

TOGHOTTHELE CORP.

IBLA 84-141

Decided June 19, 1984

Appeal from decision of Alaska State Office, Bureau of Land Management, approving land for interim conveyance to Native village corporation. F-14903-F.

Affirmed.

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

BLM may properly reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(a) (1982), where the easement is reasonably necessary to guarantee a full right of public use because there are no reasonable alternative sites on publicly owned land which likewise guarantee such use, e.g., where the suggested alternative sites are within a bombing range under the jurisdiction of the Department of the Air Force.

APPEARANCES: Winnie B. Atwood, Chief Executive Officer, Toghoththele Corporation, for appellant; James Q. Mery, Esq., Fairbanks, Alaska, for Doyon, Limited; Robert Babson, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Toghoththele Corporation has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 30, 1983, approving the surface estate of certain land for interim conveyance pursuant to Native village selection application F-14903-F.

In its September 1983 decision, BLM approved 67,025 acres of land for interim conveyance to appellant pursuant to section 14(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(a) (1982). In addition, BLM reserved certain public easements pursuant to section 17(b) of ANCSA, as amended, 43 U.S.C. § 1616(b) (1982), including the following:

d. (EIN 5 C5) A one (1) acre site easement upland of the ordinary high water mark in Sec. 31, T. 5 S., R. 3 W., Fairbanks Meridian, on the left bank of the Wood River. The uses allowed are those listed above for a one (1) acre site. 1/

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f. (EIN 8 C5) A one (1) acre site easement upland of the ordinary high water mark in Sec. 33, T. 4 S., R. 4 W., Fairbanks Meridian, on the left bank of the Wood River. The uses allowed are those listed above for a one (1) acre site.

(Decision at 5). In a June 1, 1979, notice of proposed easements, BLM further explained that EIN 5 C5 would serve as a trailhead for trail easement EIN 4 C5, D1, D9, and that EIN 8 C5 would serve as a trailhead for trail easement EIN 7 C5, D1. In addition, BLM stated that both sites may be used by travelers on Wood River "for a temporary camping, boat landing, loading and unloading area [for equipment and supplies] before proceeding to public lands."

By letter dated July 21, 1983, appellant objected to reservation of the two site easements, noting that, with an anticipated increase in use, it foresaw "abuses of the overnight restriction on length of stay, litter, sanitation, and indiscriminate firewood cutting." Appellant proposed, as an alternative, a "single more centrally located twenty-five (25) foot trail easement crossing Section 14 of T. 5 S., FM. with a one-eighth (1/8) acre sta[g]ing area upland of the ordinary high water mark of the Wood River a[t] its point of origin." By letter dated August 29, 1983, BLM responded to appellant's objections, deciding to retain the two proposed site easements. BLM concluded that:

Our research revealed that the Wood River receives significant public use. Your staff suggested that public camping can be accommodated on the Blair Lake Air Force Range. When contacting the Air Force we were told that this is a heavy artillery range and can be closed to camping at any time. We do not feel that two one acre sites for a stretch of river nearly fifty miles long is unreasonable when considering the slow travel involved.

In its statement of reasons for appeal, appellant contends that the two site easements do not comport with the regulatory requirements with respect to the reservation of public easements. In particular, appellant argues, the easements are not located on existing sites, as required by 43 CFR 2650.4-7(b)(3)(ii). 2/ Appellant states that:

1/ The permitted uses are listed as follows: "One Acre Site - The uses allowed for a one (1) acre site easement are: vehicle parking (e.g., aircraft, boats, ATV's, snowmobiles, cars, trucks), temporary camping, and loading or unloading. Temporary camping, loading, or unloading shall be limited to 24 hours" (Decision at 4).

2/ Appellant cites 43 CFR 2650.4-7(b)(2)(ii); however, the language it quotes is in 43 CFR 2650.4-7(b)(3)(ii).

The location of campsites when none presently exist is not justified. Campsite easements are not a function necessary to the utilization of the two (2) twenty-five (25) foot trail easements as previously described. Distances from the river to public lands are short, one half (1/2) and one and one half (1-1/2) miles respectively, and can be covered easily. Persons intending to use these trail easements will be equipped for, and prepared to travel the distances required to get to public lands.

