

STATE OF ALASKA

IBLA 84-132

Decided May 14, 1984

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving the conveyance of certain lands to Kuitsarak, Inc., without reservation of two site easements requested by the State of Alaska pursuant to section 17(b) of the Alaska Native Claims Settlement Act.

Set aside and remanded.

1. Alaska Native Claims Settlement Act: Easements: Generally

If BLM determines that a waterway through land to be conveyed pursuant to the Alaska Native Claims Settlement Act is a "major waterway," as defined in 43 CFR 2650.0-5(o), BLM must reserve in the land conveyance such public easements at periodic points along the waterway as are reasonably necessary to facilitate proper public use of the waterway after the conveyance.

2. Alaska Native Claims Settlement Act: Easements: Review

When the record of BLM's final decision concerning the reservation of public easements in the conveyance of land pursuant to the Alaska Native Claims Settlement Act does not reveal any explanation of BLM's determination not to include the reservation of particular easements timely recommended by the State of Alaska, the Board will set aside the decision and require BLM to consider the State's recommendations and provide a written explanation of its decision in response to the recommendations.

APPEARANCES: M. Francis Neville, Esq., Assistant Attorney General, State of Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed the September 29, 1983, decision of the Alaska State Office, Bureau of Land Management (BLM), approving the interim conveyance of certain lands to Kuitsarak, Inc., a Native village

corporation, pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1976 and Supp. V 1981). The State disagrees with BLM's conveyance decision which did not include the reservation of two public easements requested by the State pursuant to the provisions of section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), and the Department's regulations at 43 CFR 2650.4-7. <sup>1/</sup>

Section 17(b)(3) of ANCSA provides for the Department's reservation of public easements on lands patented to Native village and regional corporations. In exercising this authority, BLM is to consider whether a proposed easement is "reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, [or] such other public uses as the [Land Use] Planning Commission [or the Department] determines to be important." Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp.

664 (D. Alaska 1977). <sup>2/</sup> Prior to arriving at its final determination of the public easements to be reserved in a particular conveyance, BLM is to consider recommendations by the State submitted within 90 days after notice by BLM requesting such recommendations. 43 CFR 2650.4-7(a)(10) and (11).

It appears from the record that BLM's evaluation of the Native selections by Kuitsarak, Inc., began in 1974 when that corporation filed selection application F-14862-A. On March 25, 1977, BLM notified the State Commissioner, Department of Highways, of the easements proposed to be reserved in the conveyance of lands to the Native corporation, and directed the State to file its comments with the Land Use Planning Commission (LUPC). On the same date BLM also notified the LUPC of the proposed public easements and directed the LUPC to respond within 90 days. Included among the proposed easements identified by BLM were 25-foot streamside easements along the banks of the Goodnews River and the Middle Fork of the Goodnews River (EIN 13 D1, L; and EIN 15 D1, L).

In response to BLM's notice, the State informed the LUPC that it had no comments on the proposed easements. On June 17, 1977, the LUPC responded to BLM expressing, *inter alia*, its agreement with the proposed streamside easements. On April 4, 1978, the BLM State Director issued an internal memorandum

<sup>1/</sup> Following the filing of the appeal, the State and BLM stipulated to a partial settlement of the appeal, and by its order of Dec. 13, 1983, the Board approved their agreement. Remaining for consideration by the Board are the issues raised by the State concerning the lands to be conveyed to Kuitsarak, Inc., under BLM's Sept. 29, 1983, decision, located in secs. 29 and 32, T. 11 S., R. 72 W., and secs. 3 and 9, T. 12 S., R. 72 W., Seward meridian. BLM did not respond to the State's statement of reasons in this regard.

<sup>2/</sup> In this decision the district court held, among other things, that the Secretary must adhere to the quoted criteria prescribed for the Land Use Planning Commission in section 17(b)(1) of ANCSA, 43 U.S.C. § 1616(b)(1) (1976 and Supp. V 1981), when reserving public easements pursuant to section 17(b).

expressing his final decision concerning public easements to be reserved in the conveyance to Kuitsarak, Inc. The decision indicated the State Director's approval of the reservation of the two streamside easements.

