

STATE OF ALASKA

IBLA 84-124

Decided May 10, 1985

Appeal from decision of the Alaska State Office, Bureau of Land Management, amending easement reservations in interim conveyance of lands under provisions of section 17(b) of the Alaska Native Claims Settlement Act. F-14852-A, F-14852-B.

Set aside; hearing ordered.

1. Alaska Native Claims Settlement Act: Conveyance: Easements-- Alaska Native Claims Settlement Act: Easements: Access --Alaska Native Claims Settlement Act: Easements: Public Easements--Indians: Alaska Natives: Generally

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

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

Pursuant to 43 CFR 2650.4-7(a)(3), the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. The established interpretation of the "present existing use" requirement is that easements substantially conform to existing uses and that evidence of such use be recent.

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

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by

BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

4. Alaska Native Claims Settlement Act: Easements: Review

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is upon the party challenging the determination to show that the decision is erroneous.

APPEARANCES: Barbara L. Malchick, Esq., Assistant Attorney General, Anchorage, Alaska, for State of Alaska; David P. Wolf, Esq., Anchorage, Alaska, for Dot Lake Native Corporation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On December 28, 1979, the Alaska State Office, Bureau of Land Management (BLM), issued a decision approving certain lands for interim conveyance to Dot Lake Native Corporation (Dot Lake) under section 12(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1611(a) (1982). Among others, BLM's decision reserved the three "Fish Lake" easements designated EIN 20 C4, EIN 9 L, and EIN 27 C5.

On April 7, 1980, Dot Lake filed an appeal with the Alaska Native Claims Appeal Board (ANCAB) objecting to the easements as improper, unnecessary, and duplicative. BLM filed an answer stating it had no objection to deleting EIN 9 L and EIN 27 C5, and to restricting EIN 20 C4 to Government use. The State of Alaska (Alaska) intervened, contending all three easements were reasonably necessary for public access. By order of August 21, 1980, ANCAB remanded the disputed easements to BLM for additional review. ^{1/}

On January 28, 1983, BLM's Assistant to the State Director for Conveyance Management issued a memorandum to the Chief, Division of ANCSA and State Conveyances, amending BLM's previous easement determination as follows:

EASEMENTS TO BE RESERVED:

(EIN 20 C4) An easement sixty (60) feet in width for an existing road from the Alaska Highway in Sec. 28, T. 22 N., R. 7 E., Copper River Meridian, southerly to U.S. Survey 4290 in Sec. 33, T. 22 N., R. 7 E., Copper River Meridian. The uses

^{1/} By Secretarial Order No. 3087, dated Apr. 29, 1982, the Secretary abolished ANCAB and transferred its functions to the Interior Board of Land Appeals, effective June 30, 1982.

allowed 2/ are those listed above for a sixty (60) foot wide road easement and limited to government use only.

Discussion:

This existing road provides access from Dot Lake and the Alaska Highway to the Air Force repeater site on Knob Ridge. The road was previously noted on the records under the authority of 44 LD 513 (serial number F-023684).

EASEMENTS TO BE DELETED:

- a. (EIN 9 L) An easement twenty-five (25) feet in width for an existing access trail from the road leading to the Air Force repeater site on Knob Ridge in Sec. 33, T. 22 N., R. 7 E., Copper River Meridian, southerly to public lands.

Discussion:

This easement is being deleted based on information furnished to the Bureau of Land Management by the Dot Lake Native Corporation. This information supported an alternative route to the public lands accessed by this easement. This alternative route, known locally as the "Berry Creek Trail," is from the Alaska Highway in Sec. 13, T. 22 N., R. 5 E., Copper River Meridian, southerly along Berry Creek to the Knob Ridge area.

- b. (EIN 27 C5) A one (1) acre site easement in Sec. 33, T. 22 N., R. 7 E., Copper River Meridian, adjacent to road EIN 20 C4 and trail EIN 9 L.

Discussion:

This easement was reserved to serve as the trailhead for trail EIN 9 L. EIN 27 C5 is being deleted because it is not necessary since EIN 9 L is also being deleted.

These determinations were finalized in BLM's decision of September 16, 1983, which is now before us on appeal by the State of Alaska.

[1, 2] Under the criteria enunciated in section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b)(1) (1982), 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

2/ The memorandum lists the following uses allowed for a 60-foot-wide road easement: travel by foot, dogsled, animals, snowmobiles, two- and three-wheel vehicles, small and large ATV's, track vehicles, four-wheel drive vehicles, automobiles, and trucks.

standard" for judging whether easements are reasonably necessary "shall be present existing use." This regulation provides in part:

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.

"[P]resent existing use" is defined at 43 CFR 2650.0-5(p) as:

* * * 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 established interpretation of the "present existing use" criterion is that easements substantially conform to existing uses and that evidence of such use be recent. Northway Natives, Inc., 69 IBLA 219, 89 I.D. 642 (1982), overruled in part on other grounds, United States Fish & Wildlife Service, 72 IBLA 218 (1983).

Alaska contends that EIN 9 L has been used for more than 20 years by hunters, trappers, fishermen, and berrypickers, and is travelled by foot, small all-terrain vehicles (ATV's), pack animals and motorcycles. The State also asserts that EIN 9 L crosses less than 1 mile of Dot Lake land, not 2-1/2 miles, as by BLM. Alaska contends that without EIN 9 L, a large block of public land would be effectively closed to hunting, trapping, and other activities.

Alaska submits that BLM's alternative route, Berry Creek Trail, has had little use, that aerial photos reveal no trail system thereon, that the creek bed cannot accommodate ATV's or pack animals, and that the route traverses heavy brush and rugged terrain. The State asserts that BLM's file fails to document the feasibility of this alternative route. It also contends that Berry Creek Trail does not guarantee a full right of access to the public lands because a 2-1/2-mile portion of the creek bed has been conveyed to Doyon Limited without appropriate easement reservations.

Dot Lake replies that the public lands around Fish Lake may be accessed directly from the Alaska Highway. It points out that in addition to Berry Creek Trail, Rock Creek, and Robertson River trails also provide access to the Fish Lake public lands, and that currently, float planes provide the major means of access. In addition, Dot Lake contends that the easements sought by Alaska would adversely affect Native subsistence, lifestyle, and culture.

Alaska has submitted a reply brief in which it maintains that EIN 9 L meets the "present existing use" criterion of 43 CFR 2650.4-7(a)(3), and that

BLM's finding that Berry Creek Trail is a reasonable alternative route is unsupported by discussion or documentation. The State disputes Dot Lake's assertion that access exists from the Alaska Highway, stating that the public land is "located several miles and several ridges south of the highway." Alaska also points out that access by floatplane is seasonally limited and not available to all segments of the public. It requests reversal of BLM's decision, or, in the alternative, a hearing to present evidence on which easements or routes are reasonably necessary to guarantee a full right of access.

[3] The State is correct that the record as constituted is devoid of any assessment of "present existing use." BLM states that it deleted EIN 9 L based on information received from Dot Lake, but the extent of that information is not disclosed. Moreover, the allegations made by Alaska concerning the inadequacy of the Berry Creek trail as an alternative route have apparently not been considered. Under these circumstances, we are unable to determine whether BLM's decision was reasonable. Where there are disputed facts essential to resolution of legal issues, this Board has the discretionary authority to order an evidentiary hearing before an Administrative Law Judge pursuant to 43 CFR 4.415. Doyon Limited (On Reconsideration), 77 IBLA 219 (1983). Therefore, this case shall be referred to the Hearings Division, Office of Hearings and Appeals, for a hearing and decision as to the reasonableness of the Berry Creek trail as an alternative route for EIN 9 L, EIN 27 C5, 3/ and EIN 20 C4. 4/ The Administrative Law Judge's decision shall constitute the final Departmental decision in this matter unless an appeal to the Board is filed within 30 days from receipt of the decision. See 43 CFR 4.410, 4.411.

[4] As the party challenging BLM's easement determination, the State of Alaska shall have the burden of showing that the determination is erroneous. Northway Natives, Inc., supra; Doyon Limited, supra.

Therefore, pursuant to the attorney delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for hearing and decision by an Administrative Law Judge.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Gail M. Fraizer C. Randall Grant, Jr.
Administrative Judge Administrative Judge

3/ This easement is a trail head for EIN 9 L.

4/ While characterized as an access road to an Air Force repeater site on Knob Ridge, which explains its restriction by BLM to Government use only, it is suggested in the record and by appellant that this easement also serves as a connecting route for EIN 9 L to access public lands. If so, the limitation of EIN 20 C4 to Government use only would seem inappropriate if it is found that EIN 9 L and EIN 27 C5 should be reserved.

