

Editor's note: Appealed -- aff'd in part, rev'd in part, remanded, Civ.No. J83-0018 (D.Alaska Aug. 10, 1984); on remand -- affirmed in part, vacated in part, and remanded for evidentiary hearing -- See 85 IBLA 273, 92 I.D. 134 (March 12, 1985)

GOLDBELT, INC.

IBLA 82-1142
ANCAB G 80-1

Decided July 27, 1983

Appeal from decision by Alaska State Office, Bureau of Land Management, reserving transportation and site access easements across Native land selection. AA-9205-C, AA-9205-EE, AA-18004, and AA-18008.

Affirmed.

1. Alaska Native Claims Settlement Act: Easements: Review

Where Native corporation appeals a decision to reserve transportation easements across Native lands selected pursuant to the Alaska Native Claims Settlement Act, the burden of proof to show the easements were not properly reserved is on the corporation. Where the decision to reserve transportation easements is supported on the record by a showing of a reasonable basis for the reservation, it is ordinarily affirmed in the absence of a showing of error of law.

2. Alaska Native Claims Settlement Act: Easements: Generally

Where a Native corporation contends on appeal alternatives exist to easements reserved across Native land selections made pursuant to the Alaska Native Claims Settlement Act, the burden lies upon the corporation to show that the alternatives proposed are reasonable.

3. Alaska Native Claims Settlement Act: Easements: Generally

Evidence offered to show use of a Native selection for transportation purposes after 1977, was properly admitted as relevant to an issue raised by appellant

concerning the existence of alternative easement sites, even though the evidence of use after Dec. 18, 1976, could not be considered to determine the separate issue concerning whether there was present existing use of land prior to Dec. 18, 1976.

4. Alaska Native Claims Settlement Act: Easements: Present Existing Use

Under 43 CFR 2650.4-7(a)(3), present existing use is the primary standard used to determine whether easements are reasonably necessary to be reserved under the Alaska Native Claims Settlement Act. Evidence offered by users of the reserved easement of actual use of the area for transportation purposes prior to Dec. 18, 1976, is sufficient to support a reservation under the Act for the transportation uses described in 43 CFR 2650.4-7(b)(1)(viii).

5. Alaska Native Claims Settlement Act: Easements: Generally

Evidence of use of a reserved transportation easement for other uses does not tend to invalidate the easement, where it appears there was also actual use of the area for transportation purposes.

6. Alaska Native Claims Settlement Act: Easements: Generally

Where, by regulation, a site easement for parking in connection with a transportation easement is limited in extent to 1 acre, no greater area than 1 acre may be reserved.

APPEARANCES: Arthur Lazarus, Jr., Esq., and Stephen J. Pearson, Esq., for appellant; Dennis J. Hopewell, Esq., Office of Alaska Regional Solicitor, for appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Appellant Goldbelt, Inc. (Goldbelt), is an urban corporation established under section 14(h)(3) of the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. § 1613(h)(3) (1976). Goldbelt appeals from a decision of the Bureau of Land Management (BLM), reserving to the

United States two easements, designated EIN 5 D3 and EIN 6 D3, for transportation purposes at Echo Cove in the city and borough of Juneau, Alaska, across lands selected by Goldbelt under the Act. Both easements were reserved by BLM pursuant to section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), by decision dated September 19, 1980. Following appeal to the Alaska Native Claims Board (ANCAB) the matter was referred for hearing to an Administrative Law Judge, pursuant to 43 CFR 4.911(c) (1981), who was directed to submit a recommended decision to ANCAB after making the required record.

On December 30, 1982, E. Kendall Clarke, the Administrative Law Judge assigned to conduct the fact-finding hearing, issued a decision recommending that this Board find the BLM decision to reserve both easements was correct. While this matter was pending before the Administrative Law Judge, ANCAB's function was transferred to the Interior Board of Land Appeals by Secretarial Order No. 3078, dated April 29, 1982. Interim rules to govern this matter were published June 18, 1982, at 47 CFR 26390. This appeal is therefore now properly before this Board.

