

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving for interim conveyance to Napakiak Corporation certain lands without reservation of an easement for public use of a certain winter trail. F-14901-A (Anch.).

Hearing ordered.

1. Alaska Native Claims Settlement Act: Easements: Access -- Alaska
Native Claims Settlement Act: Easements: Public Easements --
Evidence: Sufficiency -- Hearings

Pursuant to 43 CFR 2650.4-7(b), a transportation easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternate route is put in dispute and the facts of record are insufficient to find that a BLM decision not to reserve an easement based on that route is supported by a rational basis, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

APPEARANCES: M. Francis Neville, Assistant Attorney General, for the State of Alaska; Jeffrey B. Lowenfels, Esq., Anchorage, Alaska, for Calista Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

By decision dated March 31, 1982, the Alaska State Office, Bureau of Land Management (BLM), approved for interim conveyance to the Napakiak Corporation on behalf of the Native village of Napakiak approximately 103,562 acres of land based on selection application F-14901-A (Anch.)

filed under section 12(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611(a) (1976 and Supp. IV 1980). By notice dated April 30, 1982, the State of Alaska appealed the BLM decision of interim conveyance. Its statement of reasons urged that BLM unreasonably failed to reserve for public use two existing winter trails that receive significant use for travel between villages and for access to public land. The two trails are identified as EIN 2 C3, D1, D9 (hereafter EIN 2), and EIN 3 C3, D1, D9 (hereafter EIN 3).

By motion filed October 18, 1982, the State, with the concurrence of counsel for BLM, requested that its appeal be dismissed as to EIN 3. This Board granted the motion by order dated November 8, 1982, and thus the only issue remaining on appeal is whether BLM's failure to reserve EIN 2 was proper.

Calista Corporation has entered an appearance opposing the State's appeal. ^{1/}

Proposed easement EIN 2 is a 25-foot easement for an existing access trail from the north section line of sec. 2, T. 7 N., R. 72 W., Seward meridian, running southwesterly through the village selection to public land. The easement would be limited to winter use.

In July 1981 the State Director distributed for comment to interested persons, including representatives of the State of Alaska, a draft memorandum presenting recommendations for easements in the Napakiak conveyance. In that memorandum the State Director proposed reserving this easement with the following comments:

The trail alignment as shown on the map was illustrated by the State of Alaska. As a State marked trail, they attest to its existence and use. Reservation of this easement is necessary to assure continued public access for intervillage travel and to public lands and resources. Based on additional information from LUPC [the Land Use Planning Commission], the trail has been realigned to reflect the existing use. Trail EIN 1 D1 identified by LUPC (trail from Bethel to Napakiak) has been combined into trail EIN 2, C3, D1, D9.

^{1/} Calista Corporation is the regional Native corporation that receives the subsurface estate of lands conveyed to Napakiak Corporation. By motion received Nov. 1, 1982, Calista Corporation moved to intervene in this appeal. Both the State of Alaska and BLM state they have no objection to the motion. Calista Corporation was named as a party in the BLM conveyance decision and therefore, under both the regulations of the former Alaska Native Claims Appeal Board and the Board of Land Appeals, Calista Corporation could participate as a matter of right in this appeal. 43 CFR 4.904 (1981); 43 CFR 4.414. To do so, Calista should have filed an answer within 30 days of receipt of appellant's statement of reasons. Under 43 CFR 4.414, an answer that is not timely filed may be disregarded in deciding the appeal. In this case, since neither the State of Alaska nor BLM objects to Calista Corporation's participation, its views will be considered.

By letter dated July 20, 1981, the State's land management officer reported its agreement with the easement recommendations in the draft memorandum but reserved the right to appeal if changes were made.

On November 9, 1981, BLM held a meeting with the Napakiak Corporation to discuss its conveyance and related matters including the proposed easement reservations. Representatives of the State and Calista Corporation also attended. The trip report prepared by a BLM realty specialist following the meeting summarizes the discussion on EIN 2 as follows:

The village corporation disagrees with this easement. If this land-based route is used at all it is only used during the time that the Kuskokwim River is changing from a liquid to solid state (ice). In the meeting it was learned that the route used between Bethel and down-river villages lies on the Kuskokwim River and parallels the right bank. At Napakiak the route branches with one route continuing on the river and paralleling the right bank to Nunapitchak, Atmautluak, Kasigluk, and other villages; the other route heading southerly on the river, contacting land in Sec. 1, T. 6 N., R. 73 W., Seward Meridian, intersecting in Sec. 24, T. 6 N., R. 73 W., Seward meridian, a winter trail to Eek. Each village tends to use a slightly different route due to terrain association preferences.

The report states as well that the State's representative at the meeting had no comments.

