. 29 and 32 of T. 4 S., R. 29 E., and crosses land to be conveyed to Doyon in T. 5 S., R. 29 E., terminating at Fortymile Station. Portions of this trail are reserved in EIN 11 C5, L and EIN 75 C5.

The Fortymile Station-Government Supply Route (GSR) intersects the Taylor Highway in T. 3 S., R. 32 E., and heads southerly, crossing the Mini-cup Trail on land to be conveyed to Doyon in sec. 1, T. 4 S., R. 31 E., and continues southerly through that township, meeting the WAMCATS trail in the southwestern part of that township before entering sec. 4, T. 5 S., R. 31 E. It then continues along ridgetops through the northwestern portion of that township and then through the townships to the west, crossing land to be conveyed to Doyon in T. 5 S., R. 30 E. and T. 5 S., R. 29 E. The State has designated the GSR as RST 1892. Portions of this trail are reserved in EIN 58b C5, D9, L and EIN 75 C5.

Although Doyon does not appeal the reservation of easement EIN 58 C5, D9, L for the Mini-cup Trail, Doyon objects to the reservation of site easement 58a L for a campsite easement along that trail. Doyon objects that two easements that branch from that trail, EIN 58b C5, D9, L, and EIN 11 C5, L, are duplicative. Doyon also

¹⁰ EIN is an acronym for Easement Identification Number. The letter/number combinations are sponsor codes. C5 represents the BLM District office; D9 stands for the State's Department of Fish and Game; and L represents the general public.

¹¹ See n. 6, *supra*. (The Alaska Department of Natural Resources, Division of Mining, Land and Water, maintains a website, <http://dnr.alaska.gov/mlw/trails/rs2477/>, providing information on the State's R.S. 2477 assertions).

objects to reservation of easement EIN 75 C5 which crosses land to be conveyed in T. 5 S., R. 29 E., to provide access to Champion Creek.

BLM'S PROPOSED TRAIL EASEMENTS

The trail easements are 25 feet wide and allow travel by foot, dogsleds, animals, snowmobiles, two- and three-wheeled vehicles, and small all-terrain vehicles (ATVs) (less than 1500 pounds). Although the trails can be accessed by individuals starting from several directions, BLM's proposal can be understood from the perspective of a person traveling from Eagle to reach public land in T. 5 S., R. 28 E., below the confluence of the Middle and North Forks of the Fortymile River. That person would take the Mini-cup Trail (EIN 58 C5, D9, L) from the Taylor Highway and then turn southwesterly in sec. 1, T. 4. S., R. 31 E., on the portion of the GSR Trail designated as EIN 58b C5, D9, L. The reserved easement joins the WAMCATS trail to public land at the confluence of Champion Creek and Little Champion Creek in section 31, the point at which Champion Creek is sometimes floatable and can be used by rafters.¹²

BLM's Easement Memo explains that the trail provides a traditional access route from the Taylor Highway along the Mini-cup Trail then southwesterly to the south side of Champion Creek into a wild segment of the Fortymile Wild and Scenic River corridor. Noting that the area to the north of Champion Creek is closed to motorized hunting from August 5 to September 20, BLM states that this trail provides access to the nearest motorized hunting from Eagle during the restricted period.

Having reached that point on EIN 58b C5, D9, L (and the GSR trail) where it meets the WAMCATS trail, the traveler could then follow the WAMCATS trail on public land along the south side of Champion Creek to its confluence with the North Fork of the Fortymile River and then southerly to the confluence of the Middle Fork and beyond. However, BLM has reserved EIN 75, C5, which takes the traveler south from Champion Creek across land to be conveyed to Doyon in T. 5 S., R. 29 E., where it meets the GSR trail and turns westward to the overland spur of the WAMCATS trail where it heads southwesterly to Fortymile River.

BLM has also sought to provide access to public land at the headwaters of Champion Creek above its confluence with Little Champion Creek. Easement EIN 11, C5, L follows the WAMCATS trail from the Mini-cup Trail, but then turns westward to reach the headwaters of Champion Creek 4 miles above its confluence

¹² BLM did not reserve the GSR trail that would take the traveler along ridge tops across land conveyed in T. 5 S., Rs. 29 and 30 E.

with Little Champion Creek.¹³ This ridgeline trail provides access from the Mini-cup trail to isolated public lands on the north and west side of Champion creek. The ridgeline provides an identifiable, easy walking surface in the summer into the Champion Creek wild and scenic river corridor.¹⁴

Doyon considers EIN 58b C5, D9, L and EIN 75, C5 unnecessary. Arguing that EIN 58b C5, L and EIN 11 C5, L are duplicative, Doyon proposes that travelers from Eagle follow the Mini-cup trail, turn onto EIN 11 C5, L and then follow Champion Creek to other points on public land. Doyon argues that EIN 75, C5 reserves an unnecessary “shortcut” across its land because travelers could still follow the course of Champion Creek. Doyon believes that reserving only the Mini-cup trail and EIN 11 C5, L, fulfills ANILCA’s requirement to design all easements so as to minimize their impact on Native life styles and avoid duplicative easements that would only encourage public recreation on land conveyed under ANCSA contrary to 43 C.F.R. § 2650.4-7(a)(7).