Sometime in 1978 BLM suspended action on the Kuitsarak, Inc., selection application, presumably to await the Department's revision of its public easement regulations in accordance with the district court's decision in Alaska Public Easement Defense Fund v. Andrus, supra. <sup>3/</sup> The next pertinent document in the record is a BLM memorandum dated December 21, 1979, which presented new easement recommendations to the BLM State Director with the explanation that the recommendations were based on the new regulations. This document indicates that BLM reconsidered and rejected the proposed streamside easements along the Goodnews River and the Middle Fork of the Goodnews River. The basis for the rejection of each of these easements was stated to be: "The easement does not meet the requirements of the new easement regulations. It is recreational in nature." <sup>4/</sup>

On July 29, 1982, the BLM State Director notified the State of the revised, proposed public easement recommendations and requested that the State provide its comments within 20 days so that BLM could consider them prior to meeting with the affected Native corporations. BLM's memorandum expressed the determination that the Goodnews River is navigable but that the streamside easements proposed to be reserved along the banks of the Goodnews River and the Middle Fork of the Goodnews River (EIN 13 D1, L; EIN 15 D1, L) were contrary to the Department's regulations. The memorandum did, however, express BLM's tentative approval of the reservation of two 1-acre site easements along the Goodnews River. One of these proposed easements (EIN 8 C4, C6) was located on an island in the Goodnews River in the SW 1/4 sec. 18 and the NW 1/4 sec. 19, T. 12 S., R. 72 W., Seward meridian; the other easement (EIN 11 C5) was located "upland of the ordinary high water mark on the left bank of the Goodnews River between two unnamed streams in NE 1/4 Sec. 2, T. 11 S., R. 72 W., Seward Meridian." BLM described both site easements as "necessary to facilitate public travel along the Goodnews River."

The record does not contain any written response by the State to BLM's request for comments; however, it does reveal that a representative of the State attended a meeting to discuss BLM's tentative easement decisions, held at the village of Goodnews Bay on October 5, 1982, and proposed the reservation of additional site easements along the Goodnews River and the Middle Fork of the Goodnews River during this meeting.

On October 26, 1982, the State provided BLM with a summary of "additional evidence to support reservation of a reasonable pattern of 17(b) easements to be reserved on lands to be conveyed to Kuitsarak, Inc., at the

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<sup>3/</sup> The Department published revised regulations in response to the district court's decision on Nov. 27, 1978, at 43 FR 55326 (codified at 43 CFR 2650.4-7).

<sup>4/</sup> This conclusion follows from the district court's decision in Alaska Public Easement Defense Fund, supra at 677-78, and the resulting provisions of 43 CFR 2650.4-7(b).

village of Goodnews Bay." 5/ Included in the letter was the following information, obtained from Mr. Ron Hyde, owner of Alaska River Safaris and a longtime guide on the Goodnews River:

- 1) Alaska River Safaris averages 80 river floaters on the Goodnews River per season and approximately 100 other guests by power boat.
- 2) There are approximately 50 to 60 other floaters on the river during the summer.
- 3) During the peak of the season as many as 35 people may be on the river at the same time.
- 4) The trip through the conveyance area takes two to four days, depending on the weather conditions. At times floaters can be traveling into a 35 mph headwind in heavy rain.
- 5) Floating parties on the river average four stops per day.

In its letter the State also acknowledged Native corporation objections to the proposed site easements based on past littering, tree cutting, and interference with Native fish camps by recreational users of the river.

The Calista Corporation, the Native regional corporation affected by the Kuitsarak, Inc., land selections, also wrote to BLM on October 26, 1982. In its letter the regional corporation reported opposition by Kuitsarak, Inc., to the additional site easements proposed by the State and suggested that Mr. Hyde could obtain a "temporary permit" from the village corporation when conducting rafting trips on the Goodnews River. On October 29, 1982, the Calista Corporation again wrote to BLM, responding particularly to the State's October 26 letter. In this letter the regional corporation described the proposed site easements as recreational in nature, and thus not authorized under the Department's regulations, and further suggested that if recreational users of the Goodnews River were interested in the easement decisions they should have participated in the village land conveyance meeting because the State is "totally inept to propose easements utilized by specific user groups on corporate lands."

There is no direct response by BLM to the State's proposal for additional site easements indicated in the record. An internal BLM memorandum, dated October 18, 1982, discusses the October 5 meeting at the village of Goodnews Bay, and includes the information that the Native village corporation board did not object to the reservation of the site easement identified as EIN 11 C5, but did object to the site easement identified as EIN 8 C4, C6, in part because past river travelers had cut trees and left litter along the

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5/ In its letter the State referred to an enclosed map on which suggested locations for the easements were noted. The map is not included in the record.

river. There is, however, no reference in this memorandum to the additional site easements proposed for reservation by the State.

An internal memorandum dated March 3, 1983, indicates BLM's final decision regarding the navigability of water bodies within the lands selected by Kuitsarak, Inc., including the determinations that the Goodnews River and the Middle Fork of the Goodnews River are navigable waterways. An internal memorandum dated June 22, 1983, indicates BLM's final decision regarding proposed easements and its determination that the Goodnews River and the Middle Fork of the Goodnews River are major waterways. The easements approved in this memorandum are the same as those reserved in BLM's September 29, 1983, decision approving the interim conveyance of lands to Kuitsarak, Inc. Neither document contains any reference to the State's proposal for additional site easements.

