

Appeal from decision of Alaska State Office, Bureau of Land Management, denying reservation of easements in the interim conveyance of the surface estate of land to the Shaktoolik Native Corporation. F-14932-A through F-14932-C and F-21915.

Reversed.

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

The Secretary of the Interior is authorized and directed to reserve public easements across lands selected by Native village corporations which are reasonably necessary to guarantee 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.

2. Alaska Native Claims Settlement Act: Appeals: Generally

In deciding whether an easement is properly reserved pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1616(b) (1976), the burden of proving error by a preponderance of the evidence is on the person seeking the easement.

APPEARANCES: R. Eldridge Hicks, Esq., Anchorage, Alaska, for appellant; Dennis J. 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 MULLEN

Patrick J. Bliss has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 27, 1980, in part approving the surface estate of certain land, totaling 108,441 acres, for interim conveyance to the Shaktoolik Native Corporation (Shaktoolik), on behalf of the Native village of Shaktoolik, pursuant to section 14(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C.

§ 1613(a) (1982). Appellant challenges the BLM determination that it would not reserve to the United States three public easements, EIN 11 C5, L (EIN 11); EIN 11A C5, L (EIN 11a); and EIN 8L, L (EIN 8), 1/ in the conveyance to Shaktoolik, in accordance with section 17(b) of ANCSA, as amended, 43 U.S.C. § 1616(b) (1976). 2/

On April 23, September 27, and October 18, 1974, Shaktoolik filed selection applications F-14932-A through F-14932-C, under the provisions of section 12 of ANCSA, as amended, 43 U.S.C. § 1611 (1982), for the surface estate of certain lands in the vicinity of Shaktoolik, Alaska. By decision dated March 27, 1980, the Alaska State Office, BLM, approved certain of the selected lands for interim conveyance (DIC) to Shaktoolik, reserving to the United States a number of public easements pursuant to section 17(b) of ANCSA, supra.

[1] Under the criteria enunciated in section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b)(1) (1976), the Secretary of the Interior is authorized and directed to reserve public easements "across lands selected by Village Corporations * * * which are reasonably necessary to guarantee * * * a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission [Joint Federal-State Land Use Planning Commission for Alaska] determines to be important." 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." 3/ This 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

1/ The easements are described as follows:

"EIN 11 C5, L: A site easement for a bush airstrip, 600 feet in width and 6000 feet in length, located in sections 1 and 12, T. 11 S., R. 11 W., Kateel River Meridian.

"EIN 11A C5, L: An easement for an existing access trail, fifty (50) feet in width, from site easement EIN 11 C5, L in section 1, T. 11 S., R. 11 W., Kateel River Meridian easterly to section 6, T. 11 S., R. 10 W., Kateel River Meridian (this trail easement leads from the airstrip easterly to public lands).

"EIN 8L, L: An easement for an existing access trail, fifty (50) feet in width, from the mean-high tide line in Norton Bay in section 32, T. 10 S., R. 11 W., Kateel River Meridian, southeasterly through sections 1 and 2, T. 11 S., R. 11 W., Kateel River Meridian to bush airstrip EIN 11 C5, L."

2/ This provision was deleted in the 1982 codification of the United States Code, but remains applicable.

3/ "[P]resent existing use" is defined as:

"[U]se 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." 43 CFR 2650.0-5(p).

route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land.

Departmental regulations also provide specific directives with respect to the reservation of transportation and site easements. 43 CFR 2650.4-7(b)(1) provides that transportation easements are those which are "reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways," including transportation to and from airports. In addition, the regulations provide that transportation easements should be reserved "only if there is no reasonable alternative route of transportation across publicly owned lands." 43 CFR 2650.4-7(b)(1)(i). With respect to site easements, the regulations provide that such easements "may be reserved for aircraft landing * * * at a trail head, along an access route or waterway, or within a reasonable distance of a transportation route or waterway where there is a demonstrated need to provide for transportation to publicly owned lands or major waterways." 43 CFR 2650.4-7(b)(3). In addition, the regulation provides that "[b]efore site easements are reserved on transportation routes or on major waterways, a reasonable effort shall be made to locate * * * aircraft landing sites on publicly owned lands." Finally, easements for aircraft landing sites shall be reserved "only if they have present significant use and are a necessary part of a transportation system for access to publicly owned lands." 43 CFR 2650.4-7(b)(3)(v).

By letter dated January 29, 1975 (Exh. J), appellant's attorney, John P. Irvine, proposed that public easements be reserved with respect to "trails, easements and access routes established over the years in the development of several mining claims in the Ungalik River area." Irvine identified three trails and the "Ungalik Airport" as the basis of these easements. He stated that the three trails have "[o]ver the years" provided access to the mining claims from various points along the beach on Norton Bay easterly to the claims. He stated that the area is "highly mineralized" and that mining has been "continuous since 1899." Only two of the proposed easements are involved in the present appeal, viz., the airport and the trail from Norton Bay past the airport to Mineral Survey No. 1245. The airport is currently designated EIN 11 and the trail has been broken down into two easements, EIN 8 from Norton Bay to the airport and EIN 11a from the airport to the exterior boundary of the Native selection. See Exh. B. 4/ By letter dated January 26, 1976 (Exh. K), an attorney for a Mr. Geamalis, Daniel Kass, informed BLM that he joined in appellant's request for easements which are likewise "necessary" for access to Geamalis' adjacent mining claims.