Trail Easements EIN 58b C5, D9, L and EIN 11 C5, L

Although trail Easements EIN 58b C5, D9, L and EIN 11 C5, L begin at different points on the Mini-cup Trail and end at different places on Champion Creek, Doyon considers them to be duplicative because both lead from the Mini-cup Trail to

¹³ BLM did not reserve the portion of the WAMCATS trail between EIN 11 C5, L and EIN 58b C5, D9, L.

¹⁴ BLM’s Final Easement Memo states that EIN 11 C5, L is reserved “instead of a longer RS 2477 trail assertion” proposed by the Alaska Department of Fish and Game (ADFG) that corresponds to a portion of the WAMCATS trail that leaves the Mini-cup trail and enters the wild and scenic river corridor in sec. 33, T. 4. S., R. 30 E. *See supra* note 12. We find this statement puzzling for several reasons. First, if the R.S. 2477 assertion is valid, EIN 11 C5, L will provide access in addition to the R.S. 2477 trail, not “instead” of it. *See Tetlin Native Corp. v. State of Alaska*, 759 P. 2d at 533; *Fitzgerald v. Puddicombe*, 918 P. 2d at 1019; *State of Alaska v. Alaska Land Title Ass’n.*, 667 P. 2d at 726-27. Moreover, EIN 11 C5, L does not go to the same place as the R.S. 2477 assertion; although EIN 11 C5, L goes to the headwaters of Champion Creek, the WAMCATS trail leads to Champion Creek near its confluence with Little Champion Creek, as does the GSR trail and EIN 58b C5, D9, L. Because ADFG’s proposal would provide access to Champion Creek that is similar to EIN 58b C5, D9, L, it would be more accurate to state that BLM chose to reserve EIN 58b C5, D9, L, not EIN 11 C5, L, as an alternative to ADFG’s proposed reservation of a portion of the WAMCATS trail. Unlike EIN 11 C5, L, neither EIN 58b C5, D9, L nor ADFG’s proposal achieve BLM’s objective of providing access to public lands at the headwaters of Champion Creek.

Champion Creek. *See* 43 C.F.R. § 2650.4-7(b)(1)(ii). Doyon refers to our decision in *City of Tanana*, 98 IBLA 378, 382 (1987), where we found that a parallel easement was duplicative. In that case, however, the parallel easements actually connected and were not miles apart as they are here.

Because easements are to be reserved if they are reasonably necessary to provide a full right of public use of the public lands to which they provide access, an easement may be considered duplicative of another and not “reasonably necessary” if its elimination would not significantly affect the full use of the public lands to which each would provide access. The question then becomes whether one easement does something that the other does not.

Although Doyon believes that all users can simply follow EIN 11 C5, L to Champion Creek and then follow the creek 4 miles to its confluence with Little Champion Creek, BLM argues that the difficulty of the terrain between those points makes reservation of both easements necessary. Answer at 12, 13. BLM’s Final Easement Memo explains that EIN 58b C5, D9, L provides a traditional access route from the Taylor Highway along the Mini-cup Trail then southwesterly to the south side of Champion Creek into a wild segment of the wild and scenic river corridor. It provides access to the nearest motorized hunting from Eagle during the restricted period from August 5 to September 20. ATV users need a trail of this scope to reach public lands where use of the ATVs is allowed.¹⁵ Answer at 10. Were we to find that the easements were actually duplicative, such a finding would not necessarily impel the reservation of the shorter trail EIN 11 C5, L instead of EIN 58b C5, D9, L. Although BLM may designate a new route as an easement, it can only do so “if there is no reasonable alternative route or site available.” 43 C.F.R. § 2650.4-7(a)(3). If the trails were duplicative, the availability of existing trail EIN 58b C5, D9, L would take precedence over designating the new trail EIN 11 C5, L.