In support of its appeal the State argues that the record does not show a rational basis for BLM's denial of the State's request for additional easements, and that reservation of the additional easements requested by the State is necessary to facilitate reasonable public use of the Goodnews River and the Middle Fork of the Goodnews River. As is explained below, the Board has concluded that BLM did not adequately justify its decision not to reserve the additional easements requested by the State and, therefore, remands the case to BLM for further consideration of the State's requests.

[1] Under BLM's determination that the Goodnews River and the Middle Fork of the Goodnews River are "major waterways," made pursuant to 43 CFR 2650.0-5(o), it is incumbent upon BLM to reserve such public easements "at periodic points" along these waterways as are reasonably necessary to facilitate public use of the waterways. See Alaska Public Easement Defense Fund, supra at 675-76, 677-78; 43 U.S.C. § 1616(b)(1) (1976); 43 CFR 2650.4-7(a)(1) and (b)(3). As the district court stated in Alaska Public Easement Defense Fund at page 677, the statutory authority for the reservation of such easements is "in recognition of the fact that there would be valid public uses of the State's water, even when surrounded by land withdrawn pursuant to the ANCSA," and "[t]he purpose of the easements along waterways is to provide a place for docks, campsites, and such facilities to service those who are properly using the public water."

[2] It may be BLM's opinion that reservation of the additional easements urged by the State in this case is not necessary to reasonably facilitate public use of the Goodnews River and the Middle Fork of the Goodnews River. We will not attribute this position to BLM, however, for it is not apparent from the record before us that BLM gave any serious consideration to the State's proposals prior to its approval of the interim conveyance of lands to Kuitsarak, Inc., and BLM did not appear in the appeal to offer any explanation for not reserving the requested easements in the conveyance.

The State has presented information to BLM supporting its proposal for additional site easements along the Goodnews River to facilitate public use of that waterway. See Letter of October 26, 1982, from James E. Culbertson, Natural Resource Officer, Alaska Department of Natural Resources, to Robert

Arnold, Assistant to the State Director for Conveyance Management (BLM). The thrust of this information is that the distances between the site easements approved by BLM on the Goodnews River (EIN 8 C4, C6; EIN 11 C5), considered with remaining access to or from the waterway across nonselected, Federal lands, are too great to facilitate convenient public use of the waterway. Inasmuch as this information relates to proposals offered by the State at least as early as the October 5, 1982, meeting at the village of Goodnews Bay, it appears that BLM was obliged to consider the State's recommendations in accordance with the provisions of 43 CFR 2650.7(a)(10) and (11). 6/

Because the record does not reveal a rational basis for either nonconsideration or rejection of the State's proposals, the Board directs that BLM shall investigate the information presented by the State to determine its accuracy, and if the results of such investigation confirm the asserted need for additional easements, BLM shall amend its September 29 conveyance decision to provide for the reservation of such easements with appropriate written justification. See State of Alaska, 79 IBLA 335 (1984); United States Fish & Wildlife Service, 72 IBLA 218 (1983). 7/ If BLM determines that an additional easement recommended by the State is not reasonably necessary, it shall support its determination with a written explanation. State of Alaska, supra. 8/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the portion of BLM's September 29, 1983, decision approving interim conveyance of lands to

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6/ BLM notified the State of its tentative, final easement determinations in a memorandum dated July 22, 1982. Although BLM requested that the State respond within 20 days, the regulations provide that the State "shall be afforded 90 days after notice by the Director to make recommendations with respect to the inclusion of public easements in any conveyance." 43 CFR 2650.4-7(a)(10). In any event, BLM has not suggested that it considered the State's proposals to be untimely.

7/ The additional evidence presented by the State in its October 26, 1982, communication to BLM apparently did not concern past use of the Middle Fork of the Goodnews River. Nonetheless, in conducting its investigation as directed in this decision, BLM should consider whether uses of that "major waterway" support the reservation of an additional easement as asserted by the State.

8/ In this process BLM shall disregard the Native corporation arguments previously raised in opposition to the proposed easements. Their assertion that the proposed easements would not be lawful because they are recreational in nature is contrary to the statutory authority to reserve easements to facilitate proper use, including recreational use, of State waterways. Their suggestion that the State cannot properly represent the interests of its citizens in the easement decision process ignores the clear mandates of the statute and regulations that the State be consulted on behalf of its citizens. Their concern over past littering, tree cutting, and other destructive actions by users of the waterways through the selected lands is properly addressed by regulations governing use of easements, rather than by denial of public easements.

Kuitsarak, Inc., and appealed by the State of Alaska is set aside and the case is remanded to BLM for further action consistent with the Board's opinion.

R. W. Mullen  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Franklin D. Arness  
Administrative Judge