Easement EIN 5 D3 (easement 5) is a site easement for parking reserved in connection with easement EIN 6 D3 (easement 6), a 60-foot-wide road easement which provides access from the Glacier Highway to Echo Cove, an arm of Berner's Bay, a salt water bay located about 40 miles north of Juneau. The stated purpose of the reservation of these easements is summarized by BLM as follows: 1/

This easement was requested by the State of Alaska, Department of Transportation, Division of Harbors. The one acre site will be used for public parking and access to a proposed boat launching ramp to be constructed on tidelands by the Division of Harbors. The proposed site is located approximately 40 miles north of Juneau via the Glacier Highway and currently receives heavy public use, generally by boaters. Over thirty (30) letters and mailgrams were received from the public urging reservation of this site. The letters supported the public's use of the site for launching purposes for access to Berners Bay. The Division of Harbors provided expert testimony that Bridget Cove which was suggested as an alternative by Goldbelt, Inc., was not a reasonable alternative to Echo Cove. They stressed that for small boaters, Echo Cove was the best place for the boat launching ramp. Due to the lack of available harborage in Juneau and since Echo Cove is accessible via the Glacier Highway, is located along a major water transportation corridor, and is a topographically protected bay, the need for a public boat launch is immediate and the location is logical. On the basis of current heavy public use and the need for a parking area which would be suitable for vehicle and boat trailer traffic, the one acre request is justified. Reservation of the site easement would ensure continued

1/ BLM memorandum dated Sept. 2, 1980, subject: Final Easements for Goldbelt, Inc., at 2, 3.

public use and provide a transportation route via water to public lands and coastal communities north of the Native selection area.

On appeal before this Board, Goldbelt objects to the reservation of the two transportation easements, contending, in exceptions to the recommended decision, that the easements violate the standards established by Departmental regulations implementing the Act codified at 43 CFR 2650.4-7. Goldbelt argues that BLM has failed to show a lack of reasonable alternatives of access across Federal lands, and has failed to show the existence of significant existing use of Echo Cove for transportation purposes prior to December 18, 1976, a date which both parties agree should be used as an ending date for purposes of calculating present existing use under the Act. ^{2/} It is also contended that easement 5, the site easement for parking, exceeds the maximum allowable size and is not reasonably necessary, and that the easements were reserved for the purpose of providing access to lands selected by a Native corporation for recreational purposes, contrary to Departmental regulation. Finally, Goldbelt contends the Administrative Law Judge misapplied the standards set by ANCAB limiting the scope of review at hearing; exceeded the scope of review set by the Board, and erroneously applied ANCAB's standards for review to the evidence presented at hearing; failed to make complete findings of fact, as required by ANCAB's order dated July 9, 1981; confused regulatory requirements for reservation of easements; and erroneously characterized the evidence produced at the hearing to support the agency decision. On March 7, 1983, following its initial brief, Goldbelt petitioned to reopen or to supplement the record to show the existence of another alternative to Echo Cove which could provide access to Berner's Bay.

At a hearing held in Juneau, Alaska, from November 2 through 4, 1981, which included a visit to the proposed easements and the alternative Bridget Cove site, 14 witnesses testified concerning the nature of the easements, the history of the use of the affected lands, the existence of possible alternative sites, and the purposes of the easements. Although several alternative sites for access to Berner's Bay were proposed by Goldbelt, the evidence at hearing focused upon Echo Cove and Bridget Cove, as launching sites for small boats traveling to Berner's Bay and the three rivers which enter the Bay. Two other sites, Sawmill Cove and Cowee Creek were mentioned during the hearings. Cowee Creek was the subject of little testimony, apparently because it was inaccessible by road and clogged with debris and logs. Sawmill Cove was mentioned as an alternative but no proof concerning its character or possible use was offered. Echo Cove is an arm of Berner's Bay opening directly into

^{2/} This date is fixed in apparent reliance upon the court's decision in Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 678 (D. Alaska 1977). See Departmental Regulation at 43 CFR 2650.0-5(p) which provides:

"(p) 'Present existing use' means use by either the general public which includes both Natives and non-Natives alike or by a Federal, State, or municipal corporation entity on or before December 18, 1976, or the date of selection, whichever is later. Past use which has long been abandoned shall not be considered present existing use."

the bay itself. Berner's Bay is a body of salt water along mainland Alaska north of Juneau which opens into Lynn Canal, a portion of the Alaska inland waterway extending north and south along the Alaska coastline.

Bridget Cove is located within Lynn Canal about 3 miles from the entrance to Berner's Bay, and is sheltered by a small island. Glacier Highway, the main traveled road in the area, ends at Echo Cove. The Glacier Highway passes Bridget Cove about 3 miles before it ends at Echo Cove. Small boats up to 18 feet in length or longer have been launched from car top carriers and trailers directly into the water at Echo Cove since at least 1973, where there is a short access road and available vehicle parking at the road's end.