We do not find that these trails are duplicative. Even if EIN 11 C5, L alone would provide access to both sides of Champion Creek, as Doyon contends, it does not provide for the reasonable use of that Creek by rafters because of the difficulty in the terrain that separates it from the point where EIN 58b C5, D9, L reaches the creek where floating is possible. Reserving EIN 58b C5, D9, L alone, however, would discourage full use of public land at the headwaters of Champion Creek that the conveyance will further isolate. We conclude that both easements are reasonably necessary to provide for the full use of lands that remain in Federal ownership.

¹⁵ While motorized hunters would use EIN 58b C5, D9, L during the restricted period to reach areas south of Champion Creek where motorized hunting is allowed, nonmotorized hunters would need to use 11 C5, L to access the north and west sides of the creek during the nonmotorized hunting season there.

Trail Easement EIN 75, C5

As stated before, the EIN 75, C5 trail takes the traveler south from Champion Creek across land to be conveyed to Doyon in T. 5 S., R. 29 E., where it meets the GSR trail and turns westward to the overland spur of the WAMCATS trail where it heads southwesterly to Fortymile River. Doyon argues that this “shortcut” is not necessary because the traveler could follow the WAMCATS trail on public land along the south side of Champion Creek to its confluence with the North Fork of the Fortymile River and then southerly to the confluence of the Middle Fork and beyond.

BLM believes that people coming from Eagle along EIN 58b C5, L need a route out of the Champion Creek portion of the wild and scenic river corridor to public lands where they can hunt and fish that is not limited to the entire length of Champion Creek, especially in the winter when the travel route is subject to aufeis conditions. It provides access to the nearest motorized hunting from Eagle during the restricted access period under State hunting regulations from August 5 to September 20 each year. This trail does not only serve travelers from Eagle. ADFG called the trail “necessary to facilitate travel from the North Fork Fortymile River to the Champion Creek area” and indicated that it “is used annually by hunters and trappers to access public lands.” Ex. D at p. 2.

Arguing that BLM’s real purpose is to facilitate travel by hunters from Eagle to land to the south beyond the Champion Creek area, Doyon suggests that those hunters could travel further south on the Taylor highway and access public land through R.S. 2477 trails. Doyon argues that these R.S. 2477 trails provide reasonable alternatives on public lands that make the reservation of easement EIN 75, C5 unnecessary. BLM argues that Doyon in making this argument has failed to meet its burden in this appeal, stating: “It is insufficient to just look at maps and contend that old RS 2477 trails can be used without any evidence that those routes are still in useable condition.” Answer at 15.

[2] It is well established that the party challenging a BLM easement decision bears the burden of proving that it is in error. *State of Alaska*, 137 IBLA at 293; *City of Tanana*, 98 IBLA at 383; *Mendas Cha-Ag Native Corp.*, 93 IBLA at 254; *Tetlin Native Corp.*, 86 IBLA 325, 335 (1985). That showing can be accomplished by demonstrating that BLM’s action was not consistent with statutory and regulatory principles established for reservation of easements in conveyances to Native corporations. *State of Alaska*, 137 IBLA at 293.

Ideally, we would be deciding this question on the basis of arguments and evidence presented by both sides on the specific merits of alternative trails or sites on public land that the parties themselves have identified and considered. *E.g.*,

Tetlin Native Corp., 86 IBLA at 336-37; *Toghotthele Corp.*, 81 IBLA 317, 322 (1984). However, in this appeal, BLM and Doyon both approach the requirement to consider alternatives for trails and sites on public land in the manner of an “Alphonse and Gaston routine,” with Doyon arguing that BLM must first attempt to identify reasonable alternatives on public lands before the agency decides upon an easement, while BLM argues that Doyon cannot meet its burden in this appeal unless it first identifies reasonable alternatives. In contending that Doyon has failed to meet its burden in this appeal because it has provided no evidence that those routes are still in useable condition, BLM in essence admits that it gave them no consideration as alternatives.

Nevertheless, even assuming that the routes are in useable condition so that motorized hunters could reach the hunting area, Doyon’s argument completely ignores the need to provide other users access to public land in the Champion Creek area. Hunters from Eagle are not the only persons seeking to use land in the wild and scenic river areas. As we stated earlier, it is BLM’s duty to reserve easements across land conveyed to Doyon that are reasonably necessary to guarantee a full right of public use and access for all of the purposes for which the public land was set aside under 16 U.S.C. § 1271 (2006).

