

STATE OF ALASKA

IBLA 92-563

Decided March 29, 1995

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving regional selection application AA-10662.

Decision set aside, referred for hearing.

1. Alaska Native Claims Settlement Act: Appeals:  
Standing—Rules of Practice: Appeals: Standing to Appeal

Although Departmental regulation 43 CFR 4.412(b) requires a party filing an appeal from a decision involving a selection application under the Alaska Native Claims Settlement Act to file a statement of standing within 30 days after filing its notice of appeal, the Board's discretionary authority to dismiss such an appeal for failure to file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the statement of reasons and there is no showing that a procedural deficiency has prejudiced a party.

2. Alaska Native Claims Settlement Act: Appeals:  
Standing—Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places—Alaska Native Claims Settlement Act: Conveyances: Easements—Alaska Native Claims Settlement Act: Easements: Public Easements—Rules of Practice: Appeals: Standing to Appeal

In an appeal by the State of Alaska from a decision denying reservation of public easements in a historical place conveyance to a Native corporation, the State's allegation that the easements are needed to assure reasonable access to State-owned land below the ordinary high water line indicates a property interest affected by BLM's decision that provides a basis for standing to appeal.

3. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places—Alaska Native Claims Settlement Act: Conveyances: Easements—Alaska Native Claims Settlement Act: Easements: Public Easements

Although the primary standard for determining whether an easement in a conveyance for a historical place is reasonably necessary is "present existing use," which must be established by Dec. 18, 1976, or the date of selection, whichever is later, Departmental regulation 43 CFR 2650.4-7(a)(3) provides for reservation of public easements absent a demonstration of present existing use 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.

4. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places—Alaska Native Claims Settlement Act: Conveyances: Easements—Alaska Native Claims Settlement Act: Easements: Public Easements

A hearing is properly ordered in an appeal from a decision rejecting an easement in the conveyance of a historical place on the ground that alternative access exists when BLM fails to explain the basis of its decision, the appellant has challenged the reasonableness of the access selected by BLM, and the facts of record are insufficient to determine whether BLM's decision should be affirmed.

5. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places—Alaska Native Claims Settlement Act: Conveyances: Easements—Alaska Native Claims Settlement Act: Easements: Public Easements

A decision rejecting an easement in the conveyance of a historical place on the ground that alternative access exists on the State land below the ordinary high water line will not be affirmed in the absence of a clear explanation of how reasonable access is to be accomplished when the land is submerged.

APPEARANCES: John T. Baker, Esq., Assistant Attorney General, Anchorage, Alaska, for appellant; Joseph D. Darnell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Robert E. Price, Esq., Anchorage, Alaska, for the Bristol Bay Native Corporation.

## OPINION BY ADMINISTRATIVE JUDGE IRWIN

The State of Alaska has appealed the June 30, 1992, decision of the Alaska State Office, Bureau of Land Management (BLM), approving regional selection application AA-10662 for the conveyance of a historical place to the Bristol Bay Native Corporation (BBNC) without reserving site easement EIN 1 D9 or a trail easement along the west bank of the Ugashik Narrows.

The historical place consists of two parcels, one on each side of the narrows through which water flows from Upper Ugashik Lake into Lower Ugashik Lake. A small island in the narrows would remain public land. The lakes lie within the Alaska Peninsula National Wildlife Refuge and were formed 9,000 to 14,000 years ago when glaciers receded. The narrows became an east-west migration passage for caribou and other game, and salmon swimming upstream from Lower to Upper Ugashik Lake have made the narrows an attraction to fishermen from ancient times to the present day. The discovery in 1974 and 1975 of artifacts and other evidence of occupancy by prehistoric man since the time of deglaciation led to the designation of this historical place. <sup>1/</sup>