There is currently no road access to Bridget Cove and there was no evidence that it has been used as a boat launch for any but the smallest boats which could be carried by boaters from the highway, a distance of more than 700 feet. The shoreline from Echo Cove up to the mouth of Sawmill Creek (the second alternative site proposed in March 1983 following the fact-finding hearing by Goldbelt), is a sloped beach which permits small boats to run into the shore at any point. The shoreline from Bridget Cove to the entrance of Berner's Bay is a rock wall which affords no shelter.

Although the transcript of the record made by the Administrative Law Judge briefly mentions Sawmill Creek, there is no evidence concerning the area offered by any witness. The documentary evidence submitted by Goldbelt following hearing indicates that the area is not accessible by road, but that, in the event a timber sale proposed for the area finds buyers, a road 4-1/2 miles long would be built to permit the area to be logged. This proposed extension of the present road would presumably provide access to Sawmill Creek, which would then be located at road's end, in much the same fashion as Echo Cove is now situated.

The regulatory standard for determining under what conditions reservation of an easement across Native lands is proper, and when alternatives to reservation must be considered appears at 43 CFR 2650.4-7(a)(3) which provides:

(3) The primary standard for determining which public easements are reasonably necessary for access shall be present existing use. However, a public easement may be reserved absent a demonstration of present existing use only if it is necessary to guarantee international treaty obligations, 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. When adverse impacts on Native culture, lifestyle, and subsistence needs are likely to occur because of the reservation of a public easement, alternative routes shall be assessed and reserved where reasonably available. The natural environment and other relevant factors shall also be considered.

[1] As Goldbelt points out, Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), declares that the Secretary of the

Interior, in reserving easements under section 17(b)(3) of the Act, is limited to the purposes enumerated by section 17 (b)(1) of the Act to easements which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, and docks. The Departmental regulations codified at 43 CFR 2650.4-7, supra, published following the decision in Alaska Public Easement Defense Fund v. Andrus, supra, accept and follow the court's analysis of the statute. 3/ The scope of the Board's review is not so limited as to require affirmance upon a mere finding that the decision is not arbitrary and capricious. United States Fish & Wildlife Service, 72 IBLA 218 (1983). However a decision reserving an easement will ordinarily be affirmed where the issues of material fact have been referred to an Administrative Law Judge for an evidentiary hearing and the evidence supports the decision. Cf. United States v. Dunbar Stone Co., 56 IBLA 61, 67-68 (1981) (Board has authority to make findings of fact based on its own review of the record before the Administrative Law Judge). While it is true, as was pointed out in Northway Natives, Inc., 69 IBLA 219, 89 I.D. 642 (1982), that ANCAB's order establishing the scope of review for the factfinder here is somewhat confusing, the primary intent of the order is to establish the rule that easement decisions by BLM must be shown to have a rational basis. 4/ This is ultimately a factual matter, as was recognized by ANCAB when it ordered an evidentiary hearing. 5/ It is against this basic standard that the record of appeal and the transcript of hearing is examined.

[2] There are two principal issues on appeal: Whether there was present existing use of the Echo Cove site prior to December 18, 1976, and whether there is any reasonable alternative to the use of Echo Cove for transportation access into Berner's Bay. The existence of alternative sites is considered first.

Goldbelt contends that BLM did not adequately consider alternative sites prior to making an initial assessment of the Echo Cove site. It then argues that the evidence produced at the hearing is also insufficient to establish that Echo Cove is the best site for an access easement to Berner's Bay or that alternative sites do not exist. Claiming that recent events justify further consideration of this aspect of the appeal, appellant seeks a further evidentiary hearing or, alternatively to supplement the record to develop facts

3/ 43 FR 55326 (Nov. 27, 1978).

4/ Northway Natives, Inc., supra at 226-27 n.2, 89 I.D. 645 n.2. The Northway decision, although earlier decided, considers an Oct. 9, 1981 ANCAB decision in this pending appeal in reaching the stated conclusion concerning scope of review.