(Statement of Reasons at 3). Appellant also argues that 43 CFR 2650.4-7(b)(1)(i) <sup>3/</sup> provides that easements will be reserved only if there is no reasonable alternate site on publicly owned lands and that there are such sites. Appellant also argues that BLM has not made a reasonable effort to locate the site easements on publicly owned lands, in violation of 43 CFR 2650.4-7(b)(3). Appellant states that:

Reasonable alternate sites exist on the boundary of the Blair Lakes Bombing Range as it follows the opposite bank of the Wood River. This bombing range is publicly owned land and equally suitable for the location of campsite easements. Terrain on both banks of the river is very similar and a one (1) acre site easement is not a material invasion of the boundaries of this 655,000 acre Range.

Id. Moreover, appellant contends that BLM has not made a reasonable effort to negotiate with the military to accept alternative site easements within the bombing range:

No formal written request has been made to the Military nor does there appear to have been even a substantive conversation with the Military regarding the nature of and need for these easements. Further, there is no documentation in the files that the Military has actively considered and denied such a request.

Id. at 4. Appellant requests that the site easements involved herein be "replaced respectively by two (2) one quarter (1/4) acre sites to be limited to vehicle parking, loading and unloading, only as these functions relate to the use of (EIN 4 C5, D1, D9) and (EIN 7 C5, D1)," and that the site easements, for purposes of camping, be located on the boundary of the bombing range.

[1] Under the criteria enunciated in section 17(b)(1) of ANCSA, supra, BLM may reserve public easements

across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee \* \* \* a full right of public use and access for recreation, hunting,

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<sup>3/</sup> Appellant cites 43 CFR 2650.4-7(b)(2)(i); however, the language it quotes is in 43 CFR 2650.4-7(b)(1)(i) and applies to transportation easements, not site easements. See 43 CFR 2650.4-7(b)(3)(i).

transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important. [Emphasis added.]

See Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 675 (D. Alaska 1977); State of Alaska, 74 IBLA 275, 278 (1983). The applicable regulation, 43 CFR 2650.4-7(a)(3), further provides that the "primary standard" for judging whether easements are reasonably necessary "shall be present existing use." Moreover, the regulation provides that

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.

Id. The regulation cited by appellant, 43 CFR 2650.4-7(b)(3)(ii), provides, with respect to site easements, that they be "located on existing sites unless a variance is \* \* \* otherwise justified." In our view, deciding whether a variance is justified must be based on the general requirements in 43 CFR 2650.4-7(a)(3) set forth above.

There is no indication in the record that the site easements involved are based on "present existing use." Rather, the easements are discussed in terms of future use. In both cases, the easements are discussed in terms of the fact that they "will" serve as trailheads and that travelers "may" use the sites. See Memorandum from District Manager, Fairbanks, Alaska, to Files, dated May 4, 1979, at 4, 5. In comparison, most other proposed easements were discussed in terms of existing use. Thus, the two easements in question must each qualify as a justified variance by meeting one of the conditions set forth in 43 CFR 2650.4-7(a)(3). The question is not, as appellant suggests, whether the site easements are functionally necessary to the use of the trail easements, but whether there is a "demonstrated need" to provide for transportation to publicly owned lands or major waterways. 43 CFR 2650.4-7(b)(3). <sup>4/</sup> If there is such a need, and no reasonable alternative sites, then the easements are "reasonably necessary" within the meaning of section 17(b) of the statute.

Appellant does not contest the use of Wood River for hunting and recreation in the area, nor that there are public lands near it. Thus, the need for site easements both for travel on the waterway and to the public lands is not a concern. The issue is whether there are alternative sites to those

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<sup>4/</sup> Appellant raises the question of "demonstrated need" when it challenges the functional necessity of the campsite easements. Appellant argues that travelers are equipped to travel the short distance to public lands and that there is, therefore, no need to camp at the selected sites. We disagree. BLM has concluded that the sites serve as camping spots not only for those traveling to public lands but for those using the river. With respect to those traveling to public lands, the sites may be needed as an end-of-the-day respite before traveling into the hinterland. Appellant has not demonstrated otherwise.

reserved. Appellant suggests that reasonable alternative sites for camping are available across Wood River on land under the jurisdiction of the Department of the Air Force. However, we conclude that these sites, on military lands, are not reasonable alternatives because BLM cannot guarantee a full right of public use.

The record contains a confirmation/report, dated July 7, 1983, of a telephone conversation in which an employee of the Alaska State Office, BLM, states: "Talked to Jerry [Costello, Yukon Resource Area, BLM, Fairbanks, Alaska] re: public use of Blair Lake Air Force Range. He researched it and found that these lands are currently open to the public, however, they are reserved as an artillery range and may be closed at any time." (Emphasis in original.) To similar effect are notes of a September 20, 1983, telephone conversation between Keith Woodworth and L. Waller.