By memorandum dated January 25, 1982, the State Director, BLM, presented final easement, major waterway, and navigability recommendations. He found that no public easements should be reserved. As to EIN 2 he commented that the trail was dropped because alternate and preferred access is available via the Kuskokwim River in its frozen state. 2/

In its statement of reasons the State urges that EIN 2 is part of an existing trail network providing access from Bethel to public lands and outlying villages. The State alleges that in the winter the trails are staked and extensively used, that the history of use dates back to the early 1920's, and that the trails were originally constructed and maintained by the Alaska Road Commission. The State disputes BLM's conclusion that the Kuskokwim River provides reasonable alternate access, asserting:

Fish and Game area biologists and other public users of these trails in the winter will testify that the river is often unusable in the winter due to overflow conditions and ice plates that form in the river. Moreover, the very fact that the trails are

2/ In a Jan. 22, 1982, letter to the president of Napakiak, Inc., reporting the decisions on easements, BLM states in addition that "[t]his pattern of use [via the frozen river] was indicated by the village and verified by the district office."

staked for winter use and have a long history of significant winter use demonstrates that the Kuskokwim River is not, and has not in the past been, a preferred or dependable alternative route in the winter.

The State argues that BLM has unreasonably ignored the regulatory criteria which state that the standard for determining which public easements are reasonably necessary for access shall be present existing use (43 CFR 2650.4-7(a)(3)) and that reservation of a public easement shall follow existing routes of travel unless a variance is otherwise justified (43 CFR 2650.4-7(b)(1)(iv)). The State contends that the Kuskokwim River is often unsafe and unsuitable for winter travel because of overflow and ice plate conditions and thus not a reasonable alternative to existing trails because it fails to guarantee winter access.

BLM responds that the record supports the conclusion that EIN 2 should not be reserved. Specifically, BLM notes that the information obtained at the Napakiak meeting and verified by the BLM district office established that use of the frozen Kuskokwim River was the preferred access route and provided a reasonable alternative to the trail, which was reported to be used very seldom, if at all. BLM argues that 43 CFR 2650.4-7(b)(i) precludes reservation of an easement where there is a reasonable alternative. BLM adds that since the river is navigable it is public land and a trail over selection land accessing the same areas should not be reserved, that even if the trail were significantly used it should not be reserved where a reasonable alternative exists, and that a reasonable alternative does not have to be useable 100 percent of the time.

Calista Corporation argues that reservation of easement EIN 2 is unnecessary for three reasons: (1) It is no longer used, as evidenced by the brush and vegetative overgrowth obliterating signs of the trail; (2) the former trail is only used by Natives and Native use is not to be grounds for reservation of an easement under 43 CFR 2650.4-7; and (3) there is a reasonable alternative route along the Kuskokwim River.

[1] Section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), directs the Secretary of the Interior to reserve public easements across selected lands and at periodic points along the courses of major waterways that are reasonably necessary to guarantee international treaty obligations and a full right of public use and access for recreation, hunting, transportation, utilities, docks, and other public uses. Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (1977).

Departmental regulations governing the reservation of public easements specify that the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. 43 CFR 2650.4-7(a)(3). The Board has held that present existing use is most reasonably interpreted to mean that public easements substantially conform to existing uses and that the evidence of such use be recent. Northway Natives, Inc., 69 IBLA 219, 234, 89 I.D. 642, 649 (1982). In the case of transportation easements, however, there are additional regulatory standards to be applied.

The Department may reserve transportation easements across lands conveyed to a Native corporation that are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways. 43 CFR 2650.4-7(b). As pertains to this case, 43 CFR 2650.4-7(b) also requires that if public transportation easements are to be reserved, they shall:

(i) Be reserved across Native lands only if there is no reasonable alternative route of transportation across publicly owned lands;

(ii) Within the standard of reasonable necessity, be limited in number and not duplicative of one another (nonduplication does not preclude separate easements for winter and summer trails, if otherwise justified);

* * * * *

(iv) Follow existing routes of travel unless a variance is otherwise justified;

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(xii) Not be reserved simply to reflect patterns of Native use on Native lands.

The State argues on appeal that EIN 2 is a presently used trail for winter travel. BLM has found that the Kuskokwim River is the preferred route, but argues that even assuming that EIN 2 is presently used it may not be reserved because the river constitutes a reasonable alternative to EIN 2 across public lands. The State challenges the reasonableness of the route because it is often unsafe and unusable in the winter.

BLM is correct that EIN 2 may not be reserved if the river is a reasonable alternate route. Based on the evidence in the record, however, we cannot make a finding as to the reasonableness of the river route. Where there are disputed facts determinative of legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415. Patricia C. Alker, 70 IBLA 211 (1983). Therefore, this case shall be referred to the Hearings Division, Office of Hearings and Appeals, for a hearing and a recommended decision as to the reasonableness of the Kuskokwim River as a winter transportation route as it affects the conveyance to the Napakiak Corporation. A determination of the reasonableness of the river route shall include consideration of the nature and degree of risks posed by its use in winter and of the normal periods of time it is unusable. Since a finding that such route would be unreasonable then requires assessment of EIN 2 as a present existing trail for winter use and as otherwise meeting the requirements of 43 CFR 2650.4-7, evidence should also be taken as to the propriety of reserving EIN 2 as a transportation easement in the conveyance to Napakiak Corporation.

The burden of proof at the hearing is upon the State to show that BLM's decision is erroneous. Northway Natives, Inc., supra. Following the hearing

the Administrative Law Judge shall serve his recommended decision on the parties and allow each to respond with briefs to the Board within 30 days of receipt of the decision. After receipt of the briefs, this Board will issue a final decision for the Department on this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, as amended (43 FR 26,390 (June 18, 1982)), the case is referred to the Hearings Division.

Will A. Irwin
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member