5/ See, e.g., Land Use Planning Commission Local Easement Study, dated November 1974 at 21, defining the term "Reasonably necessary:"

"Reasonably Necessary shall refer to those access-related easements which would be deemed necessary by a prudent person, acting in the public interest as defined in Section 17(b) and the implementing regulations, with sufficient knowledge of the facts inherent in particular situations and with an understanding of the intent of the Settlement Act, as expressed in Sections 2(a) and 2(b)."

concerning another proposed alternative site, Sawmill Creek, a location within Berner's Bay. Alternative sites are contended to be a relevant consideration by Goldbelt for the reason that Goldbelt plans to develop Echo Cove as a resort area, a use it finds inconsistent with the existence of a public boat launch facility.

The hearing testimony comprises 500 pages of transcript concerning the relative merits of Echo and Bridget Cove, the two alternatives considered at hearing. While the recommended decision of the Administrative Law Judge summarizes the testimony of the witnesses, his findings of fact are very brief, as Goldbelt observes. This Board is not bound to either accept or reject the recommended decision, but may look to the record developed by the fact-finder to determine whether the decision appealed from is supported by a factual basis. 6/ The record, which was extremely detailed, establishes positively that BLM considered alternatives to the reservation of an easement at Echo Cove, and considered the economic and environmental impact the reservation of an access site at Echo Cove would have upon the Native selection. The BLM assistant to the Director for Conveyance Management testified that alternative sites were considered, but that such access must be "real access" and not just "legal access." 7/ The Echo Cove easement was reserved because it was the only location giving direct access to Berner's Bay and its riverine system which was served by an existing road. 8/ Bridget Cove was rejected because it lacked direct access, and was not served by an existing road, and because it was not suitable for small boats. 9/ The transcript shows these conclusions to be supported by the testimony of six small boat users who have personally used Echo Cove and are familiar with boating conditions in the vicinity of Berner's Bay. 10/ The transcript of the hearing, taken as a whole, establishes that Bridget Cove was considered and rejected as a possible alternative to Echo Cove by BLM and that the decision is supported by substantial evidence tending to show the absence of reasonable alternative sites.

Concerning the existence of alternative sites, the Board finds that the following facts and legal conclusions have been established in the record of this case: (1) Bridget Cove, Cowee Creek, and Echo Cove are possible boat launch sites located on coastal waters about 40 miles north of Juneau; (2) of the three sites considered, only Echo Cove has a road leading into the launch area; (3) Echo Cove provides direct access for small boats under 18 feet traveling into Berner's Bay and the rivers emptying into Berner's Bay; (4) neither of the other two sites considered provides actual current access to small boat users desiring to use Berner's Bay and the rivers emptying Berner's Bay; (5) Bridget Cove is further limited since the adjacent shoreline and water conditions, being more exposed, are not as favorable to small boats; (6) Cowee Creek is further limited since the mouth to the creek

6/ Northway Natives, Inc., supra at 231 n.4, 89 I.D. 648 n.4.

7/ Tr. 214.

8/ Tr. 241.

9/ Tr. 248.

10/ Tr. 308-28, 337-39, 360-61, 411-15, 425, 449-92.

is blocked by flood debris; and (7) neither alternative proposed is a reasonable substitute for Echo Cove because neither will supply equivalent access to small boaters seeking to enter the Berner's Bay area.

To justify further hearings upon the merits of Sawmill Creek, the alternative proposed following hearing, Goldbelt is obliged under prior decisions of the Department to demonstrate at least the existence of a substantial probability that the new hearing will produce a different decisional result. ^{11/} Here, Goldbelt has offered evidence to show that a possibility now exists an additional 4-1/2 miles of road will be built connecting Echo Cove to Sawmill Creek contingent upon a successful timber sale in the fall of 1983. ^{12/} Assuming this to be so, evidence of the value of Sawmill Creek as an alternative site will tend to be speculative, since there is not now, nor can there be in the near future, any actual access to Sawmill Creek for vehicles. Since a standard of comparison reasonably used by the BLM decisionmaker to evaluate alternatives to Echo Cove was the existence of actual access, Sawmill Creek would also be presently rejected since there is no road to the place, despite the other apparent similarities of Sawmill Creek to Echo Cove. Under the circumstances, further hearings are not required. The Board finds that BLM did, in fact, consider all reasonable alternatives to Echo Cove and that the decision to reserve easements at Echo Cove is supported by substantial evidence. It is apparent that, for the present at least, there are no reasonable alternatives to Echo Cove as an access point for small boats into Berner's Bay because none of the other sheltered places opening into the bay is served by a road.