By memorandum dated October 12, 1978 (Exh. W), the easement review staff of the Fairbanks District Office, BLM, recommended that EIN 11 and EIN 11a be reserved. The staff stated that the airstrip was built for hauling mining equipment and supplies by "large air transport type aircraft" to

4/ Exhibit B indicates that only a portion of EIN 8 from the airstrip northwesterly towards Norton Bay crosses land which would be subject to interim conveyance to Shaktoolik. Thus, only this portion would be reserved as a public easement pursuant to section 17(b) of ANCSA, supra. The remainder of the trail apparently crosses public land. For the purposes of this decision, however, we will refer to the entire trail as EIN 8.

the Ungalik mining area and that it "continues to be necessary for this purpose." The staff further stated that the airstrip is the only one between Koyuk and Shaktoolik and in the "general proximity to public lands north and east of the native selection boundary." Finally, the staff noted that the airstrip "could prove extremely valuable in that it is capable of handling large fire retardant type aircraft to provide fire control assistance to public lands in this area and to village selected lands." With respect to EIN 11a, the staff stated that it would provide access from the airstrip easterly to public land in sec. 7, T. 11 S., R. 10 W., Kateel River Meridian, Alaska. The staff did not recommend the reservation of EIN 8 because it served only a "private interest group" and public access to public lands was adequately provided by EIN 11 and EIN 11a.

On November 13, 1978, the Alaska State Office, BLM, issued a notice of proposed easements (Exh. T) which recommended only the reservation of EIN 11 and EIN 11a in the interim conveyance to Shaktoolik, adopting the rationale of the staff of the Fairbanks District Office. By letter dated December 29, 1978, appellant's attorney stated that EIN 8 should also be reserved at least to the extent that it provided access from the airstrip northwesterly to public lands in sec. 35, T. 10 S., R. 11 W., Kateel River Meridian, Alaska, for fire fighting purposes.

On July 13, 1979, the State Director, Alaska State Office, BLM, issued a draft memorandum setting forth those easements to be reserved in the interim conveyance to Shaktoolik. The draft memorandum stated that EIN 11 and EIN 11a would be reserved: EIN 11 because of the need to land "large transport aircraft to haul mining equipment" and EIN 11a because of the "frequent transport of heavy mining equipment" to mining operations east of the conveyance area. No mention was made of EIN 8.

In a memorandum to the files dated November 26, 1979 (Exh. R), a BLM realty specialist stated that EIN 11 and EIN 11a would not be reserved based on comments from the Bering Straits Native Corporation and on an investigation of the easements which disclosed that there was "no existing use on the airstrip for access to public lands" and "alternate access to public lands by the Ungalik River and various natural landing strips on public lands." The BLM realty specialist further stated that:

The airstrip was constructed by Pat Bliss in connection with his mining operation. There is a small airstrip by his mine on public lands, but the subject strip is much larger, located on the top of a hill. The strip has been constructed, maintained and used as a private airstrip. In questioning air charter services in Nome and Unalakleet, 5/ it was found that the pilots

5/ In an undated memorandum to the files, the BLM realty specialist states that she contacted Foster Aviation and Bering Air Service in Nome and Unalakleet Air Service in Unalakleet. The memorandum indicates that the BLM realty specialist talked to someone in charge with respect to all three air charter services. Most of the information relied upon by the BLM realty specialist came from James Roe, with Bering Air Service, who allegedly stated that he "knew the area and the airstrip well."

were aware of the airstrip, however, it was common knowledge that it is a private airstrip and that one did not land there. * * * The pilots when needing access to the area, land either on the beach or on flat tops of hills scattered on the public lands.

We requested information on the type of use on the public lands and it was stated that guides took their clients for hunting into the area northwest of Shaktoolik.

Little is known concerning mineral exploration in the area although GS [Geological Survey] states that there is a large mineral deposit near Christmas Mountain. 6/

On February 4, 1980, the State Director issued a final memorandum (Exh. D) setting forth those easements to be reserved in the interim conveyance to Shaktoolik. EIN 11 was not recommended because of the lack of existing use by the public for access to public lands and the availability of alternative access. EIN 11a was not recommended because it was considered only to be necessary if the airstrip was to be reserved. No mention again was made of EIN 8. 7/

By letter dated February 7, 1980 (Exh. S), Howard J. Grey, on behalf of appellant, objected to the failure to recommend the reservation of EIN 11 and EIN 11a. Grey stated that the airstrip "has in fact been used by a number of carriers and individuals," including Reeve Aleutian Airways, Sea Airmotive (Sea Air), Unalakleet Air Taxi, Foster Aviation, Munz Northern Airlines, and Seward Peninsula Aviation. Grey also noted that the airstrip has been used by GS, BLM, State Fish and Game, U.S. Fish and Wildlife Service, and the Federal Aviation Administration (FAA). Grey stated that sand bars and other nondesignated airstrips are "extremely hazardous" and cannot accommodate the large cargo type aircraft using the "Ungalik Airport," and that the Ungalik River has historically not provided access because of the "shallow nature" of the mouth of the river.

The record also contains a May 1980 memorandum to the files from the Chief, Branch of Easement Identification, which summarizes a February 29, 1980, meeting with appellant and Howard J. Grey. In that meeting, appellant is reported to have stated that Geamalis Mining Company and Pat Ryan also conduct mining operations in the Ungalik River area "each year" and that, while the airstrip, completed in 1963, is marked with a large X to indicate to pilots that they use it at their own risk, appellant "has not denied the use of the airstrip to anyone who has requested." Appellant and Grey also reportedly argued that the Ungalik River is not an alternate access route because it is "very shallow" except during periods of spring runoff when boats can travel 6 to 7 miles north of appellant's mining claims. The memorandum further discloses that appellant stated that the sandbars change from year to year and that there is "no guarantee" that they will be "usable."

6/ Christmas Mountain is located approximately 5 miles east of appellant's airstrip. See Exh. B.

7/ However, in a memorandum to the files in May 1980, the Chief, Branch of Easement Identification, stated that EIN 8 was "deleted earlier [than the State Director's draft July 1979 memorandum] because it was felt that the airstrip provided alternate access to public lands."

With respect to EIN 8, the memorandum recounts that appellant and Grey stated that EIN 8 is not a "duplication" of EIN 11 and EIN 11a, but that it complements those easements by providing access for heavy mining equipment, large amounts of fuel and maintenance equipment for the airstrip, brought in by barge, which the airstrip cannot accommodate. In addition, the memorandum relates that appellant and Grey also stated that EIN 8 could not be rerouted around the conveyance area to the north because of a "steep ridge" which forms a "topographic barrier to overland travel." On March 27, 1980, BLM issued the decision in question.

On April 25, 1980, appellant filed a notice of appeal of the March 27, 1980, decision asserting error by reason of BLM's failure to recognize and reserve easements identified as EIN 11, EIN 11A, and EIN 8.

By order dated May 24, 1982, the Alaska Native Claims Appeal Board (ANCAB) 8/ directed that a hearing be held before an Administrative Law Judge, who would issue a recommended decision on whether BLM erred in failing to reserve the three above-described public easements, identified by appellant, in the interim conveyance to Shaktoolik. 9/ On May 13, 1983, Administrative Law Judge L. K. Luoma conducted a hearing in Anchorage, Alaska. On June 29, 1984, Judge Luoma issued a recommended decision, the full text of which is attached to this opinion as Appendix "A." In his decision Judge Luoma concluded that:

1. The trail access easements and the airstrip site easement are reasonably necessary to guarantee access to publicly owned lands.
2. The three easements meet the standard of present existing use, thereby qualifying them as public easements reasonably necessary for access.
3. The trail access easements and the airstrip easement are complementary not alternative means of access to publicly owned lands. There are no reasonable alternative means to access the publicly owned lands.

8/ By Secretarial Order No. 3078, dated Apr. 29, 1982, the Secretary abolished ANCAB and transferred its functions to the Interior Board of Land Appeals, effective June 30, 1982.

9/ By amended order dated Nov. 17, 1980, ANCAB approved segregation of secs. 1, 2, and 12, T. 11 S., R. 11 W., Kateel River Meridian, Alaska, from the remainder of the land included in the interim conveyance to Shaktoolik pursuant to a stipulation agreed to by both parties, in order to permit the conveyance to proceed as to the unsegregated land. On Apr. 12, 1983, BLM filed a request for an additional segregation order with respect to a portion of the land in the bed of the Ungalik River, by modification of the original segregation order to permit BLM to make a redetermination that the entire river is navigable and, thus, not subject to interim conveyance to Shaktoolik. However, on Sept. 26, 1983, BLM issued an interim conveyance of the segregated land, excluding the bed of the Ungalik River. We find no reason to make a further segregation of the riverbed by way of an order by this Board.

4. The BLM's decision was inconsistent with statutory and regulatory easement criteria.

5. Reservation of the public easements is authorized by § 17(b) of ANCSA and the regulations promulgated thereunder 43 CFR 2650.4-7.

(Recommended Decision at 13).