The place to be conveyed includes six separate sites of varying significance identified in the BIA Report, <sup>supra</sup> note 1, as 49-UGA-1 through 49-UGA-6. We will refer to them as sites 1 through 6. The largest, site 1, was grouped with sites 5 and 6 in Parcel A; Parcel A consists of almost 53 acres on the east side of the narrows. Sites 2, 3, and 4 lie from north to south along the west side of the narrows and have been grouped into a parcel of about 19 acres designated as Parcel B. <sup>2/</sup>

In a letter to BLM dated March 26, 1991, Robin Willis, a habitat biologist with the Alaska Department of Fish and Game, identified a need to reserve sites for floatplane access on Parcels A and B. She stated that at least 82 parties had used the narrows for fishing or hunting access in 1990, according to U.S. Fish and Wildlife Service (FWS) surveys, and most had arrived by floatplane. Referring to the narrows' characteristic strong winds and poor weather, she stated that floatplane tie-ups should be located on the basis of these weather patterns and the availability of sand rather than cobble beaches. Floatplane access on both parcels is needed to enable passengers to transfer safely between various modes of transportation, *i.e.*, foot to plane or boat to plane, during various weather conditions, she stated. "These specific site locations have been used for many years and are in the publics [sic] interest," she concluded. On the accompanying map an "X" was marked on Parcel A on the eastern shore of the narrows, north of the island (designated EIN 2 D9), and another "X" was marked

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<sup>1/</sup> See Report of Investigation for Ugashik Narrows, Bristol Bay Corporation, BLM AA-10662, Bureau of Indian Affairs, ANCSA Office, Anchorage, Alaska, April 1986 (BIA Report) at 2, 4, 28-30.

<sup>2/</sup> *Id.* at 8, 16, 31-32.

on Parcel B on the north shore of Lower Ugashik Lake (designated EIN 1 D9). <sup>3/</sup>

On May 9, 1991, BLM sent the State for comment a Draft Easement Memo that proposed not to recommend EIN 1 D9, the 1-acre site easement upland of the ordinary high water mark on the north shore of Lower Ugashik Lake on Parcel B, "because there is nearby alternate public shore space for change in mode of transportation and access to public land." The Draft Easement Memo also proposed not to recommend the 1-acre site easement on Parcel A, EIN 2 D9, for the same reason.

Apparently the basis for this reason was a map sent to BLM on April 4, 1991, by Ron Hood, Refuge Manager of the Alaska Peninsula National Wildlife Refuge, FWS, in response to a request from BLM's Karen Collie for a map of the Ugashik Narrows marked with areas that would be good to tie down a floatplane. The map showed four locations used as floatplane tie-up areas during the summer of 1990. One of the locations was on the north shore of Lower Ugashik Lake corresponding to EIN 1 D9; one was on the eastern shore of the narrows to the north of the island corresponding to EIN 2 D9; one was on the north end of the island in the narrows; and one was on Parcel B on the western shore of the narrows just to the north of the island. <sup>4/</sup>

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<sup>3/</sup> From the record, it appears this was not the first time the State informed BLM of its concerns. On May 27, 1988, BLM wrote the State's Department of Natural Resources acknowledging the protest the State had filed against Timothy Enright's Native Allotment application AA-053584 for land located to the south of Parcel A on the east side of the narrows "on April 23, 1985, and additional information submitted May 6, 1985, regarding the need for public access for sportfishing along the Ugashik Narrows shoreline and the use of an airstrip, which is located on a private parcel overlapping the lands encompassed by this Native allotment application \* \* \*."

BBNC "strongly object[ed] to the State of Alaska's request for a public access corridor on the shoreline at Ugashik Narrows and for an airstrip," stating that the "proposed easements will impact BBNC's 14(h)(1) Ugashik Narrows historical site (AA-10662) \* \* \*. Public access in close proximity to this historical site will lead to trespass and degradation of this historical resource" (BBNC letter to BLM dated Aug. 2, 1988). BLM wrote BBNC on Aug. 12, 1988, thanking it for the August 2 letter "regarding [its] objection to the State of Alaska's request for an easement on [BBNC] 14(h)(1) site, AA-10662, and Native allotment application, AA-053584," and stating that copies of the letter would "be placed in the above-referenced case files [AA-10662 for the historical place application, AA-10662-1E for the request for easements, and AA-053584 for the Native Allotment application]."