Appellant contends, in this context, that the Administrative Law Judge failed to define the legal standards applicable to a determination of whether reasonable alternatives exist to the Echo Cove reservation. Goldbelt argues that, in violation of 43 CFR 2650.4-7(a)(3), there has been no consideration of the impact of the easements upon Goldbelt's economic situation or upon the environment. Several witnesses testified concerning these matters on behalf of Goldbelt. The BLM decisionmaker commented upon this aspect of his decision as well. It is clear that Goldbelt opposes the reservation of easements 5 and 6 because the easements could interfere with the possible establishment of a resort on the cove by contributing noise, pollution, and some traffic to the resort area which would neither be income producing nor controllable by the Native corporation. While these matters were not dismissed as without basis, in the absence of proof of the existence of some other place giving small boaters similar access into Berner's Bay, it was determined the present easements at Echo Cove should be retained. The decision to reserve the easements because of lack of a reasonable alternative was correct.

[3] Concerning the second principal issue on appeal, present existing use of the easement, evidence was received by the Administrative Law Judge concerning actual use of Echo Cove by boaters. Goldbelt contends, however, that evidence of use after December 18, 1976, was improperly considered

^{11/} See special concurring opinion in United States v. Mattox, 36 IBLA 171, 176 (1978).

^{12/} Exhibits A through E, Goldbelt Petition to Reopen.

by the fact-finder to justify the reservation of the easements. In evaluating this argument it is necessary to repeat that there are two principal issues in this appeal: (1) whether or not there is a reasonable alternative to the easement at Echo Cove that will not burden the Native corporation, and (2) whether there was existing use of the easements prior to December 18, 1976. At the hearing before the Administrative Law Judge, the burden to prove both the existence of alternative sites and the lack of use of Echo Cove prior to 1977 was upon Goldbelt. Clearly, evidence of other access routes into Berner's Bay up to the time of hearing, and comparisons of those sites to Echo Cove, was relevant to the issue whether there was an alternative route. Just as clearly, evidence of use of Echo Cove after December 18, 1976, was not relevant to the issue whether there was present existing use of the cove. This distinction between the purposes for which evidence of use could be considered was noted at the outset of the hearing. 13/ The distinction is

13/ Tr. 8-20, opening statements of counsel; Tr. 313-16, 337. The following exchange appears at Tr. 313-16:

"MR. PEARSON: Your honor, in light of the question, I would just like to note that perhaps he should limit his testimony to periods ending December 18, 1976.

"JUDGE CLARKE: I believe that is proper.

"MR. HOPEWELL: Your Honor, I think testimony of use after 1976 is relevant to several of the issues. It can be relevant to show whether or not Bridget Cove is a reasonable alternative. It also goes to show whether or not Echo Cove is reasonably necessary to access an isolated tract of land, even if there is no use prior to December of 1976, and I would propose to solicit some testimony of use after 1976, not to show present existing use, but to support some of the other arguments: reasonable necessity, access to isolated tract, a reasonable alternative, things of that nature.

"JUDGE CLARKE: Do you wish to respond to that?

"MR. PEARSON: Yes, your Honor. Basically, the regulations are quite clear as to what the parameters and requirements are for reservation of easements. The particular transportation easements specify that they must be reasonably necessary, that they have existing use, that they have -- even assuming that, they also say that those type of easements will be reserved only if, number one, there are no reasonable alternatives across publicly held lands; and, number two, there is significant present existing use prior to the relevant date, December 18, 1976.

"I think by specifying those two factors, those two conditions in addition to everything else, they meant those to be separate and distinct conditions, and they did not mean that use occurring after a particular date could be interpolated to mean that there are no reasonable alternatives. That type of argument will be circular: There is no reasonable alternative because people were using this site, say, after 1976, even though we can't consider this use after 1976 as a present existing use justifying the site.

"I think the whole argument would be circular.

"JUDGE CLARKE: Well, as I have ruled on many other things during this hearing, I would rather err on the side of including too much evidence rather than not enough, and eventually having this case sent back to me. I do not want to see this case back before me again.

preserved throughout the proceeding. While the circumstance is not specifically commented upon by the recommended decision, both the BLM decisionmaker and Administrative Law Judge noted that evidence of use after December 18, 1976, was not to be considered in determining whether there was present existing use of Echo Cove for transportation. ^{14/} In evaluating the transcript of hearing regarding the question of present existing use of the easement at Echo Cove, only the evidence of use prior to December 18, 1976, has been considered by this Board.