The recommended decision and case file were then delivered to this Board. Following this transmittal, BLM filed exceptions to the recommended decision (BLM Exceptions), which were received on October 9, 1984. These exceptions are: (1) The record does not establish sufficient public use; (2) the record does not support a finding of no reasonable alternative; and (3) appellant did not meet his burden of proof. 10/

BLM advances the argument that, while appellant submitted evidence of his use and limited use by others, the evidence of such use is not sufficient to warrant the reservation of easements. However, taking the record as a whole, including those exhibits introduced by joint stipulation of counsel, we find sufficient evidence to support Judge Luoma's finding that "the three easements meet the standard of present existing use, thereby qualifying them as public easements reasonably necessary for access" (Recommended Decision at 13). BLM notes that the prime user of the proposed easements was appellant and that appellant submitted little evidence of use by others. However, appellant is a member of the public, and his use and use by others is additive, not exclusive. BLM also argues that the record contains no evidence of any specific use of EIN 11A by parties other than appellant, except for a self-serving statement by appellant that others have crossed his mining claims to gain access to public land (Tr. 40). This argument ignores the fact that EIN 11 is completely surrounded by selected lands, and since we have found that EIN 11 was used by others to gain access to public lands, it necessarily follows that EIN 8 and EIN 11A which afford access from the landing strip to public lands are also used by others.

BLM's second argument is that the record does not support a finding of no reasonable alternative. BLM recognizes that "the established access needs are for transportation of bulk supplies for mining activity, for hunting access and for emergency fire fighting purposes" (Recommended Decision at 12-13; BLM Exceptions at 8). BLM then argues that appellant "is presently the only person mining in the area, and that his right of access is a private right of access protected by section 17(b)(2) of ANCSA" (BLM Exceptions at 3); that hunting parties could utilize natural landing sites on the Unhalik River;

10/ It is recognized that this decision will have impact upon the rights of the Shaktoolik Native Corporation and possibly have an impact on the rights of the Bering Straits Native Corporation. However, copies of the notice of appeal and all subsequent pleadings and determinations have been served on both corporations, who had the right to join in this case at any time prior to this Board's determination. Neither corporation has elected to do so and, as a result, we consider this determination to be binding on both corporations. See Phelps Dodge Corp., 72 IBLA 226 (1983).

and that the airport could be used by fire fighting parties under the common-law right to enter land in defense of persons or property. The flaw in this argument for common-law entry is the assumption that, following conveyance of the land, the landing site would continue to exist. There is no requirement in the conveyance that the landing site must be maintained. Thus, while the common-law right would continue so long as there is a landing site, if it were not maintained, this right could not be exercised. ^{11/} There is no evidence of a similar alternative site suitable for the purpose which would counter appellant's testimony that there is not. We find sufficient basis in fact for Judge Luoma's decision.

[2] BLM's final argument is that appellant did not meet its burden of proof. In deciding whether the easements involved herein are properly reserved pursuant to section 17(b) of ANCSA, supra, the burden of proving error by a preponderance of the evidence is on the appellant Bliss. U.S. Fish & Wildlife Service, 72 IBLA 218 (1983); State of Alaska, 71 IBLA 256 (1983). BLM states that "Bliss presented very little evidence of public use and was not able to give specific accounts of non-mining use" (BLM Exceptions at 9). This argument ignores stipulated exhibits F, J, K, O, P, and Q. We find that appellant presented proof and can find no basis for a determination that Judge Luoma failed to properly weigh the evidence presented to him. After a review of the record, the transcript, and the exhibits introduced in evidence without objection, we believe that Judge Luoma properly considered and weighed the evidence before him.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Luoma's decision, attached hereto as Appendix "A," is accepted and adopted and the BLM decision that the interim conveyance to Shaktoolik should not be subject to the reservation of easements EIN 11 C5 L, EIN 11A C5 L, and EIN 8L L is reversed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

^{11/} The record indicates that, in order to be usable, this landing site must be maintained on a yearly basis.

Appendix A

June 29, 1984

PATRICK J. BLISS,	:	<u>IBLA 82-1134</u>
Appellant	:	(Formerly ANCAB VLS 80-17)
v.	:	
BUREAU OF LAND MANAGEMENT,	:	17(b) Easements
Respondent	:	
	:	Appeal from Decision of the
	:	Bureau of Land Management Nos.
	:	F-14932-A through F-14932-C;
	:	F-21915, dated March 27, 1980

RECOMMENDED DECISION

Appearances: R. Eldridge Hicks, Esq., Ruskin, Barker & Hicks,
Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq.,
Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage,
Alaska, for respondent.

Before: Administrative Law Judge Luoma

By order dated May 24, 1982, the Alaska Native Claims Appeal Board referred this matter to the Hearings Division for hearing and a recommended decision on the propriety and necessity for reservation of certain public easements in a conveyance of lands by the Bureau of Land Management (BLM) to the Shaktoolik Native Corporation (Shaktoolik). Pursuant thereto a hearing was held on May 13, 1983, at Anchorage, Alaska.

On April 23, September 27 and October 18, 1974, the Shaktoolik Native Corporation for the Native Village of Shaktoolik filed selection applications F-14932-A through F-14932-C, under the provisions of Sec. 12 of the Alaska Native Claims Settlement Act of December 18, 1971 (43 U.S.C. 1601, 1611) (ANCSA), for the surface estates of certain lands

in the vicinity of Shaktoolik. By decision dated March 27, 1980, the Alaska State Office of the BLM approved certain of the selected lands for interim conveyance (DIC) to Shaktoolik, reserving to the United States a number of public easements pursuant to Sec. 17(b) of ANCSA (43 U.S.C. 1601, 1616).

On April 25, 1980, Patrick J. Bliss, appearing *pro se*, filed a Notice of Appeal of said BLM decision of March 27, 1980, approving for conveyance to the Native Village Corporation of Shiktoolik lands included in this appeal. Appellants statement of reasons was included with the Notice of Appeal, and asserts BLM erred by failing to recognize those public easement requests identified as (EIN 11 C5, L), (EIN 11A C5, L) and (EIN 8L, L).

On August 22, 1980, an Amended Order of Segregation was issued by AN CAB, reserving from the interim conveyance to Shiktoolik the land underlying the easements included in this appeal. In the Amended Order of Segregation, the appealed easements were described as follows:

A. (EIN 11 C5, L) A site easement for a bush airstrip, 600 feet in width and 6,000 feet in length, located in Secs. 1 and 12, T. 11S., R. 11W., Kateel River Meridian.

B. (EIN 11A C5, L) An easement for an existing access trail, fifty (50) feet in width, from site easement EIN 11 C5, L in Sec. 1, T. 11 S., R. 11 W., Kateel River Meridian, easterly to Sec. 6, T. 11 S., R. 10 W., Kateel River Meridian (this trail easement leads from the airstrip easterly to public lands).

C. (EIN 8L, L) An easement for an existing access trail fifty (50) feet in width, from the mean high tide line in Norton Bay in Sec. 32, T. 10 S., R. 11 W., Kateel River Meridian, southeasterly through Secs. 1 and 2, T. 11 S., R. 11 W., Kateel River Meridian to bush airstrip (EIN 11 C5, L).

EVIDENCE PRESENTED

At the hearing a stipulation as to admission of exhibits, signed by the attorneys for both parties, was submitted in evidence. This stipulation included two maps (Exs. A and B) and the pertinent portion of the administrative record (Exs. C through V), to be received in evidence, subject to the right of either party to disprove or dispute the content of any exhibit. Also stipulated to were Exhibit W, another portion of the administrative record, and Exhibit X, a certified copy of certain Federal Aviation Administration (FAA) records.

The first witness was Patrick J. Bliss, the appellant, testifying in his own behalf. He began mining in Alaska in 1950, and started his operation in the Ungalik River area in about 1956. He is the record owner of several mining claims located near proposed airstrip easement (EIN 11 C5, L), and has been actively mining the claims and prospecting in the area since 1956.

Beginning in 1956 Mr. Bliss has used a trail access route, which runs from the mining camp at Bonanza Creek to Norton Bay, a distance of six to eight miles (Tr. 17-18). This trail access is a combination of (EIN 8L, L) and (EIN 11A C5, L). He testified that this same trail had been used since Bonanza had been discovered in 1896 (Tr. 18) (Bonanza is the location of the regional mining operation).

Mr. Bliss uses this trail access about every other year to transport bulk fuel and supplies to his mining operations. Natives from Shiktoolik and Koyuk have used this trail access for hunting and fishing (Tr. 30, 31).

Mr. Bliss started building the airstrip (EIN 11 C5, L) in the early 1960's, and has made frequent use of the strip since its completion in 1963. Since that time he has maintained the airstrip and regraded it yearly (Tr. 51).

He has never taken any action to assert private ownership of the airstrip, and he considers it open for public use (Tr. 32, 63). FAA records (Ex. X) indicate that the airstrip is privately owned and that permission must be secured before landing (Tr. 61). These records merely reflect a popular misconception about the nature of the strip (Tr. 62, 63). Although he was responsible for the placing of the large white "X" on the runway, he did this to warn other pilots to use caution when approaching the strip (Tr. 30).

This airstrip has been widely used with and without the prior permission of Mr. Bliss. Among the users were five charter aircraft companies, who have flown in persons and equipment for oil exploration, prospecting activities and hunting (Tr. 19, 20). Exhibit F includes the sworn affidavits of two commercial pilots who have previously made use of the strip. Various government agencies have used the airstrip to fly in personnel, including the BLM, Alaska Department of Fish and Game, U.S. Fish and Wildlife Service, Environmental Protection Agency and the Alaska Department of Environmental Conservation (Tr. 20). Natives and non-Natives have used the airstrip for hunting purposes.

Mr. Bliss is a licensed commercial pilot with extensive flying experience in Alaska. His opinion is that there are no reasonable alternatives to the airstrip easement (EIN 11 C5, L). The closest airstrips of equivalent size are Shaktoolik, 25 miles to the southwest, and Koyuk, 35 miles to the north (Tr. 23). He knows of no natural ridges or mountain tops in the area that could safely be used as landing areas (Tr. 28). Mr. Bliss conceded that it is possible to land small aircraft with oversize tires on sandbars along the Ungalik River and the coast of Norton Bay. These landing areas are not reasonable alternatives to (EIN 11 C5, L), as the sandbars shift location seasonally, may be covered during high water, and are usually no longer than 300-500 feet in length (Tr. 28, 29). The sandbars would be inadequate for landing larger aircraft or firefighting crews.

In the opinion of Mr. Bliss, there are no reasonable alternatives to trail access easements (EIN 8L, L) and (EIN 11A C5, L). Without these easements the public lands east of the Shaktoolik selection would be inaccessible (Tr. 21). The terrain of the lands to the north and south of the public lands is very steep and not suitable for road building or travel (Tr. 21). The airstrip easement is not a reasonable alternative, as the trail easement is necessary for the transport of large equipment and bulk fuel that cannot be delivered by air. The two are used for distinguishable types of access (Tr. 23).

The Ungalik River is not a reasonable alternative access to the public lands. During the summer months the river is three to six inches deep and can easily be walked across (Tr. 31). Only after a continuous rain would the river provide an access for small skiffs to the public lands (Tr. 31). It would be impossible to haul the types and amounts of materials transported over (EIN 8L, L) (Tr. 31).

The first witness called by the BLM was Ms. Michelle Ward, a BLM realty specialist. She has resided in Alaska since the spring of 1980, but has never traveled to the Norton Bay area (Tr. 76). Ms. Ward contacted the various air charter companies and government agencies that according to Mr. Bliss, had previously used airstrip (EIN 11 C5, L). Based on her telephone calls to these charter companies and government agencies, she found no evidence of public use of the airstrip (Tr. 73, 74). She conceded that she did not know with whom she spoke at the charter companies, their positions or length of employment, whether they had any flying experience, or whether the information conveyed to her was based on personal knowledge, business or official records, or unsubstantiated rumor. Ms. Ward had a similar lack of knowledge about the persons she spoke with at the government agencies (Tr. 73-87). Ms. Ward did not contact the two commercial pilots who signed affidavits regarding their prior use of the airstrip (Tr. 81).

In the opinion of Ms. Ward, the three easements in issue are not reasonably necessary to provide access to public lands. The Ungalik River, classified as navigable by BLM is a reasonable alternative access. Ms. Ward conceded that there were conflicts in the BLM report on the navigability of the Ungalik, and that she had no reason to doubt Mr. Bliss' testimony regarding the depth of the river or the extent of transportation it could support (Tr. 93).

A second alternative access route is from Norton Bay from the north. She admitted that she knew of no one who actually traveled this route, and that she has not traveled it herself (Tr. 93, 94).

The next witness called by BLM was Mr. Martin J. Karstetter, BLM's acting chief of the Branch of Easement Identification, Alaska Branch. He related generally the process of notice and meetings and the criteria followed by the BLM in deciding whether to reserve a proposed public easement across selected Native lands (Tr. 101, 102).

The BLM defines public use as use by the general public, not Native use and not mining operations (Tr. 105). Based on that definition there is no evidence of public use of any of the three easements (Tr. 105). These easements are used primarily to support Mr. Bliss' mining operations. Mr. Bliss' rights of access are protected under the 1872 Mining Act; it was not necessary to reserve public easements (Tr. 132).

According to Mr. Karstetter, there are several reasonable alternative access routes to the public lands north and east of the Shiktoolik selection area, including the Ungalik River and an interconnecting trail system between the villages along the coast (Tr. 108).

The Ungalik River is classified by the BLM as a navigable river, due to a single commercial use that occurred in the late 1930's, even though for most of the year it has a depth of only three to six inches (Tr. 123). It would be reasonable to access the public lands by walking up the Ungalik River, or by waiting until periods of high flow and then transport up, piece by piece if necessary, items of heavy equipment (Tr. 125).

The interconnecting trail system is also a reasonable alternative access. Mr. Karstetter admits that he has never used this route, nor has he heard of anyone who has (Tr. 128).

Mr. Karstetter admitted that his testimony is complete hearsay, consisting of his examination of the BLM file and hearsay statements transmitted from Ms. Ward (Tr. 116). He also admitted that neither he nor anyone else from the BLM had examined the easements on the ground (Tr. 134). Further, while it is his opinion that Mr. Bliss' rights of access are protected by the 1872 Mining Act, he concedes that he is not an attorney and has no actual knowledge of the rights of Mr. Bliss (Tr. 142).

The final witness called by the BLM was Paul O. Johnson, BLM's acting chief of the Branch of Native Allotment. In 1979, Mr. Johnson was responsible for a two to three day field investigation of two Native historic sites (marked 14(h)(1), 14(h)(1)' on Ex. B) northeast of the Shiktoolik selection area. He is familiar with the region (portrayed in Ex. B) also through his father-in-law, who grew up in Shiktoolik (Tr. 153).

In the late 1930's, Mr. Johnson's father-in-law helped to transport a dredge up the Ungalik River. It was transported in pieces by boat, and by hauling and pushing. The boat used was probably an open skiff (Tr. 159). He admits there was some moving of gravel in the riverbed, and unknown damage to the bottom of the skiff. He also conceded that environmentalists would likely "frown upon" any serious disruption of the riverbed today (Tr. 174, 175).

Depending on the time of year, Mr. Johnson feels there are reasonable alternatives to the three proposed easements. The Ungalik River, traveling cross-country around Native lands, and using helicopters are three possible alternative accesses. He also testified that it is possible to land small aircraft on the sandbars of the lower Ungalik, but admitted that the most suitable sandbars would be in the Shiktoolik selection area (Tr. 166).

APPLICABLE LAW

Under section 17(b) of ANCSA, 43 USC § 1616(b), the Secretary of the Interior is authorized and directed to reserve certain public easements across lands selected by Village Corporations and Regional Corporation and at periodic points along the course of major waterways. That section reads, in pertinent part:

(b)(1) The Planning Commission shall identify 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 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.

* * *

(3) Prior to granting any patent under this chapter to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

The breadth of this authority was first interpreted in Alaska Public Easement Defense Fund v. Andrus, 435 F.Supp. 644 (D. Alaska 1977) and later more particularly defined by section 903(A) of the Alaska National Interest Lands Conservation Act of December 2, 1980 (ANILCA), 43 U.S.C. § 1633(A), which reads:

With respect to lands conveyed to Native Corporations or Native Groups the Secretary shall reserve only those easements which are described in section 17(b)(1) of the Alaska Native Claims Settlement Act and shall 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.

The implementing Departmental regulations, 43 CFR, Subpart 2650, properly reflect the statutory authority and court interpretation. For ease of reference the relevant regulations follow:

§ 2650.4-7 Public easements.

(a) General requirements. (1) Only public easements which are reasonably necessary to guarantee access to publicly owned lands or major waterways and other public uses which are contained in these regulations * * * shall be reserved.

* * *

(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 there is no reasonably alternative route or site available, or if the public easement is for access to an isolated tract area of publicly owned land. When adverse impacts on Native cultures, lifestyle, and subsistence needs are likely to occur because of the reservations 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.

(4) All public easements which are reserved shall be specific as to use, location, and size. Standard sizes and uses which are delineated in the subsection may be varied only when justified by special circumstances.

* * *

(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. * * * If public 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.

* * *

(2) Transportation easements shall be limited to roads and sites which are related to access. The use of these easements shall be controlled by applicable Federal, State, or municipal corporation laws or regulations. The uses stated herein will be specified in the interim conveyance and patent documents as permitted uses of the easement.

* * *

(3) Site Easements. Site easements which are related to transportation may be reserved for aircraft landing or vehicle parking (e.g. aircraft, boats, ATV's, cars, trucks), * * * where there is a demonstrated need to provide for transportation to publicly owned lands * * *. * * * Before site easements are reserved on transportation routes * * * a reasonable effort shall be made to locate parking, camping, beaching, or aircraft landing sites on publicly owned lands in or around communities * * *. If a site easement is to be reserved it shall:

(i) Be subject to the provisions of paragraphs (b)(1)(ii), (iii), (vi), (xii), (xiii), and (xiv) of this section.

* * *

(v) Be reserved for aircraft landing strips only if they have a present significant use and are a necessary part of a transportation system for access to publicly owned lands and are not suitable for reservation under section 14(c)(4) of the Act. Any such easement shall encompass only that area which is used for takeoffs and landings and any clear space around such site that is needed for parking or public safety.

* * *

§ 2650.0-5 Definitions.

* * *

(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.

* * *

(R) "Publicly owned lands" means all Federal, State, or municipal corporation (including borough) lands or interests therein in Alaska, including public lands as defined herein, and submerged lands as defined by the Submerged Lands Act, 43 U.S.C. 1301, et seq.

In addition to these regulations we are bound by certain procedural rulings made by the then Alaska Native Claims Appeal Board 1/ in the case of Appeal of Goldbelt, Inc., ANCAB G 80-1 (October 9, 1981). They are:

1. When an appellant appeals a BLM easement determination made pursuant to ANCSA and its enabling regulations, the burden of proof is upon the party challenging the determination to show that the determination is erroneous.

* * *

3. In light of the clear and unambiguous definition of "present existing use" in 43 CFR 2650.05(P), any activities which took place after December 18, 1976, are not to be considered in determining present existing use under 43 CFR 2650.47(a)(3).

See also, Northway Natives, Inc., 69 IBLA 219 (December 17, 1982).

1/ ANCAB was terminated and its functions transferred to the Interior Board of Land Appeals by Secretarial Order No. 3078, dated April 29, 1982.

DISCUSSION
FINDINGS AND CONCLUSIONS

The rulings made by ANCAB in Appeal of Goldbelt, Inc., *supra*, dispose of burden of proof arguments. Clearly, the burden of proof is upon Mr. Bliss to show that BLM's failure to reserve the three public easements was erroneous. To prevail Mr. Bliss must show by substantial evidence that BLM's decision was arbitrary and capricious. With regard to the third ruling, no one disputes the conclusion that only activities which took place prior to December 18, 1976, may be considered in determining "present existing use" under 43 CFR 2650.4-7(A)(3).

This leads to a discussion of the basic issue of whether the BLM's decision was arbitrarily and capriciously made.

Present Existing Use

Mr. Bliss testified that he used trail access (EIN 8L, L) and (EIN 11A C5, L) to transport bulk fuel and supplies to his mining operations from Norton Bay since 1956. This trail access has been used by miners in the region since 1896, when mining activity in this area first started. Native hunters and fishermen from Koyuk and Shiktoolik have also used this trail intermittently.

The BLM argues that this trail is used solely by Mr. Bliss and that therefore the present existing use is insufficient to justify reserving a public easement. The testimony in support of the BLM position is principally unsubstantiated hearsay, and therefore cannot be given great weight. Additionally, BLM's witnesses indicated that there is at least some evidence of Native use of this trail access. Accordingly, I find that such commercial and other Native use falls within the definition found in 43 CFR 2650.0-(P) which states that "present existing use means use by * * * the general public which includes both Natives and non-Natives alike * * *."

Mr. Bliss also testified that the airstrip easement (EIN 11 C5, L) was a public airstrip used by a variety of persons on behalf of various entities regularly since its completion in 1963. Among the users were several air-charter companies, government agencies, and various Native and non-Native hunters. The airstrip was used to fly in persons and supplies relating to oil and mineral exploration, to serve the fish runs along the Ungalik River, and to inspect the mining operation of Mr. Bliss. Also in evidence are the affidavits of two commercial pilots relating their prior use of the airstrip and their knowledge of prior use by other commercial pilots.

BLM argues that there is no evidence of public use of the airstrip. FAA records (Ex. X) indicate that the airstrip is private and that permission must be granted before landing. The testimony of the BLM realty specialist is unsubstantiated hearsay from mainly unknown sources at the government agencies and charter companies. This testimony is not persuasive.

It is my opinion that the trail easements and the airstrip easement all meet the standard of "present existing use" for determining whether a public easement is reasonably necessary within the context of 43 CFR 2650.4-7(A).

Reasonable Alternatives

Mr. Bliss testified that there are no reasonable alternatives to the two trail access easements and the airstrip site easement that provide access to the public lands to the north and east of the Shiktoolik selection. He argues that the trail access easements (EIN 8L, L) and (EIN 11A C5, L) are not a reasonable alternative to the airstrip site easement (EIN 11 C5, L). Rather, they provide a complementary access route for the transportation of large equipment that cannot be flown in by aircraft or for bulk fuel that cannot be delivered due to weather conditions.

The BLM contends that there are several reasonable alternatives to the three easements in issue. They are: the Ungalik River; natural landing areas for aircraft, including sandbars and ridges; and overland travel from the north and south. In my opinion none of these provides a reasonable alternative means to access the public lands.

The Ungalik River has recently been reclassified by the BLM as a navigable river. Nevertheless, both sides seem to agree that the river's usual depth is three to six inches except during brief periods after spring runoff or continuous rain. The Ungalik River no matter how classified could provide only sporadic access to the public lands by small skiffs. It could not reasonably be used to transport fuel and equipment to the mining operations, which have existed on the public lands since 1896. Neither could the Ungalik provide reasonable access for firefighting crews or other individuals, corporations or government agencies that occasionally need to bring equipment or supplies onto the public lands.

There is no evidence of any ridges or mountain tops in the area that are suitable as landing areas for aircraft. It is possible to land very small planes on the sandbars along the Ungalik River. It is my opinion that these sandbars are not reasonable alternatives to the airstrip site easement. The location of the sandbars changes yearly, the sand

occasionally washes out exposing boulders, and the changing characteristics of the river prevent any guarantee there will be a usable sandbar along any particular segment of the river at any particular time. These sandbars cannot be used by miners transporting heavy equipment, or as an emergency airstrip for any large transport aircraft or for fire control aircraft.

Mr. Bliss contends that alternative ground approaches over public lands from the north or south are not reasonable due to the steep terrain. This terrain forms a topographical barrier that makes travel extremely difficult.

There is no evidence presented that any of the alternative routes proposed on behalf of the BLM have actually been traveled. These routes were ascertained by persons who had flown over the region or had studied maps and aerial photographs. I therefore find that these overland routes are not reasonable alternatives.

SUMMARY OF CONCLUSIONS

1. The trail access easements and the airstrip site easement are reasonably necessary to guarantee access to publicly owned lands.
2. The three easements meet the standard of present existing use, thereby qualifying them as public easements reasonably necessary for access.
3. The trail access easements and the airstrip easement are complementary not alternative means of access to publicly owned lands. There are no reasonable alternative means to access the publicly owned lands.
4. The BLM's decision was inconsistent with statutory and regulatory easement criteria.
5. Reservation of the public easements is authorized by § 17(b) of ANCSA and the regulations promulgated thereunder 43 CFR 2650.4-7.

RECOMMENDATION

I recommend that the BLM's DIC be amended to include trail access easements (EIN 8L, L) and (EIN 11A C5, L) and airstrip site easement (EIN 11 C5, L).

L. K. Luoma
Administrative Law Judge

Distribution attached.

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