Although copies of these 1988 letters are in the record for AA-10662 and AA-10662-1E, copies of the State's letter filed Apr. 23, 1985, and the additional information submitted May 6, 1985, are not.

<sup>4/</sup> Apparently this map was not included in the attachments that accompanied the Draft Easement Memo BLM sent out for comment.

See Answer of BLM at 11-12 and Exhibit A. Thus, three of those sites, being located on Parcels A and B, are not alternatives, as they would have to be reserved as easements from any grant to BBNC.

In the State's July 1, 1991, response to BLM's May 9, 1991, Draft Easement Memo, Willis stated that the State's "particular concern is retaining access to the island (public lands) in the center of the Narrows. This island provides the best opportunity for fishing while not encroaching on the historical/burial sites to the east and west." Based on additional research and a re-examination of the State's request, Willis agreed that public land to the north of Parcel A would provide access to the eastern shore of the narrows. However, because the channel is unwadeable from the eastern shore, access to the island and the traditional fishing area in the channel to the west of the island is needed, Willis stated. Weather patterns cause standing waves at least 3 days a week during the summer fishing season at the southern end of the narrows, she reported, preventing access to the channel and the island. The shoreline of the western channel, north of Parcel B, "has a cobble substrate with intermittent boulders," boulders offshore, and wave action on the lake, making this area hazardous for floatplane access. Similarly, the shoreline of the public lands to the west of the conveyance, *i.e.*, west of EIN 1 D9 on the north shore of Lower Ugashik Lake, "also has onshore and offshore boulders which preclude reasonable access for floatplanes into this area." "There are two locations on the west side of the Narrows, on the very periphery of the conveyance, that have sandy beaches that would allow reasonable locations for floatplane tie-ups and short distances to the utilized public lands and waters," she added. These sites were marked on an accompanying map. One was located slightly to the east of the "X" marking EIN 1 D9 on the map submitted with the March 26, 1991, letter. The second was located on Parcel B just to the north of the area on the shore of the western channel that was indicated on the map sent to BLM on April 4, 1991, by Ron Hood. Willis stated the State "continue[s] to request the establishment of at least one of the[se] two site easements," noting that "the size of the easement can be reduced to a minimum of 25' x 100' if necessary to get agreement from all parties."

BLM's Final Easement Recommendations, dated July 26, 1991, repeated those in the Draft Easement Memo. Accordingly, BLM's June 30, 1992, decision approving Parcels A and B for interim conveyance under section 14(h)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1988), stated: "There are no easements to be reserved to the United States pursuant to Sec. 17(b) of ANCSA [43 U.S.C. 1616(b) (1988)]." The State filed a timely appeal.

The State does not challenge BLM's failure to reserve the easement it requested on Parcel A. It does object to the failure to reserve the site easement it requested on the north shore of Lower Ugashik Lake (EIN 1 D9). In addition, based on a field examination conducted by Department of Fish and Game personnel after BLM's decision, the State argues "that preservation of an existing trail, running along the west bank of the Narrows

above the ordinary high water line, is necessary to allow continued access from the proposed site easement (depicted by a red "X" on Exhibit 2) <sup>5/</sup> to the public lands to the north of Parcel B" (Statement of Reasons (SOR) at 9 and Exh. 13). "BLM's decision is in error because it failed to reserve easements which are reasonably necessary under section 17(b) of ANCSA to guarantee continued public access across Regional Corporation lands to public resources," the State argues (SOR at 3-4). It argues further:

The agency's decision contains no factual analysis whatsoever to support the lack of such easements, nor addresses in even a conclusory fashion the public access concerns raised by the State of Alaska. For these reasons, BLM's decision should be reversed and remanded with instructions to reserve easements identified by the State. In the alternative, BLM should be instructed to hold hearings for the purpose of taking public testimony, and to make specific findings, on the need for continued public access to the Ugashik Narrows.

Id. at 4.

[1] BBNC and BLM have moved that we summarily dismiss the State's appeal as provided in 43 CFR 4.402(d) and 4.412(c) because the State failed to file a statement of standing within 30 days after filing its notice of appeal as required by 43 CFR 4.412(b). Unlike the requirement for the timely filing of a notice of appeal, the requirement for timely filing a statement of standing is not jurisdictional and dismissal is discretionary with the Board. Discretion to dismiss an appeal for failure to file timely a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the SOR and there is no showing that a procedural deficiency has prejudiced a party. Robert A. Perkins, 119 IBLA 375, 379-80 (1991). No showing of prejudice to BLM or BBNC has been made.

[2] BBNC contends that there is nothing in the State's SOR that demonstrates it has a property interest affected by BLM's decision not to reserve easements, and seeks to align this case with Appeal of Sam E. McDowell, 2 AN CAB 350 (1978), and to distinguish State of Alaska, 78 IBLA 390 (1984). In McDowell, the Alaska Native Claims Appeals Board dismissed appeals of several fishermen because their use of the banks of the Chuitna River for recreation for several years did not constitute a property interest. In State of Alaska, *supra* at 393, we found the State's "property interest in the submerged lands and navigable waters of the Yukon River are sufficiently affected by BLM's conveyance decision [declining to reserve any easements along 28 miles of the river] to afford standing to the State." "The State alleges that its property interest is affected by

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<sup>5/</sup> We note that the red "X" marked on Exhibit 2 lies to the west of the marks for EIN 1 D9 on the maps submitted on Mar. 26, 1991, and July 1, 1991.

BLM's decision because the easements are necessary to a reasonable pattern of public travel and access along the river," we noted. *Id.* BBNC argues "[t]his case merely involves access to a small island of public land in the Ugashik Narrows by an occasional sport fisherman, and there is no affect [sic] on the public use of State submerged lands" (Answer at 2). We do not agree. It is to the navigable waters of the narrows and State-owned land in the narrows below the ordinary high water mark, including the western channel, as well as to the island in the narrows and the lands to the north of Parcel B that are public lands, that the State seeks access for the public to fish (SOR at 5; Reply at 3). This is a property interest that is affected by BLM's decision. State of Alaska, supra. The motions to dismiss are denied.

Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), authorizes BLM to convey to Native Corporations title to existing cemetery sites and historical places. Departmental regulation 43 CFR 2653.0-5(b) defines "historical place." BBNC's historical place application was filed on December 16, 1975, and included the six sites identified by Don Dumond and Winfield Henn of the University of Oregon during summer field investigations in 1974 and 1975. Although it does not appear from the record that notice of the application was published beforehand, as required by 43 CFR 2653.5(h), in June 1978 BLM forwarded the application to the BIA for an investigation and report. BIA archaeologists conducted the required field examination from September 11 through September 16, 1985. BIA's area director certified the report of that investigation as satisfying the pertinent regulatory criteria on June 2, 1986. BLM is required to issue a conveyance if the land certified by BIA is available. 43 CFR 2653.5(k).

[3] Under section 17(b)(3) of ANCSA, 43 U.S.C. § 1616(b)(3) (1976), the Secretary is required to reserve public easements to the extent necessary to achieve certain purposes prior to granting any patent issued under that statute, including one for a historical place. Section 17 of ANCSA established the Joint Federal-State Land Use Planning Commission (LUPC) for several purposes, including the identification of public easements across lands selected by Native 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." 43 U.S.C. § 1616(b)(1) (1976). 6/

Although BLM points out that the State failed to request the easements it seeks in this case in its role as a member of the LUPC, the Secretary has an independent obligation to reserve easements meeting the criteria of subsection (b)(1) of the statute. Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 675 (D. Alaska 1977). Like his obligation under

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6/ The LUPC completed its work in 1979, and subsections (a) and (b) no longer appear in the current United States Code.

any statute providing for the disposition of the public lands, the Secretary's obligation under this provision continues until a patent issues. See generally Knight v. United States Land Ass'n, 142 U.S. 161 (1891); Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); Ben Cohen (On Judicial Remand), 103 IBLA 316, 328-29, aff'd sub nom. Sahni v. Watt, CIV. No. S-83-96-HDM (D. Nev. Jan. 12, 1990, and Jan. 14, 1991), aff'd, No. 91-15398 (9th Cir. Apr. 27, 1992).

Regulations promulgated by the Department following the decision in Alaska Public Easement Defense Fund v. Andrus, supra, provide that only public easements that are "reasonably necessary" to guarantee access to publicly owned lands or major waterways and other public uses shall be reserved. 43 CFR 2650.4-7(a)(1). "The primary standard for determining which public easements are reasonably necessary for access shall be present existing use." 43 CFR 2650.4-7(a)(3). "Present existing use" is defined in 43 CFR 2650.0-5(p) as use by either the general public or by a Federal, state, or municipal corporation entity on or before December 18, 1976, or the date of selection, whichever is later. "The most reasonable interpretation of the 'present existing use' requirement is that easements should substantially conform to existing uses and that evidence of use be recent (emphasis in original)." Northway Natives, Inc., 69 IBLA 219, 234, 89 I.D. 642, 649 (1982), overruled in part, United States Fish and Wildlife Service, 72 IBLA 218 (1983). <sup>7/</sup> "However, a public easement may be reserved absent a demonstration of present existing use \* \* \* 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." 43 CFR 2650.4-7(a)(3).

"All public easements which are reserved shall be specific as to use, location, and size. Standard sizes and uses which are delineated in this subsection may be varied only when justified by special circumstances." 43 CFR 2650.4-7(a)(4). Requirements governing transportation easements are set forth in 43 CFR 2650.4-7(b)(1)(i)-(xiv); the widths of trail easements are limited, depending on uses, under 43 CFR 2650.4-7(b)(2)(i)-(v). Site easements related to transportation may be reserved under requirements set forth in 43 CFR 2650.4-7(b)(3).

[4] In response to the State's argument that BLM's decision "contained no findings whatsoever to support the conclusion that continued public access to the Ughashik Narrows does not require the reservation of easements under Section 17(b)" (SOR at 2), BLM states that "[i]t is [the] whole record which must be reviewed and not just the final decision," citing Northway Natives, Inc., supra at 230, 89 I.D. at 647. BLM

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<sup>7/</sup> "We hold it is contrary to the express and implied purposes of the easement selection criteria to say that whenever an existing trail of any sort can be located, it is thereby eligible for reservation for a markedly different use. Present existing use cannot reasonably be construed to mean, in effect, future possible use." Id. at 233, 89 I.D. at 649.

states that "[t]he easement file, AA-10662-1E, adequately documents the basis and rational[e] of the BLM's easement decision" (Answer at 11).

Although it is true that we examine the whole record in carrying out our de novo review function, BLM operates under

the \* \* \* general requirement, imposed by well-established precedent, that its decision must contain a reasoned and factual explanation providing a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before this Board. Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990); Roger K. Ogden, 77 IBLA 4, 90 I.D. 481 (1983); Petrovest, Inc., 71 IBLA 250 (1983).

Southern Utah Wilderness Alliance, 131 IBLA 293, 294-95 (1994). We have applied this requirement to decisions whether or not to reserve easements. State of Alaska, 81 IBLA 7, 12 (1984); State of Alaska, 79 IBLA 335, 338 (1984). BLM's statement in its decision that "[t]here are no easements to be reserved to the United States pursuant to Sec. 17(b) of ANCSA" disregards the fact that the question of a transportation easement had been raised and had been specifically considered by BLM in connection with the application. It was incumbent upon BLM to set forth that history in its decision, along with an explanation summarizing the basis for its decision not allowing the easement. Its failure to do so not only creates the misimpression that no easement issues were involved in the application, it leaves uncertain the reasons for BLM's decision not to include the easement, rendering it difficult to review that decision.

In State of Alaska, 86 IBLA 263 (1985), we ordered a hearing when the State challenged the reasonableness of the access selected by BLM and the facts of record were insufficient to determine whether BLM's decision should be affirmed. In Northway Natives, Inc., *supra*, we observed:

The lack of a formal requirement [in the easement reservation regulations promulgated by the Department in 1978, *see* 43 CFR 2650.4-7(a)(2) §/] that the BLM fully justify its decisions in writing does not mean that BLM \* \* \* need not be able to document a rational basis for its decision to reserve or not reserve an easement. In this case, because there was not adequate documentation before ANCAB regarding BLM's decision from which to ascertain whether the decision was proper, a hearing was ordered to receive evidence concerning the basis for its decision. It should not be necessary to do this in many cases if BLM has adequately documented its easement decisions and provided that documentation for administrative review.

69 IBLA at 231-32, 89 I.D. at 648.

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§/ This regulation provides: "In identifying appropriate public easements assessment shall be made in writing of the use and purpose to be accommodated." *See Northway Natives, Inc.*, *supra* at 229-31, 89 I.D. at 647-48.

In this case, as in Northway Natives, Inc., *supra*, the documentation before us regarding BLM's decision raises sufficient doubts concerning whether the decision was proper to necessitate a hearing, particularly as BLM failed to explain its reasons in its decision. The inadequacy of the record may be attributed in part to BLM, in part to the State.

BLM has not made clear whether its denial of EIN 1 D9 is based on Ron Hood's April 4, 1991, "input [which] established that there were several beaching areas available at Ugashik Narrows and used by the public in addition to EIN 1 D9" (Answer at 11) or on the additional grounds offered in BLM's Answer and in Ron Hood's accompanying affidavit, namely, that the sandy beach offshore from EIN 1 D9 actually used by floatplanes is located on State lands below the ordinary high water line and is a reasonable alternative that "is available to the public even without the easement reservation" (Answer at 11 and Exh. A at 2). There are significant questions about both positions.

As to the first, on the map submitted by Ron Hood on April 4, 1991, only one of the four areas used to tie down floatplanes in 1990 was not located on either Parcel A or Parcel B and that was the northern end of the island in the narrows. In its Reply, the State asserts that "to require its exclusive use as a docking site would likely increase public safety risks" (Reply at 7). Further, "the island itself has not been the focus of present existing use." *Id.*

As to BLM's additional grounds, the State contends that there has been no administrative or judicial determination of the location of the ordinary high water line so that BLM's assertion that planes have beached below that line cannot be corroborated (Reply at 7). In addition, the State challenges BLM's assumption that the State's submerged lands can provide reasonable alternative access without the reservation of easements, contending that "the very fact that Congress provided for the reservation of site easements in Section 17(b) indicates that Congress did not view the State's submerged lands as adequate to meet the needs of the public" (Reply at 6). The State also contends that restricting access to its submerged lands or to any site across the channel from Parcel B poses unreasonable risks to public safety; it has submitted an affidavit in support of this assertion (Reply at 6 and Exh. 1).

[6] In State of Alaska, *supra*, 78 IBLA at 394 (1984), the State argued that "to the extent that [sandbars and islands] are below the mean high water line, at least some of the time, they will be submerged land which by its nature is wholly unsuitable for the public facilities that site easements are intended to provide." Our decision in that case shows we found that argument persuasive. *See id.* at 398. By definition, areas below the ordinary high water line will sometimes be entirely submerged. Even if floatplanes have been observed to "beach on state land which is a sandy beach below the ordinary high water line and not part of BBNC's selection" (Answer at 11) the record does not establish that this beach would always provide reasonable access. We do not understand how submerged

land can provide a reasonable alternative to "a full right of public use and access for recreation, hunting, transportation," etc., under section 17(b). We cannot affirm a decision rejecting an easement on the ground that alternative access exists on the State land below the ordinary high water line with no clear explanation of how reasonable access is to be accomplished when the land is submerged.

In addition to these questions about the reasons BLM offers for its decision, we are concerned by the failure of communication between the FWS and BLM that resulted in BLM's apparently being unaware of the history of the State's efforts to assure that public access for fishing would be maintained. In a November-December 1982 exchange of letters between the State Department of Fish and Game and William H. Mattice, Chief, Division of Realty, FWS, on the subject of a proposed exchange of FWS lands for private lands on the Ugashik Narrows, the State had "no objection to the exchange as long as public access along the lake shore is maintained." The State suggested that FWS "ensure that the proposed 10' easement is above the high water line" and that "the easement agreement specifically provide for public fishing, docking of boats and airplanes, etc., in addition to simple pedestrian passage." Mattice responded that the purpose of the exchange was to gain "access across approximately 660 feet of privately owned shoreline \* \* \* for public users"; that "because the remainder of the lakeshore is available for docking of boats and airplanes, we determined that it was not necessary to negotiate for those privileges"; and that "[e]nsuring that the access easement is above the high water line is a reasonable thought. We plan to have all of our footpaths on reasonably dry land" (SOR, Exh. 11 at 1-2). The State repeated its concern for "a public easement to maintain public access in Ugashik Narrows" in a June 1986 letter to Mattice setting forth alternative measures necessary to insure consistency of a proposed modification of the Ugashik Narrows/The Triplets land exchange with the Alaska Coastal Management Program (SOR, Exh. 12 at 2). One measure "required either a 25-foot buffer zone or a public easement to maintain public access." The FWS "addressed this measure by including provisions for a 10-foot public easement in the proposed exchange agreement." *Id.* In spite of these communications, when Mattice was consulted by BLM's Karen Collie the record reflects he told her there was no need for any easements. Collie's note for the file states: "Called Bill Mattice 2/6/91 to see if easements were needed on AA-10662 - Parcel A and B. Bill called back 2/6/91 with a negative reply."

There is also inadequate documentation in the record because the State has varied and supplemented its request for easements and the reasons for them, both before and after BLM's decision. In the first place, it is not clear from the maps in the record precisely where the State would locate EIN 1 D9. Although the affidavits the State submitted with its SOR indicate that a site on the north shore of Lower Ugashik Lake would likely meet the "present existing use" requirement of 43 CFR 2650.4-7(a)(3), *i.e.*, use for the same purpose before December 18, 1976, they do not aid in defining

a specific location (see SOR, Exh. 5 ("the beach to the west of the southern outlet of the Narrows, on the north shore of Lower Ugashik Lake"), and Exh. 6 ("On the Lower Lake, access was primarily on the north shore, at the west beach or shoreline from the river outlet at the Narrows")). These affidavits also indicate the availability of other places to park floatplanes (see SOR, Exh. 5 ("both banks of Upper Ugashik Lake") and Exh. 6 ("I have parked float planes on both the west and east banks of the Upper Ugashik Lake")); and Exh. 7 ("mooring in various locations including the north shore of Lower Ugashik Lake")). It is not clear where these various locations are.

In addition, perhaps because Willis was not aware of her Department's earlier correspondence with FWS, or perhaps because she thought BLM was aware of it, <sup>9/</sup> she did not request a trail easement either in her March 26 or July 1, 1991, letters or in an April 4, 1991, telephone call from BLM's Karen Collie, so the State's request for a trail easement in addition to the site easement on the north shore of Lower Ugashik Lake came after BLM made its decision. Presumably because State personnel learned more about the area from their August 1992 field examination after BLM's decision, the reasons given in the State's SOR for requesting preservation of a trail running along the west bank of the Narrows above the ordinary high water line are not consistent with Willis' July 1, 1991, letter. That letter stated that "[t]he channel between the island and the west bank of the Narrows is shallow, allowing for foot passage." The State's SOR states: "The trail is necessary because the water is generally too deep to allow safe foot passage in the west channel itself" (SOR at 9 and Exh. 13 at 3, paragraph 6; Reply at 8 n.8). <sup>10/</sup>

It is evident from what is related above that the record does not make clear whether a site easement should be reserved on the north shore of Lower Ugashik Lake because there is no reasonable alternative site available. Nor does it make clear whether the trail easement the State has requested meets the present existing use standard or, if it does not, is reasonably necessary because there is no reasonable alternative route or is required for access to isolated publicly owned land.

In addition to what is related above, it is not clear from the record whether "adverse impacts on Native culture \* \* \* are likely to

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<sup>9/</sup> We note the statement in the affidavit from Ron Hood, FWS Refuge Manager, accompanying BLM's Answer that "[a]t the time the map was requested, my staff was told the information on it was to be used in conjunction with the decision of the BLM on whether to reserve any transportation related sites or trail easements at Ugashik Narrows in conjunction with conveyance of § 14(h)(1) land to BBNC" (BLM Answer and Exh. A at 2 (emphasis added)).

<sup>10/</sup> It appears from the State's SOR and Reply that it has abandoned its alternative of a site easement on the western shore of the narrows to the north of the island, as it suggested in its July 1, 1991, letter, in favor of EIN 1 D9 and the trail easement.

occur because of the reservation of" either of the easements the State requests. Under 43 CFR 2650.4-7(a)(3), when such impacts are likely to occur "alternative routes shall be assessed and reserved where reasonably available." However, we believe that if such impacts are likely but no alternative routes are reasonably available, section 17(b) of ANCSA requires the reservation of a public easement if it is reasonably necessary. 11/

The hearing required to supplement this record must allow the parties to address (1) the precise location of the requested site and trail easements; (2) whether each easement is supported by present existing use; (3) whether reservation of each easement would be likely to adversely impact Native culture; (4) whether each easement is reasonably necessary or whether reasonable alternatives exist; (5) whether or not each easement meets the specific requirements for transportation easements set forth in 43 CFR 2650.4-7(b); and (6) whether each easement should be reserved. As the party appealing BLM's decision, the State shall have the burden of persuasion by a preponderance of the evidence. State of Alaska, 86 IBLA at 267; Bender v. Clark, 744 F.2d 1424 (10th Cir. 1982).

Therefore, 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 set aside and the case is referred to the Hearings Division for assignment to an Administrative Law Judge whose decision shall constitute final Departmental action unless a timely appeal is filed with this Board.

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Will A. Irwin  
Administrative Judge

I concur.

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David L. Hughes  
Administrative Judge

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11/ The State's Reply states, at page 11: "BLM and BBNC are in effect arguing for a per se rule that 17(b) easements are incompatible with 14(h)(1) conveyances." Although that may be BBNC's position, at least in this case (see BBNC Answer at 7-8), it does not appear to be BLM's: "[I]t is not the position of BLM here that § 17(b) easements can not be reserved in conjunction with lands conveyed to Native corporations under § 14(h)(1)" (BLM Answer at 8 n.8). Thus, we agree with the State's "belief that the values underlying sections 14(h)(1) and 17(b) of ANCSA can and must be reconciled" (Reply at 8). Only when no reasonable alternative exists would a public easement be reserved that would adversely affect Native culture.

