

STATE OF ALASKA

IBLA 2002-197

Decided October 27, 2005

Appeal from a decision of the Anchorage Field Office, Bureau of Land Management, determining that no public easement had been reserved on lands conveyed to a Native corporation. AA-6709-EE; AA-6709-A through AA-6709-E.

Reversed and remanded.

1. Alaska Native Claims Settlement Act: Appeals:  
Standing--Alaska Native Claims Settlement Act:  
Easements: Decision to Reserve--Rules of Practice:  
Appeals: Standing to Appeal

Departmental regulation 43 CFR 4.410(b) limits standing to appeal a decision relating to a land selection pursuant to the Alaska Native Claims Settlement Act (ANCSA) to parties claiming a property interest in land affected by the decision. The State of Alaska's reversionary interest in land below the ordinary high water line, which it had transferred to a municipal corporation on the understanding an easement to it had been reserved, and the State's interest in submerged lands beyond the transferred land together constitute a sufficient property interest to sustain the State's standing to appeal a BLM decision determining that no public easement providing access to the submerged lands had been reserved in an ANCSA land conveyance to a Native corporation.

2. Alaska Native Claims Settlement Act: Conveyances:  
Generally--Alaska Native Claims Settlement Act:  
Conveyances: Interim Conveyance--Alaska Native Claims Settlement Act: Easements: Decision to Reserve--Patents of Public Lands: Reservations

A BLM decision determining that an easement segment was not reserved in the interim conveyance and patent

conveying selected lands to a Native corporation will be reversed where, although the easement language in the interim conveyance and in the patent do not explicitly describe the segment at issue and the maps associated with the interim conveyance are ambiguous as to the existence of the easement, the map incorporated into the patent as part of the conformance process clearly depicts the easement segment and establishes that the easement segment was reserved in the patent. The patent's clear reservation of the easement segment precludes BLM from determining that the easement segment never existed.

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#### OPINION BY ADMINISTRATIVE JUDGE HEMMER

The State of Alaska has appealed part of a January 9, 2002, decision issued by the Anchorage Field Office, Bureau of Land Management (BLM). <sup>1/</sup> The State challenges the portion of the decision determining that the segment of easement EIN 3 C4, providing access to Humpy Cove, neither had been reserved when the lands were conveyed to the Ounalashka Corporation (Ounalashka) nor subsequently was granted to the United States by Ounalashka, and thus had never existed.

The land at issue in this appeal adjoins the Humpy Cove area of Summer Bay on Unalaska Island, one of the Aleutian chain of islands. See BLM Answer at 2. <sup>2/</sup> On August 15, 1979, BLM issued Interim Conveyance No. 223 (IC 223) to Ounalashka pursuant to sections 14(a) and 22(j) of the Alaska Native Claims Settlement Act, as amended (ANCSA), 43 U.S.C. §§ 1613(a) (1976) and 1621(j) (2000), conveying title to the surface estate of approximately 102,885 acres of land, subject to various exceptions and reservations and subject to issuance of the

<sup>1/</sup> The decision was initially issued undated. By letter dated Jan. 15, 2002, BLM provided the parties with a "replacement" cover page bearing the Jan. 9, 2002, date. See Mar. 21, 2002, Board order granting State's petition for stay (Stay Order) at 2.

<sup>2/</sup> Humpy Cove, named for the humpy salmon found there, appears on maps to be part of Summer Bay, separated from the rest of the Bay by a small headland jutting into the Bay to the north. (BLM Answer Ex. A (Map prepared by Ounalashka, Sept. 21, 2001).)

confirming patent. (Statement of Reasons (SOR) Ex. 13 (IC 223) at 1, 5, 6-7.) The effect of the IC was to “convey to and vest in the recipient exactly the same right, title, and interest in and to the lands as the recipient would have received had he been issued a patent by the United States.” 43 U.S.C. § 1621(j)(1) (2000); see also 43 CFR 2650.0-5(h).

Easement EIN 3 C4 was one of the easements IC 223 reserved to the United States in accordance with ANCSA section 17(b), 43 U.S.C. § 1616(b) (1976). <sup>3/</sup> Section 17(b) authorized the Secretary of the Interior to reserve such easements across lands selected by village and regional corporations, after consultation with the State and 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(b)(1) and (3) (1976); see Alaska Public Easement Defense Fund v. Andrus (Alaska Public Easement Defense Fund), 435 F. Supp. 664, 675 (D. Alaska 1977); Seldovia Native Corporation, 161 IBLA at 280.

IC 223 described easement EIN 3 C4 as “[a]n easement sixty (60) feet in width for an existing road from the east side of Captains Bay in Sec. 15, T. 73 S., R. 118 W., Seward Meridian, northeasterly to Summer Bay thence southwesterly to Unalaska.” (IC 223 at 6-7, ¶ 2.b.) IC 223 also reserved another easement in the vicinity of Humpy Cove, easement EIN 3a C4, which was described as “[a]n easement for an existing access trail twenty-five (25) feet in width from the road EIN 3 C4 near Summer Bay in Sec. 32, T. 72 S., R. 116 W., Seward Meridian, southeasterly to Agamgik Bay.” (IC 223 at 7, ¶ 2.c.) Those descriptions are by themselves inadequate to delineate the roads and trails. The maps in the administrative record associated with IC 223 are fairly illegible; it is not possible to determine from any of them whether easement EIN 3 C4 reached the mean high tide line at Humpy Cove. See BLM Answer at 7-8, Exs. F and G.

IC 223 was conformed to survey along with other interim conveyances to Ounalashka, IC 14 and IC 40, during the late 1980s. At that time, the record shows

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<sup>3/</sup> 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 279, 280 n.2 (2004); Mendas Cha-Ag Native Corp., 93 IBLA 250, 254 n.3 (1986).

that the U.S. Fish and Wildlife Service (FWS) raised questions regarding whether public access to Humpy Cove was sufficiently clear in IC 223. A July 14, 1987, FWS memorandum asserted that a number of errors were introduced into the plotting of the road easement symbols on the quadrangle maps associated with IC 223 due to “differences in scales between easement symbols and map features.” See SOR Ex. 18. FWS asserted that a number of corrections would be required before issuance of the confirmatory patent “to avoid the United States having to undertake what could be a costly acquisition program.” On August 13, 1987, FWS prepared a memorandum recommending that BLM reserve a site easement for IC 223 (223-3, 223-3a) to make the trails or roads more useable. (SOR Ex. 14.)

On September 26, 1990, BLM issued Patent No. 50-90-0651 to Ounalashka conveying lands in IC 223 and other ICs. Regarding easements, the patent, a copy of which is in the record, expressly provides:

Pursuant to Sec. 17(b) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. [§§] 1601, 1613(b), the following public easements, referenced by easement identification number (EIN) on the easement maps, copies of which can be found in the Bureau of Land Management’s Public Land Records, are reserved to the United States.

The patent revised the description of easement EIN 3 C4 to read:

An easement sixty (60) feet in width for an existing road which consists of two segments. The first segment (a portion formerly known as EIN g) travels from the eastern boundary of Tract A, U.S. Survey 778 in Sec. 11, T. 73 S., R. 118 W., Seward Meridian, northeasterly to Summer[] Bay in Sec. 32, T. 72 S., R. 116 W., Seward Meridian. From segment one in Sec. 32, T. 72 S., R. 116 W., Seward Meridian, the second segment proceeds southerly and then westerly to the Unalaska Townsite in Sec. 13, T. 73 S., R. 118 W., Seward Meridian. \* \* \*.

(Patent No. 50-90-0651 at 14, ¶ 4.b.) The patent also contained a modified description of easement EIN 3a C4, identifying that easement as

[a]n easement twenty-five (25) feet in width for an existing access trail in two segments. The first segment travels from the existing road identified as EIN 3 C4 in Sec. 32, T. 72 S., R. 116 W., Seward Meridian, northerly to U.S. Survey 8369. The second segment travels from U.S. Survey 8369, southeasterly to the mean high tide line of Agamgik Bay in Sec. 1, T. 73 S., R. 117 W., Seward Meridian. \* \* \*.

(Patent No. 50-90-0651 at 14, ¶ 4.c.)

The record contains a copy of the easement map, referenced in and attached to the patent, covering the area in question. (BLM Memorandum dated Jan. 5, 1998, from Bob Rinehart to Carol Shobe, and attached map; see also SOR Ex. 20 (enlarged easement map).)<sup>4/</sup> Although the patent's description of easement EIN 3 C4 did not contain an express call to the mean high tide line at Humpy Cove, BLM's easement map plainly depicts that easement as providing access to Humpy Cove. The easement map depicts both double and single lines. Use of a double line on an easement map designates a reservation of an existing road; use of a single line designates reservation of an existing trail. See Memorandum dated Jan. 5, 1998, from Rinehart to Shobe. By double line plainly marked as "3 C4," the easement map depicts reservation of the Humpy Cove spur road that is directly at issue in the present appeal.<sup>5/</sup> See Jan. 9, 2002, decision at 6, 7, Figure 2; see also BLM Answer Ex. H.

Accordingly, when Patent No. 50-90-0651 issued, in express terms it did not reference Humpy Cove. Nonetheless, the incorporated easement map showed access to Humpy Cove by virtue of EIN 3 C4.

Subsequently, BLM addressed the segment of easement EIN 3 C4 providing public access to Humpy Cove (also known as the Humpy Cove spur road) in four decisions. On September 5, 1997, the Anchorage District Office issued a decision (SOR Ex. 1) terminating in whole and in part various Section 17(b) public easements, including some in Patent No. 50-90-0651. In that decision, BLM

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<sup>4/</sup> In its SOR, at 11 n.6, the State asserts, as does the above-referenced BLM Memorandum, that the map in the record was the one attached to the patent. Notably, while both BLM and Ounalashka acknowledge that maps "associated with" the patent depict a spur road to Humpy Cove, neither party specifies which map is the relevant "easement map" explicitly identified in the patent. Because the Memorandum from Rinehart to Shobe expressly identifies the easement map consistently with the identification of the relevant map made by the State, we refer to it hereafter as the "easement map."

<sup>5/</sup> The double line depicts an existing road running out of Unalaska to the southeast for approximately 1.5 miles; turning to the northeast and running for approximately 2.5 miles (including a large "S" turn); and turning to the north and running approximately 2.5 miles, where the road is shown forking to the left and right. To the left fork, the road turns west and curves to the north, covering approximately .75 mile, and then turns to the southwest, covering approximately 3 miles and returning to the northeast of Unalaska. To the right fork, the existing road (still plainly designated as "3 C4" proceeds to the northeast approximately 1 mile where it meets the start of existing trail designated as "3a C4." Importantly, the existing double line road continues past that junction, turning to the northwest and running approximately .5 mile to Humpy Cove.

determined, inter alia, that the portion of the first segment of easement EIN 3 C4 “from the intersection with EIN 3a C4 to Summer Bay (Humpy Cove), ends on land owned by the Ounalashka Corporation where a site easement was never reserved as required” and would, therefore, be released and terminated. (Sept. 5, 1997, decision at 10.) The State appealed from that part of the decision in an appeal docketed as State of Alaska, IBLA 98-12. By order dated May 22, 1998 (SOR Ex. 2), at BLM’s request, the Board vacated that part of the September 5, 1997, decision addressing the easement segment to Humpy Cove. We noted that

BLM [has] advised the Board that “[u]pon remand, all interested parties, including the State of Alaska and Ounalashka Corp., will be able to provide additional evidence to BLM concerning the continued justification or lack of justification for retention of EIN 3 C4,” after which BLM would issue a new decision which would be subject to appeal by any party adversely affected.

State of Alaska, IBLA 98-12, Order dated May 22, 1998, at 1.

On August 6, 1998, representatives of BLM, FWS, the State of Alaska Department of Natural Resources, Ounalashka, and the City of Unalaska conducted a field examination of the segment of easement EIN 3 C4 from its intersection with trail easement EIN 3a C4 westerly to Humpy Cove in sec. 32, T. 72 S., R. 116 W., Seward Meridian, to investigate the validity of that easement segment. See Aug. 13, 1998, Field Report (SOR Ex. 21) at 1. The Field Report, authored by the FWS representative, pointed out that it was currently impossible to drive a conventional vehicle past the parking lot located a short distance west of the road junction with easement EIN 3a C4 because Ounalashka had put up road blocks and because of generally poor road conditions. The Report further stated:

[t]he “road” to Humpy Cove divides at the parking lot. The creek side route was probably the original road. The upland road was created in an attempt to find higher, dryer ground. Both roads present hazards to standard vehicles. Both routes are suitable as foot paths.

1/4 mile west of the parking lot, the trails converge just upstream from the mouth of “Humpy Creek” (which is called “Halfway Creek” on the [Corps of Engineers] maps. Access to the tidelands is fairly easy, although the creek must be crossed to access the north shore of the cove.

I walked south along the beach to see whether it would be possible to walk over to the “Summer Bay Recreation Site” which is approximately one mile to the southwest. Walking the beach would

require much scrambling over boulders, and would not, in my opinion, fall under the definition of “reasonable access”.

Id. at 1. According to the Field Report, when asked his thoughts, the BLM Realty Specialist added that the easement was needed for public access to the tidelands at Humpy Cove and should be retained because it was unreasonable to expect the public to walk the beach or take a boat or skiff to Humpy Cove from the Summer Bay Recreation Site. He was unsure at that point, however, whether the easement should be retained as a road or as a trail. Id. at 2.

BLM issued a second decision addressing public access to Humpy Cove on December 9, 1999, reversing its prior conclusion. (SOR Ex. 3.) In that decision, BLM explained that the first segment of easement EIN 3 C4, known as Summer Bay Road, connected downtown Unalaska to the waters of Summer Bay at Humpy Cove, and noted that, while the first five miles of the road to the Summer Bay Recreation Site Subdivision had been surveyed, platted, and dedicated to public access by Ounalashka in 1994, the final one mile of the road from the recreation site subdivision to Humpy Cove had not been surveyed. (Dec. 9, 1999, decision at 4.) BLM found that easement EIN 3 C4 terminated on tidelands the State had conveyed to the City of Unalaska for use for public trust purposes, not on Ounalashka land, and that the field examination had revealed that no other reasonable alternative access routes to Humpy Cove existed. Id. BLM concluded that the Humpy Cove trail was “important for the public to access this area for fishing, hunting, beach combing, landing of skiffs, and foot travel along the beach below the mean high tide line to adjacent areas of Summer Bay \* \* \*.” Id. at 4-5. BLM therefore decided to retain the portion of the first segment of easement EIN 3 C4 from its intersection with easement EIN 3a C4 to Summer Bay, as a trail to Humpy Cove. Id. at 4-5.

On December 29, 1999, however, BLM reversed the December 9 decision in a third decision relating to the easement to Humpy Cove (SOR Ex. 4), vacating the earlier decision in its entirety. BLM explained that, “[d]ue to comments received from some of the affected parties, it was decided that a further review of the easements was warranted.” (Dec. 29, 1999, decision at 1.)

This further review ultimately led to the January 9, 2002, decision challenged on appeal. In this decision, BLM determined that there never had been an ANCSA section 17(b) easement over Ounalashka lands to Humpy Cove in the first place. BLM stated that the Federal Government could have secured an easement to Humpy Cove only by reserving the easement when it conveyed the lands in sec. 32, T. 72 S., R. 116 W., Seward Meridian, to Ounalashka on August 15, 1979, via IC 223, or by Ounalashka’s granting the United States such an easement, neither of which, it held, had occurred here. (Jan. 9, 2002, decision at 3.)

According to BLM, IC 223 described easement EIN 3 C4 as a road looping to the northeast out of Unalaska for about 4 miles before returning to Unalaska and consisting of two segments, Summer Bay Road and Overland Drive, which intersect on the northeast shore of Summer Bay Lake. BLM portrayed EIN 3a C4 as a trail easement beginning at the intersection of Summer Bay Road and Overland Drive and crossing Unalaska Island to Agamgik Bay. *Id.* at 4 and Figure 1.<sup>6/</sup> BLM noted that neither easement description contained an express call to the mean high tide line at Humpy Cove nor did the maps associated with IC 223 depict an easement reservation to the mean high tide line at Humpy Cove. BLM therefore concluded that the United States had not reserved a public right of access to the mean high tide line at Humpy Cove when it conveyed the land by interim conveyance to Ounalashka. *Id.* at 4.

Acknowledging that ICs are not final, BLM explained that it generally addressed easement deficiencies within an IC through the process of conformance, which occurs after issuance of the IC and before issuance of a final patent. BLM differentiated among three types of conformance: Conformance of an IC's easements to the ruling of the District Court in Alaska Public Easement Defense Fund, construing 43 U.S.C. § 1616(b) (1976); conformance of an IC's easements to the Departmental easement regulations promulgated in 1978, 43 CFR Subpart 2650; and conformance of an IC's boundary description to survey. (Jan. 9, 2002, decision at 5.) BLM determined that the IC was not subject to the first two types of conformance "as it was in conformity with both" the court case and the regulations. Thus, the purpose of the IC was to pass legal title to the land to Ounalashka, subject only to confirmation of the boundary descriptions after approval of the survey. *Id.*

BLM noted that IC 223 was conformed to survey in conjunction with IC 14 and IC 40, both of which were also subject to conformance in accordance with the ruling in Alaska Public Easement Defense Fund and the regulations. BLM pointed out that public access to Humpy Cove was expressly considered during the 1988 conformance period. (Jan. 9, 2002, decision at 5.) Citing maps associated with the September 1988 BLM easement conformance decisions for IC 14 and IC 40 and a map associated with November 1988 Ounalashka easement donations, BLM acknowledged that these maps depict access to Humpy Cove. *Id.* Although BLM acknowledged that the maps carried some weight, it determined that the lack of any further documentation expressing the intent to grant such an easement to the United States deprived them of any significance. (Jan. 9, 2002, decision at 5.)

BLM observed that neither the description of easement EIN 3 C4 nor that of easement EIN 3a C4 in Patent No. 50-90-0651 contained an express call to the mean high tide line at Humpy Cove, despite the inclusion in the description of easement

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<sup>6/</sup> Figure 1 is a map prepared for purposes of the Jan. 9, 2002, decision allegedly based on maps related to IC 223.



EIN 3a C4 of an express call to the mean high tide line of Agamgik Bay. BLM admitted that the “graphic representation” associated with the patent depicted access to Humpy Cove, but gave greater value to the lack of an express reservation or grant of an easement to the mean high tide line at Humpy Cove. Id. at 6 and 7, Figure 2. BLM concluded:

While it is evident that between February 17, 1988, the beginning of the conformance process, and September 26, 1990, the date of final patent, access to the mean high tide line at Humpy Cove was contemplated, there is no express reservation of such an easement nor is there any express donation of such an easement. Therefore and the maps notwithstanding, there is no Federally protected right of access for the public to the mean high tide line at Humpy Cove. Since no easement was reserved or acquired, it was improper and unnecessary for [BLM’s] decision of September 5, 1997, to terminate a public easement to Humpy Cove. It is the [BLM’s] determination that no such public easement exists.

Id. at 6.

The State appealed and petitioned for a stay of the decision pending appeal. By order dated March 21, 2002, the Board granted the stay request. Ounalashka and BLM subsequently submitted answers and the State submitted a reply brief.

[1] Before addressing the merits, we must first determine the threshold issue of the State’s standing to appeal the decision under the terms of 43 CFR 4.410(b) (2002). That rule states: “For decisions rendered by Departmental officials relating to land selections under [ANCSA], as amended, any party who claims a property interest in land affected by the decision, an agency of the Federal Government or a regional corporation shall have a right to appeal to the Board.”

BLM argues that the State has not shown a property interest, and cannot therefore pursue the appeal, because the State conveyed the tidelands seaward of the mean high tide line in Summer Bay, including Humpy Cove, to the City of Unalaska in 1995 and 1996 via Alaska Tidelands Patents 372 and 383. (BLM Answer at 3-4.) The State acknowledges this but nonetheless maintains that under Alaska Statutes (AS) 38.05.825, such conveyances are subject to the public trust doctrine and that the State retains an easement, enforceable in a court of competent jurisdiction, to ensure that reasonable access to public waters and tidelands is provided. (SOR at 8.) The State contends that this retained statutory public trust easement qualifies as the requisite property interest in lands affected by the BLM decision necessary to afford it standing to appeal. (SOR at 8.)

Ounalashka argues that neither that doctrine's creation of a right in members of the public nor its imposition of management responsibilities on the State provides the State with the requisite property interest to support standing. (Ounalashka Answer at 11-12.) Ounalashka avers that, under AS 38.05.825(c) and (d) (Ounalashka Answer Ex. H), the tidelands conveyance essentially transferred the responsibility to manage the tidelands in accordance with the public trust doctrine to the City, subject only to the State's right to enforce the City's obligation in court. (Ounalashka Answer at 13.) In short, Ounalashka maintains that, by deed and statute, the City, not the State, now owns the tidelands, has the exclusive and complete authority to manage those lands, and has a sufficient property interest to support standing to appeal BLM's decision. Ounalashka submits that the State's remaining recourse is to sue the City under the statute to compel the City to honor its public trust responsibilities. Id. at 15.

BLM asserts that the State's interest in public access and a purported reserved easement to enforce reasonable access to public water and tidelands are insufficient to satisfy the standing requirements of 43 CFR 4.410(b). (BLM Answer at 3-4.) BLM further avers that AS 38.05.825 (BLM Answer Ex. D) does not create the reserved easement asserted by the State, but places the responsibility to protect public access on the municipal grantee, leaving the State with nothing more than the right to attempt to enforce whatever rights exist under the public trust doctrine in a court of competent jurisdiction, which the Board is not. (BLM Answer at 4-5.)

In reply, the State avers that its interest under the public trust doctrine rises to the level of a legally cognizable interest in the tidelands conveyed to Unalaska, regardless of whether the State retained legal title. (Reply at 3.) The State maintains that it retains full ownership of all submerged lands seaward of the City's seaward boundary line, out to the 3-mile limit of the Territorial Sea, and that the public's right to use these State-owned submerged lands beginning at the mean low tide boundary of the City's tidelands is affected by the termination of the easement ending at the mean high tide line. Id. at 4. The State therefore maintains that it has sufficient property interests at stake to support its standing to appeal. Id.

We agree with the State on this issue for the following reasons. Despite the State's conveyance pursuant to AS 38.05.825 of the submerged lands at Humpy Cove to the City of Unalaska in 1995 and 1996, AS 38.05.825(d) grants the State a right of reversion to the conveyed lands: "Title to land conveyed under this section that is retained by the municipality reverts to the state upon dissolution of the municipality." The record makes clear that the State had no reason to believe that there was an issue of whether access was reserved to the mean high tide line of Humpy Cove until 1997 when BLM issued its first decision. Accordingly, the State's transfers of a property interest to the City of Unalaska in 1995 and 1996, as well as its retention of a reversionary interest in those transfers, were based upon the expectation that the

United States had reserved an easement to the mean high tide line at Humpy Cove, which had not been disputed, and that this property interest would be managed by Unalaska and not Ounalashka. The State has standing to obtain a determination regarding the nature of access to its interest in submerged lands, its contract with the City, and its reversionary interest, to the extent it is controlled by BLM's decision. Thus, we find that the State's title to the submerged lands seaward of the City's boundary and its reversionary interest in the conveyed tidelands qualify as the requisite property interest in land affected by BLM's decision to establish the State's standing to appeal the January 9, 2002, decision. Cf. Donna & Larry Charpied, 150 IBLA 314, 318 (1999), appeal dismissed, Desert Citizens Against Pollution v. Bisson, 954 F. Supp. 1430 (S.D. Cal. 1997), rev'd and remanded on other grounds, 231 F.3d 1172 (9th Cir. 2000) (considering the reversionary interest held by the United States in the surface estate of private lands to be part of the public lands identified in a land exchange).

Turning to the merits, the principal difference between the positions of the State and of BLM and Ounalashka appears in the different weights they accord the documents associated with the issuance of the patent. The State argues that maps associated with the patent reveal that the question of whether an easement to Humpy Cove had actually been reserved (a matter the State argues was intended at the time of the IC) arose during the time of conformance, and that the changes in the maps reflect an effort to resolve the problem by clarifying the existence of the easement on the maps. The State points to the 1987 FWS memoranda discussed above identifying the existence of errors in maps associated with the IC. (SOR Exs. 14 and 18.) The State argues that FWS's 1987 recommendations both demonstrate why the patent was conformed to verify an access easement to Humpy Cove and also disprove BLM's theory that there was no intent in the conveyance of IC 223 to reserve an easement to the mean high tide line at Humpy Cove. (SOR at 10.) Rather, the State points out that the maps associated with IC 223, upon which basis Figure 1 in BLM's decision was produced, are the same maps FWS described as erroneous in its July 14, 1987, memorandum. (SOR at 9.) In the State's view, the maps associated with the IC were in error, FWS pointed this out, and the maps associated with the patent were changed to correctly reflect the reservation of an easement providing access to Humpy Cove. The State finds further support for this view in BLM's past findings and admissions which, until the latest of the four decisions, acknowledged the existence of an easement. Id. at 9.

EIN 3 C4, including the segment to the tidelands of Humpy Cove, is clearly depicted on the easement map which is an integral part of the patent to Ounalashka. The State avers that the regulations require that public easement provisions be placed in both the IC and the patent and that the easements be identified on the maps incorporated as part of the IC and patent, but do not mandate that easements be described by an express call to the mean high tide line. (SOR at 12, citing 43 CFR

2650.4-7(d)(1) and (3).) The State thus contends that the existence of the easement on the maps associated with the patent proves the reservation of the easement and asserts that BLM may not ignore the existence of the easement on maps by choosing to rely exclusively on the easement descriptions.<sup>7/</sup>

By contrast, BLM and Ounalashka contend that the issue of what reservations were held by the United States is controlled exclusively by the IC. They argue that no public easement to Humpy Cove was reserved in the IC, and that once the IC was issued, the Government fundamentally had no authority to change what the IC granted in the patent. (BLM Answer at 5-6.) Despite the conformance process, BLM asserts that IC 223 conveyed legal title and that the regulatory definition of an IC found at 43 CFR 2650.0-5(h) compels the conclusion that the IC included all the reservations for easements. BLM concedes that easement maps for the area depicted an easement to Humpy Cove in 1988, after BLM undertook a comprehensive review of easements reserved in multiple Unalaska Island land conveyances to Ounalashka. *Id.* at 8-9; compare Ex. 4, with Ex. G and Ex. H. BLM's basic premise is that, whether or not these maps reflect what was intended to be conveyed by patent, such conveyance was effectively ultra vires. (BLM Answer at 9.) BLM maintains that the IC's language and the contemporaneous and preceding maps clearly establish that no easement to Humpy Cove was contemplated when the IC was issued. (BLM Answer at 6-8 and Ex. F.)<sup>8/</sup>

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<sup>7/</sup> The State rejects BLM's reliance on the lack of an express call to the mean high tide line at Humpy Cove in the patent language describing easement EIN 3 C4, noting that none of the road/trail easements in the IC, including those clearly intended to access the marine coastline, contains a reference to the mean high tide line, while the site easements do contain such a reference. According to the State, the different treatment of roads or trails and site easements leads to the inference that BLM considered it unnecessary to refer to the mean high tide line for a road or trail easement when it had reserved or anticipated reserving a site easement at the road or trail's terminus. Since BLM failed to reserve a site easement at the end of easement EIN 3 C4 and unsuccessfully used the lack of the site easement to justify terminating the road easement in the Sept. 5, 1997, decision, the State maintains that BLM cannot now use the lack of an express call to the mean high line as a justification for concluding that there was never a road easement, especially since, in the State's view, the failure to do so undoubtedly arose from the agency's anticipation that a site easement would be reserved. (SOR at 10-11.)

<sup>8/</sup> Exhibit F is a map prepared as part of the final easement identification process leading to issuance of the June 29, 1979, BLM Decision to Issue Conveyance. BLM acknowledges that Exhibit F contains "X" marks in the vicinity of Humpy Cove, but avers that those marks appear to represent a continuous coastline easement which  
(continued...)

Ounalashka agrees with BLM that all real property rights of the parties were set in 1979 when BLM issued IC 223 and that the subsequent patent is, by implication, irrelevant to what BLM conveyed. (Ounalashka Answer at 2-3.) Ounalashka contends that easement maps existing at the time of the IC show the easement looping around Summer Bay Lake and out to Morris Cove but do not depict any access to Humpy Cove. (Ounalashka Answer at 5-6.) Ounalashka also asserts that, even disregarding the 1988 maps, a BLM June 22, 1979, final easement memorandum and earlier documents describing easement EIN 3 C4 show that no easement was intended at the time of the IC. (Ounalashka Answer at 6, Ex. 6.)<sup>9/</sup> Ounalashka asserts that the 1979 memorandum describes easement EIN 3 C4 as furnishing access to public lands, rather than to the waters of Summer Bay or Humpy Cove, and contrasts this language with that used in the discussion of easement EIN 3a C4, which explains that the trail was necessary to access both public lands and public waters. Id. at 6-7, citing Ex. C. The absence of any reference to public waters in the final easement memorandum, Ounalashka submits, supports the lack of any intention to reserve an easement to access the waters of either Summer Bay or Humpy Cove. Id. at 7. Ounalashka also avers that the use of the term “existing road” in the IC’s description of easement EIN 3 C4 supports BLM’s conclusion because a trail, not a road, goes from Summer Bay Road to Humpy Cove. Id. at 5. Ounalashka contends that the fact that the easement description specifies that the easement travels northeasterly to Summer Bay, “thence” southwesterly to Unalaska suggests that the road turns once it reaches Summer Bay rather than continuing beyond that point, which it would have to do to reach Humpy Cove. Id. at 5-6.

Ounalashka also relies on a “tracing” of the easements in the vicinity of easement EIN 3 C4 provided to BLM by FWS in 1987. (Ounalashka Answer, Ex. E (labeled “223-3”).) Ounalashka claims that this tracing portrays that easement as going around Summer Bay Lake and heading back on Overland Drive, and portrays easement EIN 3a C4 (labeled “223-3a”) as running from Summer Bay Lake to Morris Cove and then continuing on to Agamgik Bay, but does not show any access to Summer Bay or Humpy Cove.<sup>10/</sup> According to Ounalashka, the lack of any depiction of a spur to Humpy Cove confirms FWS’s understanding in 1987 that no easement was reserved to Humpy Cove. Id. at 7-8.

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<sup>8/</sup> (...continued)

was disallowed after the revision of the ANCSA sec. 17(b) regulations issued on Nov. 27, 1978, 43 FR 55329. (BLM Answer at 8.)

<sup>9/</sup> Ounalashka claims this memorandum describes the easement as a loop road, which would be inconsistent with an intent to provide a spur off the loop to Humpy Cove. In fact, the June 22, 1979, memorandum does not use the term “loop road” in its description and discussion of easement EIN 3 C4. See Ounalashka Ex. 6 at 2.

<sup>10/</sup> This map at Ounalashka’s Ex. E contains no reference points for the water line.

The parties debate whether BLM should have reserved an easement to Humpy Cove, if it did not do so. Ounalashka asserts that the Board cannot consider, at the State's instigation, whether BLM should have reserved an easement to Humpy Cove since the only question is whether BLM did so. (Ounalashka Answer at 2.) The State asserts that BLM was obligated to reserve all necessary easements meeting the criteria of section 17(b) of ANCSA before granting any patents under that Act. (SOR at 13, citing 43 U.S.C. § 1616(b)(3) (1976).) The State insists that the Board must find that BLM did so here.

Further, the State notes that the public has reasonably relied on the easement reservation for years and submits that the Government cannot now retroactively invalidate the patent's reservation of the easement at this late date. (Reply at 7.) It contends that BLM's decision is a de facto effort to reform the patent, an action which the State alleges is barred by the 6-year statute of limitations found at 43 U.S.C. § 1166 (2000). (Reply at 5-6; SOR at 13.) The State also argues that BLM's only remaining recourse would be to rescind or terminate the easement as it attempted to do in 1999 in the case first appealed to us, but that BLM has failed here, as it failed then, to make the findings that would be necessary to justify rescinding an easement, i.e., facts showing a lack of present existing use or the existence of reasonable alternatives, and that evidence in the record would contradict any such finding. *Id.* at 14-18 and Exs. 8-12.

Finally, the State disputes the contentions of BLM and Ounalashka regarding the alleged clarity of the maps at the time of the IC. The State asserts that they are at best ambiguous, citing FWS's 1987 discovery that BLM's use of enlargement blueines plotted some road easements as extending into the ocean. (Reply at 7-8, citing SOR Ex. 17.) The State argues that ambiguous patent reservations should be construed in the Government's favor, with nothing passing that was not clearly conveyed and doubt resolved in favor of retention by the United States, which in this case, it argues, would support the reservation of the easement to Humpy Cove. (Reply at 8.)

[2] As noted earlier, section 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1976), required the Secretary to reserve such public easements across lands selected by village and regional Native corporations as were deemed reasonably necessary "to guarantee \* \* \* a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses" before granting a patent for those lands. 43 U.S.C. § 1616(b)(1) and (3) (1976); see Alaska Public Easement Defense Fund, 435 F. Supp. at 675; State of Alaska, 132 IBLA 197, 203 (1995); Mendas Cha-Ag Native Corp., 93 IBLA at 254; State of Alaska, 78 IBLA 390, 392-93 (1984); see also 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. <sup>11/</sup> However, a public easement may be reserved absent a demonstration of present existing use only \* \* \* if there is no reasonable alternative route or site available,” or other specified situations exist. 43 CFR 2650.4-7(a)(3). See State of Alaska, 132 IBLA at 204. The Secretary’s obligation to make necessary reservations, like his obligation under any statute providing for the disposition of public lands, continues until a patent issues. See State of Alaska, 132 IBLA at 203-204, and cases cited.

We agree with Ounalashka that, in its present posture, this appeal centers on the question of whether an easement to Humpy Cove was reserved, rather than on whether BLM should have reserved such an easement. We reject the theories of Ounalashka and BLM that the patent is irrelevant to any conclusion regarding the existence of a reservation. We also reject their suggestions that, to the extent the patent clarifies the reservation of an easement not apparent in the IC, either the patent is ineffective or the clarification is ultra vires. <sup>12/</sup>

BLM and Ounalashka are correct in asserting that issuance of an IC effectively “convey[s] to and vest[s] in the recipient exactly the same right, title, and interest in and to the lands as the recipient would have received had he been issued a patent by the United States.” 43 U.S.C. § 1621(j)(1) (2000); see also 43 CFR 2650.0-5(h) (defining an IC as a conveyance granting “legal title to unsurveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by [ANCSA] or imposed on the land by applicable law, subject only to confirmation of the boundary descriptions after approval of the survey of the conveyed land”). Since an IC conveys legal title and therefore is generally tantamount to a patent, the Board has held that the Department effectively loses jurisdiction to adjudicate conflicting interests in the conveyed lands. Seldovia Native Association, 161 IBLA at 285-86; Bay View, Inc., 126 IBLA 281, 286 (1993), citing Germania Iron Co. v. United States, 165 U.S. 379, 383 (1897); see also Stratman v. Lesnoi, Inc., 157 IBLA 302, 311 (2002).

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<sup>11/</sup> The regulations define “present existing use” as “use by either the general public which includes both Natives and non-Natives alike or by a Federal, State or municipal corporation entity on or before December 18, 1976, or the date of selection, whichever is later.” 43 CFR 2650.0-5(p).

<sup>12/</sup> BLM accepts that descriptive language in a confirmatory patent may clarify an ambiguous IC. BLM implies, though, that a map incorporated into a patent, which depicts the locus of a conveyance left ambiguous by descriptive language in a patent is not effective. BLM cites no support for such a position.

It does not follow, however, that the terms of a final patent have no effect on what is conveyed. To the contrary, the plain terms of IC 223 made it subject to issuance of the confirming patent. (SOR Ex. 13 (IC 223) at 6-7.) Further, the statute clarifies that a patent for the lands issues upon completion of the survey of the lands within the IC. 43 U.S.C. § 1621(j)(1) (2000); see also 43 CFR 2650.0-5(i) (defining a patent as “the original conveyance granting legal title to the recipient to surveyed lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by [ANCSA] or imposed on the land by applicable law; or the document issued after approval of the survey by the [BLM], to confirm the boundary description of the unsurveyed conveyed lands”). Thus, “[t]he easements shall be identified on appropriate maps which shall be part of the pertinent interim conveyance and patent.” 43 CFR 2650.4-7(d)(3); cf. Beau Hickory & Patricia L. Tinnell, 160 IBLA 166, 177 (2003), citing 73A C.J.S. Public Lands § 140 (“Usually a patent conveys title to all the lands within the established boundaries shown by the official map of the government survey to which the patent has reference \* \* \*. A patent which refers to an official plat of survey incorporates the plat \* \* \* by reference” (emphasis omitted)).<sup>13/</sup> Thus, what was finally conveyed to Ounalashka appears in the content of the patent.

The evidence is clear that, by the time of the patent, BLM meant to adjust the maps through the conformance process to ensure access to Humpy Cove. Although the maps connected to and, by regulation, considered part of the IC do not explicitly show the easement as extending to Humpy Cove, the map associated with and incorporated by rule into the patent does show the easement reaching Humpy Cove. The record also contains documents questioning the accuracy of the IC’s maps, including the July 14, 1987, FWS memorandum demanding clarification that access was provided. (SOR Ex. 18.) Thus, the record provides evidence to explain the changes in the map incorporated into the actual patent, consistent with the conformance process. That BLM made these changes in the map incorporated into the patent confirms that the Government reserved to itself the easement providing access to Humpy Cove.

The patent was issued to Ounalashka subject to the easement and BLM has no authority to declare otherwise. In fact, BLM and the State, if not others, operated under the assumption that such an easement had been reserved to the United States.

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<sup>13/</sup> Although the State claims that the patent, with its associated map showing access to Humpy Cove, is essentially unassailable due to the 6-year statute of limitations for suits by the United States to vacate or annul a patent, 43 U.S.C. § 1166 (2000), we do not reach a decision on that question. We also point out that BLM has various options to relinquish interests in lands and to make corrections in patents under the authority of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1745 and 1746 (2000).



Additionally, BLM's actions in regard to easement EIN 3 C4 prior to the January 9, 2002, decision, including the September 5, 1997, decision partially terminating the easement, clearly evinced its view that the easement provided access to Humpy Cove. In fact, it was only after receipt of Ounalashka's position that BLM first questioned the easement's existence. BLM is not free to declare on a unilateral basis that the easement is non-existent or declare the map which is a part of the patent to be irrelevant to the patent's terms.<sup>14/</sup>

The record in this case presents ambiguous information as to whether easement EIN 3 C4 was intended to reach Humpy Cove. Neither the description of easement EIN 3 C4 in IC 223 nor that in Patent No. 50-90-0651 explicitly mentions Humpy Cove. Although the IC may be characterized as ambiguous as to the existence of the easement segment to Humpy Cove, the patent, which by regulation includes the incorporated map, clearly depicts the easement to Humpy Cove. The final patent does reserve the easement and this is what was ultimately conveyed to Ounalashka.

We recognize the arguments presented by BLM and Ounalashka that BLM had no authority to reserve the easement segment to Humpy Cove in the light of the language and maps of the IC, because such a reservation in the patent is a change from what was conveyed in the IC. We need not reach this question because we do not see the record as demonstrating any change. Rather, the record shows that the reservation language in the IC was ambiguous and that the IC maps were ambiguous as well. Contrary to the appellees' suggestions that the IC maps clearly depicted a lack of intent to reserve an easement to Humpy Cove, the early maps are inconsistent, often depicting easements, as the State points out, extending into the ocean. The record reflects that based on usage of the easement to Humpy Cove, FWS asked for map corrections and BLM does concede that such corrections were discussed beginning in 1988, in communications leading up to the 1990 patent which incorporated an easement map depicting the Humpy Cove spur road. Contrary to a finding that the patent changed the IC, the record shows that the Government sought to clarify what was intended in the IC by placing a spur road in the proper location on the map in issuing the patent. This action was consistent with use by the public at Humpy Cove and not questioned until 1997 when BLM issued its first decision. Even then, BLM presumed that the patent had reserved an easement segment to Humpy

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<sup>14/</sup> We need not rule on the relative merits of the descriptive terms as opposed to the maps. As with the IC, the descriptive terms adopted in the patent, and quoted above, are not definitive on the issue of whether the access to Summer Bay did or did not include access to Humpy Cove. Because words often do not convey a precise description of a location on a map, maps are incorporated to clarify any ambiguity. We find no precedent, and BLM cites none, for the proposition that, while descriptive terms in a patent are debatable, a map which clearly defines an easement may be disregarded.

Cove. We thus reject the contention that the easement was a change in what was reserved in the IC. In fact, the record provides no basis for us to make the express finding that the IC meant not to include an easement to Humpy Cove, which would be a necessary element of any finding of a change between the IC and the patent.

To the extent the lack of clarity in the IC has raised issues among BLM, the State, and Ounalashka as to what should have been conveyed, BLM may not avoid its obligations with respect to the patent that was issued simply by declaring that the easement never existed. Rather, as the State points out, BLM's options to terminate the easement include a judicial action to reform the patent or termination subject to standards BLM must consider in the first instance.<sup>15/</sup> Accordingly, we reverse BLM's decision to the extent it determined that the segment of easement EIN 3 C4 providing access to Humpy Cove was not reserved when the lands were conveyed to Ounalashka and thus had never existed.

BLM has asked that, if we reverse its decision, we should remand the matter to it. We suggest that, on remand, BLM seriously explore the possibility of resolving remaining issues among the parties through direct negotiation or through another form of alternative dispute resolution such as mediation where a third party neutral can assist the parties in reaching a mutually acceptable solution to the dispute.

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 reversed, and the matter is remanded to BLM for further action consistent with this decision.

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Lisa Hemmer  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

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<sup>15/</sup> We recognize that BLM has given some indication of its views on this topic, in decisions it has terminated or rescinded, including the Sept. 5, 1997, decision. (SOR Ex. 1.) Given BLM's procedural actions in vacating that decision, we are not free to presume it would reinstate it now, and remand the matter to the agency to determine again what it wishes to do.