Thus, while we agree with BLM that some access across lands to be conveyed in this area is reasonably necessary and affirm its decision to reserve with respect to the portions of EIN 75, C5 that overlie existing trails, Doyon points out that some portions of this easement are new, notwithstanding the fact that existing portions of the WAMCATS trail provide access across land to be conveyed to Doyon from Champion Creek. As noted above, BLM may designate a new route as an easement only “if there is no reasonable alternative route or site available.” 43 C.F.R. § 2650.4-7(a)(3), (7). Thus, *before* BLM designates a new route, BLM is required to find that there are no reasonable alternatives on the basis of a record that supports that finding.

Instead of pointing to evidence in the record that supports a finding that there are no reasonable alternatives, BLM argues that Doyon has failed to meet its burden in this appeal because it has provided no evidence that the R.S. 2477 routes are still in useable condition. In making this argument, BLM attempts to assign its own obligation under 43 C.F.R. § 2650.4-7(a)(3) to consider the condition of those routes to Doyon.

Because the regulation requires BLM to find that there are no alternatives *before* it designates a new route on the basis of a record that supports that finding, BLM’s response to Doyon’s argument shows that Doyon has satisfied its burden by demonstrating that BLM’s action to reserve EIN 75, C5 was not consistent with statutory and regulatory principles established for reservation of easements in

conveyances to Native corporations. See *State of Alaska*, 137 IBLA at 293; *City of Tanana*, 98 IBLA at 383; *Mendas Cha-Ag Native Corp.*, 93 IBLA at 254; *Tetlin Native Corp.*, 86 IBLA at 335. Accordingly, BLM's decision must be set aside and the case remanded for BLM to conform the easement to existing routes or justify the designation of a new route.

Site Easement EIN 58a L

Site Easement EIN 58a L is for a 1-acre existing camp site along the Mini-cup Trail in sec. 2, T. 4 S., R. 31 E. BLM's final Easement Memo states that this periodic rest area is needed by hunters using the Glacier Mountain Controlled Use area during the nonmotorized hunting period from August 5 to September 20. Doyon points out that the site is about 4 miles from the Taylor Highway, a distance that Doyon argues is only "20 minutes by four wheeler . . . two hours by foot." SOR at 25. Arguing that the record contains no evidence that BLM made "a reasonable effort . . . to locate . . . camping sites on publicly owned lands" as required by 43 C.F.R. § 2650.4-7(b)(3), Doyon points to available public land 2 or 3 miles to the west where a campsite could be placed only 6 or 7 miles from the trailhead. Doyon argues that the nonmotorized 45-day hunting period does not justify a year-round easement, and that the only purpose of the easement is to continue recreation on the lands conveyed, in contravention of 43 C.F.R. § 2650.4-7(a)(7). Doyon points out that the Board has rejected site easements in *State of Alaska*, 153 IBLA at 307, and *Chitna Native Corp.*, 85 IBLA 311, 326, 329, 330 (1985).

BLM argues that during the nonmotorized hunting season, "[h]unters on foot with heavy packs of meat and outdoor equipment need reliable places to stop and set up camp" and "should not be required to pass all the way through a 4-5 mile stretch of private land with no possibility of camping." Answer at 7. BLM states that the campsite is not only needed by hunters but by others accessing the northern and western sides of Champion Creek. *Id.* BLM points to public comments in support of its finding. BLM observes that while Doyon argues that a reasonable alternative site exists on public land, Doyon has not identified one, a fact that distinguishes the instant appeal from *State of Alaska*, 153 IBLA at 307, the case on which Doyon relies.

Although BLM states that a site is needed by other users than the hunters who need to camp during the nonmotorized hunting season, it purports to justify this particular location solely on the needs of a particular group of users for a particular short period. BLM provides no explanation why a year-round site for other users cannot be placed on public land. Instead, BLM presents us with another iteration of its above-described Alphonse and Gaston routine, arguing that Doyon has not met its burden of proof because it has failed to identify an alternative site. Because BLM is required by 43 C.F.R. § 2650.4-7(b)(3) to make "a reasonable effort . . . to locate . . . camping sites on publicly owned lands" *before* it designates a site on land to be

conveyed, we view BLM's response as an admission that it has not done so. Accordingly, BLM's decision reserving EIN 58a L must be set aside and the case remanded to consider whether reasonable alternative campsite locations exist on public land.

CONCLUSION

We find that Doyon has failed to demonstrate that any of the trail easements are not reasonably necessary; elimination of any of the proposed easements would discourage the full use of public lands that section 17(b) ANCSA intended them to enable. The record, however, does not show that BLM considered whether there were existing routes across the land to be conveyed prior to designating a new portion for route EIN 75, C5, nor does the record show that BLM considered whether there were suitable sites for campsites on public land before proposing EIN 58a L.

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 decision appealed from is affirmed in part, and set aside and remanded in part for further action consistent with this opinion.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge