

STATE OF ALASKA
LOUIS AND MARION COLLIER

IBLA 2004-6, 2004-28

Decided April 6, 2006

Appeal from a decision by the Alaska State Office, Bureau of Land Management, AA-6695-EE, AA-6664-EE/INV.

Cases consolidated; set aside and remanded.

1. Alaska: Navigable Waters--Alaska Native Claims Settlement Act: Navigable Waters--Navigable Waters--Submerged Lands--Submerged Lands Act: Generally

Where BLM terminates seven public easements, which had been reserved to guarantee access to three lakes pursuant to section 17(b) of ANSCA, 43 U.S.C. § 1616(b) (1976), on the basis of a determination that the lakes are non-navigable and not major waterways and therefore that the easements do not provide access to publicly owned lands or major waterways, and the record does not support BLM's determination, the Board will remand the cases to BLM. Should BLM wish to proceed with decisions regarding the easements under 43 CFR 2650.4-7(a)(13), it must render an initial determination of navigability of the lakes as an aid to deciding whether the easements may be terminated.

APPEARANCES: Donald Craig Mitchell, Esq., Anchorage, Alaska, for Louis and Marion Collier; Mark P. Melchert, Esq., Anchorage, Alaska, for The Port Graham Corporation; John T. Baker, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; Regina Sleater, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The State of Alaska and Louis and Marion Collier appeal from a decision dated August 28, 2003, issued by the Alaska State Office, Bureau of Land Management

(BLM), terminating, under 43 CFR 2650.4-7(a)(13), seven public easements originally reserved under section 17(b) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), formerly codified at 43 U.S.C. § 1616(b) (1976). The easements were reserved by the United States in land conveyances issued to The Port Graham Corporation under section 12 of that statute, 43 U.S.C. § 1611 (2000). The appeals are docketed as IBLA 2004-6 (Alaska) and 2004-28 (Colliers) and are hereby consolidated. By order dated November 7, 2003, the Board issued a stay of implementation of the decision with respect to the easements that are the subject of the appeals.

Section 12(a) of ANCSA, 43 U.S.C. § 1611(a)(1) (2000), permitted Alaska Native village corporations for each Native village to select for conveyance, within 3 years after December 18, 1971, certain lands within townships in which any part of the village is located.^{1/} Section 17(b) authorized the Secretary of the Interior to reserve easements across lands selected by village and regional corporations. 43 U.S.C. § 1616(b)(1) and (3) (1976); see State of Alaska, 167 IBLA 156, 158 (2005), citing Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 675 (D. Alaska 1977); Seldovia Native Corporation, 161 IBLA 279, 280 (2004). Section 17(b) authorized the Secretary to reserve such easements, after consultation with the State of Alaska and with the Joint Federal-State Land Use Planning Commission of Alaska, as 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 (1976); see Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. at 675; Seldovia Native Corporation, 161 IBLA at 280.^{2/}

The seven site (EIN 26a D1, EIN 15 D9, EIN 6c D9, EIN 6d D9), trail (EIN 26b D1, EIN 2 D9) and road (EIN 17 D9) easements were retained by the

^{1/} ANCSA defines a “Native village” as a tribe, band, clan, group, village, community, or association comprising 25 or more Natives. 43 U.S.C. § 1602(c) (2000).

^{2/} We explained the role of the Commission in State of Alaska, 167 IBLA at 158 n.3: “Subsections (a) and (b) of 43 U.S.C. § 1616 (1976) addressed the establishment, membership, compensation, procedures, duties, and powers of the Joint Federal-State Land Use Planning Commission of Alaska and authorized the Commission to identify public easements across selected lands in Alaska. The subsections were omitted from the current edition of the United States Code pursuant to former subsection (a)(10) of the section, which provided that the Commission would cease to exist effective June 30, 1979. See 43 U.S.C. § 1616 (2000), Historical Note; see also Seldovia Native Corporation, 161 IBLA [at 280 n.2]; Mendas Cha-Ag Native Corp., 93 IBLA 250, 254 n.3 (1986).”

United States in four separate interim conveyances (IC Nos. 18, 23, 66, and 137) and, subsequently, in a final patent, 50-94-0263, to The Port Graham Corporation. The easements related to use of three lakes – Rocky Lake in T. 10 S., R. 13 W., Seward Meridian (EIN 26a D1, EIN 26b D1), Scurvy Lake in Ts. 10 and 11 S., R. 13 W., Seward Meridian (EIN 15 D9, EIN 17 D9), and Upper English Bay Lake in T. 10 S., R. 15 W., Seward Meridian (EIN 6c D9, EIN 2 D9, EIN 6d D9).

The record reveals that the five easements related to Scurvy Lake and Upper English Bay Lake (EIN 15 D9, EIN 17 D9, EIN 6c D9, EIN 2 D9, and EIN 6d D9) were originally proposed by an “Easement and Navigability Task Force” soon after The Port Graham Corporation submitted its 1974 Native village application. Documents from 1975 Task Force meetings indicate that the group recommended “easements to be reserved in conveyances” to The Port Graham, Seldovia, and The English Bay Corporations. (Apr. 23, 1975, and Sept. 15, 1975, Task Force Meeting Memoranda.) These included “D9-2,” an easement “along the English Bay River to Upper English Bay lake,” “D9-15” and “D9-17,” relating to a floatplane area at the outlet of an unnamed lake, and “D9-6” which referred to an easement (later two easements) at the “English Bay lake.”^{3/}

On August 18, 1975, the Joint Federal/State Land Use Planning Commission for Alaska sent a letter to the State Director, BLM, and interested parties, attaching its recommendations for public easements. The Commission letter explained that it was making recommendations regarding recreational use based upon a 1974 agreement not in the record for us.^{4/} The attached list of easement recommendations made clear that the Commission believed that the five easements relating to Scurvy Lake and Upper English Bay Lake were preserving use of “public waters.” (Aug. 18, 1975, Commission Letter, Attachment A, “Commission Easement Recommendations.”) The recommendation regarding D9-2 explained that “[t]his proposed easement needs to be defined so that it provides the access intended to the public waters in English Bay River and Lake system.” *Id.* at 2. With respect to D9-6, the recommendation states: “As discussed above in D9-2, we suggest” two site easements at the English Bay Lakes. The recommendations include D9-15 for an easement “at the outlet of an

^{3/} In April 1975, the “D9-17” easement was considered initially to be located on lands not available for selection. This assessment changed by September 1975.

^{4/} BLM has submitted a box of material to us spanning approximately 30 years of documentation surrounding The Port Graham Corporation’s Native village selection. The record is not indexed and BLM has not indicated a single document in the record it believes may be relevant to this matter. Admittedly, numbers and facts related to particularly enumerated easements changed over the course of years. If we have missed a critical document or misconstrued any fact in our recitation, BLM will surely clarify relevant information in a subsequent decision.

unnamed lake” “from the existing road identified as P-17.” P-17, in turn, is a recommended easement for a road to the unnamed lake with “public waters as its terminus.” *Id.* at 3. Easement D9-17 was reserved from lands conveyed to The Port Graham Corporation in IC 18, dated November 4, 1975. Easement D9-2 and the two separate easements identified as D9-6 were reserved in IC 23, dated December 5, 1975. Easement D9-15 was reserved in IC 66, dated August 26, 1977.

The easements related to Rocky Lake have a different history; they were added in response to an appeal before the Alaska Native Claims Appeals Board (ANCAB). According to ANCAB documents, BLM issued a Draft Interim Conveyance (DIC) decision on August 16, 1976, which is not in the record before us, for lands to be conveyed to The Port Graham Corporation, AA-6695-B. The State of Alaska appealed that decision on the basis of its view of “two easements not being included in the DIC which the State feels are necessary.” These included an easement to Rocky Lake. (Oct. 23, 1976, letter from BLM State Office to ANCAB.) A January 28, 1977, letter from ANCAB to the Commission states: “Review of the appeal file and discussion with the parties at a conference held October 22, 1976, indicate that, because of map errors, the two disputed easements were inadvertently excluded from the Commission’s easement identification process, mandated by §17(b) of ANCSA.” By Agreement dated March 7, 1977, The Port Graham Corporation agreed that an easement to Rocky Lake should be considered. *See* May 11, 1977, letter from ANCAB to State of Alaska. In a Memorandum to the File dated September 16, 1977, a BLM Realty Specialist recommended two easements at Rocky Lake (a site easement 26a D1 and a trail easement 26b D1).

On March 31, 1978, the Joint Federal-State Land Use Planning Commission issued recommendations for the Rocky Lake easements. (Mar. 31, 1978, Commission letter to State Director, BLM, Attachment A, “Easement Recommendations.”) According to this letter, the Commission made its recommendations based upon “Order Number 2982 by the Secretary of the Interior effective February 5, 1976.” *See* 41 FR 6295 (Feb. 12, 1976).^{5/} In its recommendations, the Commission stated

^{5/} Secretarial Order No. 2982 provided at section 4:

“[E]asements in behalf of the general public for recreation, access, transportation, utilities, airports, and aircraft landing sites will be reserved only on the basis of present existing use with the following exceptions: * * * (2) the reservation of easements to assure present and future access to all public lands and resources. These exceptions describe the only local easements in behalf of the general public to be reserved for other than present existing uses.”

41 FR 6295 (Feb. 12, 1976). Section 5(c)(1) ensured that access to State waters “shall” be reserved. 41 FR 6296. Section 5(c)(5) stated that site easements “may be reserved at suitable locations” on lake shores. For lakes less than 640 acres in size,

(continued...)

that, while it would “agree under old policy” to the easements, it “disagree[d] under new policy,” though it is unclear to which “new policy” the Commission meant to refer. In regard to easement “26a-D1,” the Commission stated:

This site is reasonably necessary for access to a public body of water that has high recreational use and value. It is the only lake in the area having road access. People as far away as Homer fish this lake. Under the new policy to be announced by the Secretary of the Interior, Rocky Lake must qualify as a major waterway for a site to be appropriate.

(Attachment A at 1.) The Commission disagreed regarding proposed access trail easement “26b-D1” “because the road is only approximately 100 feet away from the lake shore.” *Id.* Nonetheless, BLM continued to recommend easement 26a D1 as “needed to facilitate the use of the public waters of Rocky Lake.” (Oct. 10, 1978, Memorandum from Chief, Division of ANCSA Operations to State Director.) Both easements were reserved in IC 137, dated November 30, 1978.

The easements were reserved pursuant to 43 CFR 2650.4-7(a)(1), which provides that BLM may reserve “[o]nly easements which are reasonably necessary to guarantee access to publicly owned lands or major waterways.” Final patent 50-94-0263 to The Port Graham Corporation reserved all seven easements on August 12, 1994. (AA-6695 A and B.)

The record reveals that BLM conducted meetings for “Easement Review of the Chugach Region” with the State of Alaska and other interested parties no later than 2003. The purpose of such review was to determine whether easements were not necessary and should be terminated under 43 CFR 2650.4-7(a)(13), which provides for both mandatory and discretionary termination of public easements:

The Director shall terminate a public easement if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001, whichever occurs first. He may terminate an easement at any time if he finds that conditions are such that its retention is no longer needed for public use or governmental function. However, the Director shall not terminate an access easement to isolated tracts of publicly owned land solely because of the absence of proof of public use. * * * No public easement shall be terminated without proper notice and an opportunity for submission of

^{5/} (...continued)

site easements will not be reserved “unless such waters have unusual recreational or transportational value for public use.” *Id.*

written comments or for a hearing if a hearing is deemed to be necessary by either the Director or the Secretary.

43 CFR 2650.4-7(a)(13).

On April 11, 2003, a Realty Specialist, Branch of Lands and Realty, BLM, prepared a Memorandum to the Case File entitled “Major Waterway Determination for The Port Graham Corporation.” In this document, the Realty Specialist concluded that the three lakes and another unnamed lake failed to meet the definition of the term “major waterway,” as defined in 43 CFR 2650.0-5(o). This memorandum was provided to the State of Alaska under telefax cover sheet indicating it was sent on May 2, 2003. See State Ex. 6.

On April 18, 2003, BLM issued a “Notice of Intent to Terminate Certain Easements,” proposing to terminate nine easements reserved on lands conveyed to The English Bay Corporation (AA-6664-EE), and The Port Graham Corporation (AA-6695-EE). With respect to the seven relevant easements reserved in lands conveyed to The Port Graham Corporation, BLM asserted in its Notice that the three lakes were “determined to be both non-navigable and non-major.” (Notice at 2.) The Notice does not cite to any decision regarding the navigability of the lakes. It provided an opportunity for affected entities to comment on the proposed decision, consistent with the notice requirements of 43 CFR 2650.4-7(a)(13).

In comments dated June 7, 2003, Alaska objected to the termination of seven easements reserved in the Port Graham conveyance, but acquiesced in the termination of two easements, one reserved in the English Bay conveyance and the other in the Port Graham conveyance and we address these two no further. Alaska commented that the three lakes at issue were all greater than 50 acres in size, and that, by agreement dated November 13, 1987, the State and BLM had agreed that all lakes of more than 50 acres would be excluded from Native village conveyances regardless of their navigability status. The State also contended that the three lakes were public waters because they had been reserved to the ownership of the State and not conveyed to The Port Graham Corporation, and that the easements were in actual use by individuals and groups for access to the lakes, largely for recreation purposes.

In its August 28, 2003, decision, BLM determined that the seven easements are no longer required based on a review of the lands and public use patterns. The decision briefly discussed each easement and set forth a specific rationale for terminating each one. In one respect, the rationales were functionally the same for each one, and so we quote the first such decision:

43 CFR 2650.4-7(a)(1) states that public easements may be reserved to access publicly owned lands and major waterways. The road easement

was reserved to provide access to Rocky Lake. The BLM determined Rocky Lake to be both non-navigable and non-major. Therefore, the site easement does not provide access to publicly owned lands or major waterways and was determined to be recreational in nature. The State of Alaska submitted use information which supplemented the record and reinforced the BLM's determination that use of the site was recreational in nature. The Sec. 17(b) easement **is hereby terminated.**

(Decision at 2.) BLM rendered this same conclusion with respect to each easement. In addition, with respect to easements EIN 6c D9 and EIN 6d D9, BLM stated: "This site lies on patented lands and is not on village conveyed lands." (Decision at 4.) BLM stated that easement EIN 2 D9 crosses private lands.^{6/}

The State of Alaska appealed. In its Statement of Reasons (Alaska SOR), the State contends that BLM has improperly confused various relevant terms including "navigability," "major waterways," "publicly owned lands," and the significance of recreational use to such terms. The State contends that the submerged lands under the three lakes belong to the State and, therefore, the easements are necessary for members of the public to cross lands conveyed to The Port Graham Corporation in order to reach "isolated tracts of public lands" under 43 CFR 2650.0-5. The State contends that the fact that the public uses the State waters for recreation has no bearing on whether the easements should be retained or terminated, and also does not control whether the lakes are considered navigable. The State catalogues its arguments into three grounds for reversal: "(1) that BLM erred in failing to recognize Alaska's submerged lands as 'isolated tracts of public lands' under 43 CFR 2650.0-5; (2) that BLM erred in failing to support its conclusion that the lakes in question are not 'major waterways'; and (3) that BLM erred in confusing recreational use of ANCSA land with use of public easements to facilitate recreational use of navigable waters and submerged lands." (State of Alaska Reply at 1-2.) It supports its conclusion regarding its claimed ownership of the three lakes by conducting mathematical analyses to demonstrate that their acreage was not charged to The Port Graham Corporation and, therefore, the village corporation cannot have received them in ownership.

The Colliers appealed on grounds that the only access to two parcels of land that they own along Rocky and Scurvy Lakes is provided by two of the terminated

^{6/} BLM identified each easement by identification numbers as follows: EIN 26a D1 (cheng1048); EIN 26b D1 (cheng1049); EIN 15 D9 (cheng1051); EIN 17 D9 (cheng1052); EIN 6c D9 (cheng1066); EIN 2 D9 (cheng1067); EIN 6d D9 (cheng1068). Because the numbers beginning with "cheng" were not used in the record until recent years, we address these identifications no further.

easements, EIN 26b D1 and EIN 17 D9. (Colliers' Statement of Reasons (Colliers' SOR) at 1.) The Colliers contend that they received both parcels as Native allottees pursuant to the Native Allotment Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed with a savings provision by ANCSA sec. 18(a), 43 U.S.C. § 1617(a) (2000). The Colliers adopt the arguments of the State of Alaska. They add that, to the extent the Secretary of the Interior has established by rule the authority of the Department to terminate reserved easements at 43 CFR 2650.4-7(a)(13), this rule is ultra vires because section 17(b) of ANCSA provides only the authority to reserve easements and not the authority to terminate them. (Colliers' SOR at 3.) Finally, they assert that even assuming that the Secretary properly has authority to terminate easements, BLM abused its discretion in terminating EIN 26b D1 and EIN 17 D9 because it harmed their interests in violation of the United States' ongoing trust obligations to Native Alaskans. Id. at 5.

The Colliers submit documentation indicating that they would have accepted a resolution of their appeal, had The Port Graham Corporation maintained the pre-existing easements for purposes of permitting the Colliers access to their lands. They document, however, that The Port Graham Corporation insisted that they purchase and maintain a \$1 million bond in order to use each easement, a financial hardship they consider unwarranted simply to access their allotments.

The Port Graham Corporation has submitted an answer in support of the easement termination. The Corporation's purpose in appearing before the Board relates solely to its assertions that the Colliers' actions were taken in bad faith. Failing to acknowledge its own demand for a \$1 million bond from the Colliers, The Port Graham Corporation asserts that its proposed easement terms were reasonable to "protect [it] from potential claims." With respect to the easement termination, the Corporation submits nothing to support its views other than that it supports the outcome.

BLM responds in an Answer in which BLM's view of the status of any of the lakes is difficult to discern. BLM takes no position regarding the proper ownership of the submerged lands under the lakes. Rather, it challenges the State for failure to prove that the State is the owner of the lakes and asserts that "no inference may be drawn regarding navigability" from the fact that The Port Graham Corporation was not charged for the acreage of the submerged lands under Rocky Lake. (Answer at 2.) BLM takes no position regarding the other lakes at all, but contends that the State must come forward with evidence demonstrating "more commercial water traffic than BLM set forth," apparently in a 1980 memorandum regarding navigability. BLM cites this memorandum as "includ[ing] the factual material which BLM was able to compile regarding the water bodies at issue" and asserts that only if the State comes forth with information regarding "commercial water traffic" can it receive a hearing, citing the "test as set forth by the U.S. Supreme Court in *The Daniel*

Ball.” (Answer at 2.) With respect to the Colliers, BLM contends that ANCSA section 17(b) easements “are for public access, issued to the State, to courses of major waterways and not to private lands.” Id.

To summarize, as best we interpret the positions of the parties, the State contends that the lakes in question were not conveyed to The Port Graham Corporation, but rather that they are navigable waters and thus the submerged lands covered by the lakes are owned by the State. It therefore contends that easements are necessary to provide access by the public to the public waters, and that the easements must be retained because the lakes are isolated tracts of public lands. Neither The Port Graham Corporation nor BLM directly refutes this or takes a position regarding whether the lands underneath the lakes were conveyed to the Corporation or regarding submerged lands ownership, but BLM argues that the State bears the burden of proving navigability on the basis of commercial water traffic. BLM appears to believe that section 17(b) easements may only be issued “to courses of major waterways.” (Answer at 2.) In the absence of any better explanation by BLM of the status of the lakes or the proper interpretation of its regulations, we attempt to sort out the status of the record ourselves.

[1] In implementing section 17(b), the Secretary promulgated rules defining easements that can be reserved and their proper termination. Aside from easements necessary to implement treaty obligations not relevant here, for purposes of addressing the issues in these appeals, easements may only be reserved for access to “publicly owned lands” or “major waterways.” “Only public easements which are reasonably necessary to guarantee access to publicly owned lands or major waterways and the other public uses which are contained in these regulations * * * shall be reserved.” 43 CFR 2650.4-7(a)(1). A “major waterway” is “any river, stream, or lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities.” 43 CFR 2650.0-5(o). “Publicly owned lands” are defined to include “all Federal, State * * * 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.*” 43 CFR 2650.0-5(r). The separate term “public lands” is defined to include Federal lands and all interests in non-navigable bodies of water. 43 CFR 2650.0-5(g). The State has title to submerged lands under navigable bodies of water. Thus, “publicly owned lands” include lands owned both by the United States and by the State of Alaska. If the lands belong to the State of Alaska, then, they are “publicly owned lands” within the meaning of this rule. If they were conveyed to the village corporation, they are not “publicly owned lands.”

We agree with the State that BLM appears to be laboring under some misimpression regarding the purpose of section 17(b) easements. To the extent BLM

believes, as it stated in its Answer, that easements may only be granted “to courses of major waterways,” such a construction minimizes the terms of both the statute, 43 U.S.C. § 1616(b), and the rule, 43 CFR 2650.4-7(a)(7). BLM may grant easements to “guarantee access to publicly owned lands or major waterways.” 43 CFR 2650.4-7(a)(7) (emphasis added.) These are two separate terms with two different meanings. To determine, as the State asks us to do, that the lands under the lakes are “publicly owned lands,” requires determination of whether waterbodies are navigable, not whether they are “major waterways.”^{7/}

On the date of Statehood (January 3, 1959), the State of Alaska received title to submerged lands forming the bed of navigable waters within its borders pursuant to the Equal Footing Doctrine, as codified in the Submerged Lands Act of 1953, 43 U.S.C. § 1301 (2000). See State of Alaska v. United States, 662 F. Supp. 455, 457 (1987), aff’d sub nom. State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989); State of Alaska, 113 IBLA 80, 84-85 n.6 (1990). This principle applies not just to rivers, but to lakes. In State of Montana, 88 IBLA 382, 384 (1985), we held:

The Secretary of the Interior has both the authority and the duty to consider and determine what lands are public lands of the United States. See State of Montana, 11 IBLA 3, 80 I.D. 312 (1973). Such authority and duty include a determination of navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a state upon its admission into the Union. Id. The first of two principles relevant here is that the bed of a nonnavigable lake is usually deemed to be the property of the adjoining landowners. 12 Am Jur. 2d, Boundaries § 15 (1964). The second principle is that, under the “equal footing doctrine,” title to land beneath navigable waters passed to the State upon its admission into the Union. Montana v. United States, 450 U.S. 544, 551 (1981). Thus, ownership of the lakebed turns on whether or not the lake is deemed navigable.

Lands underneath navigable waters in Alaska therefore passed to the State at the time of Statehood in 1959, when Alaska entered the Union under the “equal footing doctrine.” Accordingly, beds of such waterbodies “are neither available for selection nor chargeable to either the ANCSA or the Alaska Statehood Act entitlements.” State of Alaska v. United States, 662 F. Supp. at 457. Quite simply, submerged lands situated in beds of navigable waterways in the State were not available for selection by Native corporations pursuant to section 12 of ANCSA. State of Alaska, 167 IBLA 250, 256 (2005). Navigable waters were not owned by the

^{7/} Admittedly, the regulation requires BLM to screen “rivers, streams, and lakes” to determine whether they are “major waterways.” 54 CFR 2650.4-7(a)(9).

United States when it conveyed title to the subject lands to The Port Graham Corporation. They are by definition “publicly owned lands,” 43 CFR 2650.0-5(r) to which BLM grants easements under 43 CFR 2650.4-7(a)(1). Conversely, if submerged lands did not underlie navigable waters at the time of statehood, such lands passed to the United States which then would have conveyed them, if selected, to Native village corporations under ANCSA section 12.

Thus, the State is correct to note that the issue of whether Rocky, Scurvy and English Bay Lakes constitute “publicly owned lands” as defined in 43 CFR 2650.0-5(r) is not answered by whether they constitute “major waterways.” Rather, the two terms, “publicly owned lands” and “major waterways,” represent different types of land interests for which BLM can reserve easements. “Major waterways” are themselves, like an easement, used for access to publicly owned lands. 43 CFR 2650.0-5(o). Whether the lakes are “publicly owned lands” is determined by their navigability status at the time of Alaska Statehood, not by whether they provide access to other such lands. It follows that whether the easements in question provide access to isolated tracts of publicly owned lands depends also on the navigability of the lakes.^{8/}

No party before us has clearly or accurately addressed the issue of the lakes’ navigability. BLM is correct to note that this question cannot be determined on this record simply by virtue of the fact that the acreages of each of the three lakes were not counted against The Port Graham Corporation’s entitlement to lands. The State has submitted a document demonstrating that the acreage charged to The Port Graham Corporation, as a pure mathematical calculation, could not have included the submerged lands under the three lakes. (Alaska Ex. 4.) BLM is correct that 1988 Congressional legislation ensured that Native village corporations may receive final conveyances of lands, and even of non-navigable waters, without such acreages being charged against their entitlements and without a final determination of the waterbody’s navigability.

We explained this in some detail in State of Alaska, 150 IBLA 112, 119-122 (1995). The impetus for the 1988 legislation was the fact that, in implementing ANCSA to convey lands to Native village corporations, the Department, corporations, and State often found themselves in disputes over the issue of navigability of waters within the selected lands. Because ownership of the lands at the time of a Native village selection controlled how much land would be charged to the Corporation, BLM made specific navigability determinations in order to render conclusions

^{8/} An “isolated tract” is defined as “a tract of one or more contiguous parcels of publicly owned lands completely surrounded by lands held in nonpublic ownership or so effectively separated * * * as to make its use impracticable without a public easement for access.” 43 CFR 2650.0-5(t).

regarding such ownership. Those determinations were appealed, thus tying up conveyances in litigation. We explained in State of Alaska, 150 IBLA at 120:

Because the question of navigability is essentially a question of fact, findings by the Department of the Interior are, in the context of Federal court determinations as to navigability, treated as purely advisory. However, notwithstanding the limitations inherent in a Departmental declaration that a body of water is or is not navigable, it is often necessary for the Department to make such an initial determination of navigability as an aid to carrying out many of its statutory functions. Such was deemed to be the case with respect to initial adjudications under ANCSA relating to land conveyances to Native regional and village corporations since the navigability or nonnavigability of waterbodies was deemed to affect the determination of what was “public land” under section 3(e) of ANCSA and, thus, acreage computations under sections 12 and 14 of that Act. ^{5/} See 43 U.S.C. §§ 1602(e), 1611, and 1613 (1994). [^{2/}] As a result, the Department made a number of determinations as to the navigability of waterbodies in Alaska which in turn led to a spate of Federal and administrative appeals. See, e.g., Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), aff’d sub nom. Alaska v. Ahtna, *supra*; Doyon, Ltd., 6 ANCAB 242 (1981); Doyon, Ltd. and State of Alaska, 5 ANCAB 324, 88 I.D. 636 (1981); Appeal of Bristol Bay Native Corp., 4 ANCAB 355, 87 I.D. 341 (1980); Appeal of Doyon, Ltd., 4 ANCAB 50, 86 I.D. 692 (1979). Not only did direct challenges to navigability determinations affect the timeliness of land conveyances but they also inhibited the determination of a number of other appeals where such determinations were merely ancillary to the issues being presented. See, e.g., Patricia and William Nordmark, 6 ANCAB 157 (1981).

^{5/} With one limited exception relating to nonnavigable bodies of water covering a half section of land or more, at the time that [the Alaska

^{2/} Section 12(a) of ANCSA permitted the village corporation for each Native village to select lands “from lands withdrawn by section 1610(a).” 43 U.S.C. § 1611(a)(1) (2000). Section 12 explained how to compute acreage when the selection included “public lands,” as defined in ANCSA section 3(e), which, in turn, defines “public lands” as “all Federal lands and interests therein located in Alaska except * * * the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation.” 43 U.S.C. § 1602(e) (2000). Accordingly, whether land was “public land” as defined in section 3(e) would be relevant to the determination of lands charged against the corporation’s entitlement. See Kawerak, Inc., 165 IBLA 94, 96-97 (2005).

National Interest Lands Conservation Act of 1980 (ANILCA), P.L. 96-487 (Dec. 2, 1980), 94 Stat. 2371,] was adopted the Departmental policy in computing acreage conveyed to Native corporations under ANCSA and to the State under the Statehood Act, supra, was to treat all submerged lands beneath nonnavigable waterbodies within a surveyed area as chargeable against entitlement. Lands beneath waterbodies deemed to be navigable were not charged against the Native corporation's entitlement. See 43 C.F.R. § 2650.5-1(b) (1982). In December 1983, however, the Department changed this policy to conform with the general rules applicable to cadastral surveys conducted in the lower 48 States which resulted in the exclusion from chargeability of the beds of all meandered waterbodies, not merely those which were deemed navigable. See 48 Fed. Reg. 54483 (Dec. 5, 1983). This change greatly reduced the necessity for BLM to determine whether or not any specific body of water was navigable (see generally Chugach Alaska Corp., 101 IBLA 375 (1988)) and was ultimately expressly ratified by Congress in the Act of Aug. 16, 1988, 102 Stat. 979. * * *

The policy discussed in footnote 5 was a 1983 policy memorandum issued by then-Secretary of the Interior James Watt, by which BLM could exclude acreage attributable to waters for which no navigability determination had been made from an entitlement and avoid making the determination. Congress adopted this policy in amendments to ANILCA Section 901. Title I, Pub. L. No. 100-395, 102 Stat. 979 (1988). Section 901(b)(1) provides that the conveyance of any lands abutting or surrounding a meanderable body of water would convey "all right, title, and interest of the United States, if any" in the lands beneath the meanderable waterbody, but that such acreage would not be charged against entitlement. 43 U.S.C. § 1631(b)(1) (2000). As we explained:

Since under the 1988 amendments the acreage beneath any waterbody which was meandered was not counted against entitlement irrespective of whether or not it was deemed navigable, the primary effect of these statutory changes was to remove the impediment to conveyances under ANCSA and ANILCA which had resulted from the fact that prior to this amendment, in order to determine acreage chargeability of land abutting waterbodies, BLM had to make navigability determinations in virtually every conveyance. Because of the 1988 amendments, there was no need in the overwhelming number of cases for BLM to make any determination of navigability whatsoever. See, e.g., State of Alaska (Ayakulik), 145 IBLA 122 (1998).

150 IBLA at 122.

Thus, BLM is correct to cite the 1988 changes to section 901 of ANILCA in refuting the State's presumption that, because the lands underneath the three lakes were not charged to The Port Graham Corporation's entitlement, the lands necessarily were navigable and must belong to the State. The State's presumption entirely ignores the effect of the legislation.^{10/}

BLM, on the other hand, is no more helpful in its briefing in establishing the nature of the lakes. BLM's reference to the 1980 document (State Ex. 2) discussing Rocky Lake presumes that this document is the critical navigability determination, for one or all of the lakes, which the State cannot now refute. BLM also contends that it is the State's job to prove navigability to the Board, as if it is our determination to make in the first instance.

As noted above, in State of Montana, 88 IBLA at 384, we explained that the "Secretary of the Interior has both the authority and the duty to consider and determine what lands are public lands of the United States" and that this duty includes the duty to decide what lands are navigable in order to determine whether the lands are retained in Federal ownership. We also explained in State of Alaska, however, that the question of navigability is one of fact, necessarily made in an initial determination as an aid to carrying out the Department's statutory functions. 150 IBLA at 120. This determination is one to be made by BLM in the first instance and it has not done so. Thus, BLM's suggestion that it is the State's obligation to submit proof of navigability to this Board in an appeal of a decision to terminate easements, where BLM itself has articulated no position regarding the ownership of the three lakes, sidesteps its own obligation to make the initial determination as an aid to render its easement decision. It failed to undertake this obligation when it misread its own regulations regarding the proper basis for asserting easements to publicly owned lands, 43 CFR 2650.4-7(a)(7), and for terminating easements to isolated tracts of publicly owned lands, 43 CFR 2650.4-7(a)(13).

BLM's implication that the 1980 memorandum attached to the State's SOR as Exhibit 2 constitutes an official "navigability determination" for the three lakes simply

^{10/} We infer from the State's arguments regarding meandering that it believes that the very fact that a waterbody is "meandered" means that it is navigable. (State Reply at 10, citing 1973 Manual of Survey Instructions.) The 1988 amendments to section 901(a) of ANILCA require that when the Secretary conducts surveys of lands selected by a Native, a Native corporation, or the State, "lakes [in excess of 50 acres], rivers, and streams shall be meandered in accordance with the principles in the [BLM], 'Manual of Surveying Instructions' (1973)." 43 U.S.C. § 1631(a)(1) and (2) (2000). It is clear from both the 1973 Manual at section 3-115 and ANILCA section 901(a) that the "meandering" required is not a determination of navigability. 43 U.S.C. § 1631(a)(3) (2000).

misstates that memorandum. The document is a May 22, 1980, memorandum from the Chief, Division of Resources, to the Alaska State Director, entitled “Navigability Review – State Selections – Seldovia Triangle.” It is clear that the document is purporting to review “State selections” and not the selections made by Native village corporations. As best we can determine, the only State selection in the same Township and Range location relevant here is A-058732 (South Half), which includes 223,800 acres in, inter alia, T. 10 S., R. 12-14 W. It therefore does not even relate to English Bay Lake in T. 10 S., R. 15. W., or that part of Scurvy Lake in T. 11 S. Without the relevant State selection files, we have no basis upon which to conclude that BLM meant to render any specific determination relevant to The Port Graham Corporation conveyance. The document does refer to Rocky Lake as a 100-acre lake and concludes that “[a]ll fresh-waterbodies are administratively non-navigable,” within the area covered by State selection A-058732 (South Half). The document contains no express statement regarding the navigability of Rocky Lake and, because it is not entirely clear that the drafter understood that the State selection was to include Rocky Lake, we cannot infer an intention on the part of the drafter to render a navigability determination. In the absence of any clarity on this point, and any reference to English Bay Lake or Scurvy Lake at all, we find it impossible to conclude that BLM meant to make an express navigability determination regarding the lakes at issue in the Port Graham Corporation conveyance. ^{11/}

Moreover, subsequent documents in the record undercut BLM’s construction of the 1980 memorandum as having rendered a navigability determination regarding any of the three lakes. First of all, the only documents in the file indicating that BLM undertook “navigability determinations” for ANCSA Selection AA-6695 indicate that BLM investigated portions of The Port Graham Corporation conveyance that did not include the subject lands. E.g., May 20, 1981, “Navigability Determinations” for listed lands in Townships 5-8, but not Townships 10 or 11. Further, documents in the record relating to ANCSA conveyances make clear that BLM did not necessarily make navigability determinations for lakes over 50 acres in size. A November 13, 1987, Memorandum from the Deputy State Director, Conveyance Management, to the Deputy State Director for Cadastral Survey, refers to a list of 26 Townships in a survey group, including the Townships in which the three lakes at issue here are located. (Nov. 13, 1987, Memorandum, “Navigable Waters in Survey Group Nos. 136 and 159,” Table 1.) It states: “Lakes more than fifty acres in size * * * are excluded because, regardless of their navigability status, these water bodies are

^{11/} Even if it had, the State is correct to point out that this document does not appear to have been disseminated to the public and therefore subject to appeal. In State of Alaska, 150 IBLA at 125, the Board held that only where BLM affirmatively found specific waterbodies to be nonnavigable in an appealable decision (in that case in an IC) was the State precluded from raising the argument in appealing a subsequent decision.

segregated on the survey plat.” Notably, this memorandum also states: “In general, the BLM considers nontidal water bodies navigable if at the time of Statehood, they were navigable for crafts larger than a one-person kayak.” ^{12/}

It seems clear to us that, while both BLM and the State attempt to construe the record to support their position on navigability of the three lakes, the reason neither party cites a clear statement on the navigability of any of the lakes is because no such determination has been made. A reading of the terms of the four ICs and the patent makes clear that these documents did not render any navigability finding for any of the lakes and, thus, they cannot preclude the State from raising the issue in this appeal. State of Alaska, 150 IBLA at 123. It follows that we must set aside BLM’s decision because its conclusions that the lakes are “non-navigable” and therefore that no easements to “publicly owned lands” were necessary are without foundation in the record. Without support for such conclusions, we cannot plausibly assess the State’s contention that the BLM erred in terminating the easement because, under 43 CFR 2650.4-7(a)(13), BLM “shall not terminate an access easement to isolated tracts of publicly owned land * * *.” Accordingly, we set aside and remand this matter. Only if BLM makes the requisite findings regarding the navigability of the lakes can it justify the subject action regarding each site or trail easement at issue. We recognize that site and trail easements may be treated differently under 43 CFR Subpart 2650 depending on whether they are characterized as “access easements.” However, in this case all of the easements at issue were, according to the August 28, 2003, decision reserved “to provide access” to the relevant lakes. BLM must make a determination regarding ownership of the lakes before it can properly implement 43 CFR 2650.4-7(a)(13).

^{12/} BLM cites *The Daniel Ball* as requiring a finding of “more commercial water traffic than BLM set forth” in its 1980 memorandum. As noted above, the 1980 memorandum did not expressly address Scurvy or Upper English Bay Lake at all, nor did it clearly address Rocky Lake in the context of rendering a conclusion on commercial water traffic. The reference to *The Daniel Ball*, is to a Supreme Court case at 77 U.S. (10 Wall.) 557, 563, 19 L. Ed. 999 (1870). Undoubtedly, the Supreme Court decided in that case that a navigability determination requires susceptibility of the waterbody to use for commerce at the time of statehood. It is clear, however, that “commerce” at the time Alaska became a state in 1959 requires an examination of standards as of that date. The Ninth Circuit has made clear that commercial activity at the time of Alaska statehood can include a relationship to the recreation industry. State of Alaska v. Ahtna, Inc., 891 F.2d at 1405. That the standard applicable to a navigability determination for Alaska may be different from the standard examined by the Supreme Court in 1870, or for a state such as Montana, entering the Union in 1889, see, e.g., State of Montana, 88 IBLA at 384-86, is a function of the fact that examination for navigability is made as of the date of statehood under the Submerged Lands Act.

Four additional points are worth noting. First, we recognize that the decision regarding easements EIN 6c D9 and EIN 6d D9 places them in a different posture from that of the other easements. In its decision, BLM stated with respect to each of these two easements: “This site lies on patented lands and is not on village conveyed lands.” We cannot find support in the record for treating these easements differently at this time, particularly in light of the maps in the record. See, e.g., Active Casefile AA0064EE/INV/D/2 (maps; composite map). Any final decision on remand should contain a full explanation for all of BLM’s conclusions.

Second, the State purports to challenge BLM’s determination that the lakes are not “major waterways” rendered on April 13, 2003. Given the confusion in the record regarding the status of the lakes as potentially State-owned lands, we do not find sufficient information in the record either to sustain BLM’s conclusion on this point, or to find that the State’s meager challenge to BLM’s conclusion would warrant overturning it. To the extent site easements are reserved on major waterways as “transportation easements,” the rules governing such easements are different from rules regarding easements to access publicly owned lands. See 43 CFR 2650.4-7(b) and (b)(3)(iv). BLM has not differentiated between site easements and trail or road easements at this point, and it is up to BLM to determine whether it should do so if it finds that the lakes are not navigable.

Third, BLM is correct to note that section 17(b) of ANCSA allows BLM to reserve easements for public purposes, rather than for access to private Native allotments. Because the Colliers’ concerns are resolved at least on a temporary basis by this decision, we do not otherwise address their appeal. The record contains numerous references to the Colliers and their boating on Rocky Lake, but no information regarding the dates they received certificates of allotment, or whether they had received some sort of access to their allotments by easement or right-of-way over public lands which was required to be grandfathered in the Native village conveyances. See, e.g., 43 U.S.C. § 1613(g) (2000). Should the Colliers object to BLM’s actions on remand, if they appeal they must state a basis for a contention that they are entitled to an easement.

Fourth, BLM’s discussion in its decision that the easements were terminated because they were “deemed to be recreational in nature,” is obscure to us in light of State of Alaska v. Ahtna, Inc., 891 F.2d at 1405, as well as the plain language of section 17(b), 43 U.S.C. § 1616(b) (1976). The State is of the view that BLM’s logic stems from its belief that the easements were for recreation on ANCSA patented lands. If, in fact, the lakes at issue were not navigable at the time of statehood, then the submerged lands on which the lakes are located would have been conveyed to The Port Graham Corporation by IC and patent. In such a case, BLM would be correct that “easements for recreation on lands conveyed pursuant to [ANCSA] shall not be reserved.” 43 CFR 2650.4-7(a)(7). Finally, to the extent that the remand of

this matter creates a debate over BLM's initial determination regarding the navigability of the lakes, we leave it to the parties to determine whether action under the Quiet Title Act, 28 U.S.C. § 2409a(e) (2000), may be in order. E.g., State of Alaska v. United States, 126 S. Ct. 1014 (Jan. 23, 2006).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is set aside and remanded.

Lisa Hemmer
Administrative Judge

I concur:

James F. Roberts
Administrative Judge