Appellant now urges that, considering only evidence of pre-1977 use, the Board find there was inadequate proof of significant present existing use prior to December 18, 1976, of the Echo Cove easements under 43 CFR 2650.4-7(b)(1)(viii) which provides:

(b) Transportation easements. (1) Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native corporations. Such purposes may also include transportation to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in number to constitute a public use, and government reservations or installations. Public easements may also be reserved for railroads. If public easements are to be reserved, they shall:

* * * * *

(viii) Be reserved from publicly owned uplands to the marine coastline only if significant present existing use has occurred on those publicly owned lands below the line of mean high tide. However, for isolated tracts of publicly owned uplands, public easements may be reserved to provide transportation from the

fn. 13 (continued)

"My first reaction is that which you have indicated, in that since the critical date was December 18, 1976, that no evidence should be taken subsequent to that, but I do now see that there are other issues which may not be limited by that date. I am not sure whether they are or are not, but rather than to rule at this moment on it, I would prefer to take the evidence and then exclude it from the consideration if, before reaching a determination, I conclude that, legally, I should not consider it in relation to even these other items.

"MR. PEARSON: If the testimony is received, it would be understood for the record that it is over our objection?"

"JUDGE CLARKE: I understand it is over your objection, and the ruling, of course -- my ruling is, in effect, reserved until the time of a decision and then of course I will have the benefit of briefs from the attorneys concerning whether or not I should take into consideration the testimony for any of these other factors, other than the use factor."

^{14/} Tr. 258.

marine coastline if there is no other reasonable transportation route[.]

The transcript of hearing establishes that use of Echo Cove site by the boating public began in 1971, when the Glacier Highway was completed to its present terminus at Echo Cove, and that boating use continued up until December 18, 1976. The users who testified at the hearing had all used the site for access to the Echo Cove-Berner's Bay water prior to December 18, 1976, and testified concerning use by others observed during their own use. Their evidence is uncontradicted, although several witnesses for Goldbelt questioned the accuracy of some of the observations. ^{15/} The testimony, however, establishes, and this Board finds, the existence of a clear pattern of public use by small boaters to gain access to Berner's Bay and the bay riverine system through Echo Cove prior to December 18, 1976. The Board finds that, under the circumstances, the decision to reserve the easement based upon use prior to December 18, 1976, has a rational basis, in fact, and is therefore proper.

[4] Based upon evidence of record that the Echo Cove area at the end of the now existing road is used by families for camping, picnicking, fishing, crabbing, and clamming, Goldbelt contends the easement is not sought for a permissible use, and points to 43 CFR 2650.4-7(a)(7) which prohibits the use of Native selections for recreational purposes. Thus, appellant argues that the real use of this land is sought for recreational purposes, and that a prior characterization of the area as "recreational" by the State of Alaska confirms that the easement reserved for transportation in this instance is a sham. The record does not establish a basis for this assertion. The users of the easement, with one exception, testified concerning their use of the easement exclusively for access either to Berner's Bay and the rivers flowing into the bay, or for access to Echo Cove and the area around the mouth of Echo Cove. The fact that other uses of the land have occurred does not detract from the legitimacy of the boating easement. ^{16/} Since both easements involved are for transportation purposes only, no other use is reserved by the BLM decision, and no other use is acquired by the public.

[5] Finally, while it is not entirely clear whether Goldbelt still objects that the size of the parking easement (easement 5), exceeds the 1-acre limitation established by regulation, there is nothing in the record to indicate that a larger area has been reserved. The record shows that exactly 1 acre is reserved. There is no showing that the record is in error. ANCAB's order dated October 19, 1981, appears to have resolved this issue when it was

^{15/} See, e.g., Tr. 489-91. The District Ranger for the U.S. Forest Service, denied reports of "extremely heavy use." His testimony seemed more directed towards casual use of the grounds than utilization of the transportation easement by boaters. He had actual knowledge of a high school party at the parking site which he described.

^{16/} Apparently, there were plans to establish a recreational facility at Echo Cove before it was selected by appellant, a circumstance which explains some of the uses other than for transportation which were described by witnesses. See Tr. 272, 312.

decided that the site easement was exclusive of the road easement leading to it. See Order dated October 19, 1981, at 6.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision to reserve easements 5 and 6 dated September 19, 1980, is affirmed.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

C. Randall Grant, Jr.
Administrative Judge

R. W. Mullen
Administrative Judge