In State of Alaska, 74 IBLA 275, 279 (1983), we concluded that under section 17(b) of ANCSA, supra, it is BLM, as the delegated representative of the Secretary, which "by reserving public easements, must guarantee the public's right of use and access." In that case, we held that BLM had not fulfilled its duty where a public easement stopped at the edge of a private inholding and resumed at another edge, despite the fact that the public may have had other rights of access across the inholding. In effect, such other rights of access simply did not guarantee the public a full right of access in the same way that a public easement was required to do, and, thus, were insufficient. Such an alternative right of access did not measure up to the standard set by section 17(b) of ANCSA, supra.

In State of Alaska, 78 IBLA 390 (1984), we recently applied this reasoning to site easements where BLM decided not to reserve public easements along the Yukon River within land approved for conveyance to the Dineega Corporation, a Native village corporation, because "municipal reserves in [the village of] Ruby, public lands adjacent to the conveyance area and naturally occurring sandbars in the river provided sufficient stopping points to facilitate a reasonable pattern of travel." Id. at 391. We set aside the BLM decision because the decision not to designate public easements rested largely on the assumption that the municipal reserves were available for public use as a stopping place. We concluded that such reserves could not be considered reasonable alternatives to public easements under section 17(b) of ANCSA, supra, where BLM had not confirmed that the reserves could be used in the same manner as site easements. We noted that the record was devoid of such information as "what the purposes are for which the lands were reserved, what limitations there may be on use of the reserves, what they are used for now, what their size and accessibility are, and whether they will be available for the uses at issue here in the future." State of Alaska, 78 IBLA at 398.

In the present case, the alternative sites suggested by appellant within the bombing range cannot be considered reasonable alternatives where BLM cannot guarantee future use of the alternative sites as it can with the sites reserved. While the alternative sites suggested in State of Alaska, 78 IBLA 390 (1984), were conditionally rejected by the Board in the absence of any evidence confirming the availability of future use, the alternative sites suggested herein must be rejected because BLM cannot confirm future use. The conclusion that BLM cannot confirm future use of the alternative sites rests on the fact that use of the sites may be denied at any time.

However, BLM must make a "reasonable effort" to locate alternative sites on publicly owned land. That effort is required by 43 CFR 2650.4-7(b)(3), which states: "Before site easements are reserved on transportation routes or on major waterways, a reasonable effort shall be made to locate parking, camping, beaching, or aircraft landing sites on publicly owned lands; particularly, publicly owned lands in or around communities, or bordering the waterways." There is no evidence that BLM made a specific request for use of the suggested alternative sites or that such a request was denied. However, the record indicates that BLM talked to the Department of the Air Force in connection with the alternative sites suggested herein and that while the Air Force Department permits use of its land, it reserves the right to close the land at any time. Accordingly, we believe that the informal contact by BLM was sufficient to establish that the Air Force Department could not give an assurance of future use of any of its land for camping purposes comparable to that of a public easement, and that any formal request would have reached the same conclusion. We find that BLM did make a "reasonable effort" to locate the site easements on publicly owned lands.

Moreover, the sites suggested by appellant for camping purposes do not link up with trail easements EIN 4 C5, D1, D9, and EIN 7 C5, D1. Thus, while appellant would permit site easements for the limited purposes of vehicle parking and loading and unloading connected with such trail easements, those desiring to camp and then set out on these trails would not be permitted to do so but, instead, would be required to travel some distance on the river before setting out on the trails. We do not regard appellant's suggestion of alternative camping site easements as reasonable. Indeed, the burden of proving the opposite is on the appellant, *i.e.*, appellant must establish that the conclusion that the only reasonable alternatives are the proposed site easements lacks a rational basis and is unsupported by the record. United States Fish & Wildlife Service, 72 IBLA 218 (1983). This appellant has not done.

Since we find that there are no other reasonable alternatives to the site easements involved, we conclude that such easements must be considered "reasonably necessary" under section 17(b) of ANCSA, *supra*. 5/ Accordingly, we hold that BLM properly reserved public easements EIN 5 C5 and EIN 8 C5.

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

Will A. Irwin  
Administrative Judge

We concur:

R. W. Mullen     Edward W. Stuebing  
Administrative Judge

Administrative Judge

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5/ In response to appellant's concern that the easements will be abused, we point out that uses of such easements not specifically approved are prohibited. See 43 CFR 2650.4-7(d).

