HENRY W. WATERFIELD

IBLA 83-152 Decided November 30, 1983

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving lands for interim conveyance. AA 31213-31230, F-14990-A.

Affirmed.

1. Alaska Native Claims Settlement Act: Appeals: Standing--Alaska Native Claims Settlement Act: Easements: Decision to Reserve

   A mining claimant whose unpatented mining claims are located in Alaska outside lands approved for conveyance has standing to appeal a failure by BLM to reserve a public easement in the conveyance.

2. Administrative Procedure: Burden of Proof--Alaska Native Claims Settlement Act: Appeals: Generally--Rules of Practice: Appeals: Burden of Proof

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

APPEARANCES: Henry W. Waterfield, pro se; Robert Charles Babson, Esq., Office of the Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Henry W. Waterfield has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 30, 1982, approving lands for interim conveyance to the Kuskokwim Corporation and to the Calista Corporation. Appellant states that he has no objections to any of the Native selections as long his mining claims are not selected and reasonable access is assured, preferably on certain trails shown on an enclosed map.

Appellant's mining claims are the Jolette Nos. 1-4 and the Rhy Nos. 5-18 lode mining claims, all apparently located for rhyolite. The Jolette claims were located on September 1, 1968, and their location notices

recorded with the Kuskokwim Recording District on November 20, 1968. The Rhy claims were located on September 6, 1971, and their location notices recorded on December 20, 1971. Shortly before recordation of the Rhy claims, the Alaska Native Claims Settlement Act (ANCSA) was enacted by Congress. 43 U.S.C. §§ 1601-1628 (1976 and Supp. V 1981).

Pursuant to section 12(a) of ANCSA, 43 U.S.C. § 1611(a) (Supp. IV 1980), Kipchaughpuk Limited filed selection application F-14990-A for the surface estate of certain lands in the vicinity of Crooked Creek. In 1977, Kipchaughpuk Limited was merged into Georgetown Incorporated, a domestic corporation whose name was later changed to the Kuskokwim Corporation. The Kuskokwim Corporation is now regarded by BLM as entitled to the conveyance of 92,160 acres selected pursuant to section 12(a) of ANCSA.

Appellant's mining claims are located in secs. 2, 3, and 11, T. 21 N., R. 50 W., Seward meridian. The only lands in this township approved for conveyance are in secs. 1 and 12. Thus, there is no question that appellant's claims are not among the lands selected by Kipchaughpuk Limited. Counsel for BLM raises this same point in a motion to dismiss, arguing that appellant is unaffected by the conveyance and thus lacks standing to appeal to this Board. Counsel cites 43 CFR 4.410(b), 47 FR 26392 (June 18, 1982), in support of the motion. That section provides a right of appeal to the Board to any party claiming a property interest in land affected by a decision relating to land selections under ANCSA. While it is clear that appellant's claims do not occupy lands approved for conveyance, appellant does not rely on this fact for his assertion of standing. Appellant's concern is for access to his mining claims. A map accompanying appellant's statement of reasons depicts a number of trails leading to his mining claims. These trails cross lands approved for conveyance.

There is no question that appellant has a property interest in his mining claims. It is settled law that an unpatented mining claim supported by discovery of a valuable mineral deposit is "property in the fullest sense of the word." Forbes v. Gracey, 94 U.S. 762 (1877). See also Joseph C. Manga, 5 ANCAB 224, 88 I.D. 460 (1981).

[1] It is undisputed that a conveyance to a Native corporation under ANSCA may be made subject to the reservation of a public easement to provide access to public lands. The first issue presented by this case is whether a private individual who asserts a property interest in such public lands, who perceives that his interest will be adversely affected, has standing to appeal a decision by BLM not to reserve a public easement in such a conveyance.

We are of the opinion that persons who hold property interests in public lands, such as mining claimants, permittees, lessees, and licensees, have standing. If such individuals perceive that their property interests will be adversely affected by BLM's decision not to reserve a public easement across the lands to be conveyed to give access to the remaining public land, they would have standing as a member of the public with the requisite property interests to appeal from BLM's decision. However, any such easement created need only afford access to the block of public land within which such interests are situated. An individual appellant has no right to assert the need for public access to the situs of his particular interest, because once access

is provided to the public land he is assured of access to his own lease, claim, or permit area.

In Joseph C. Manga, supra, the Alaska Native Claims Appeal Board (ANCAB) found that a mining claimant whose unpatented claims were located on lands outside of those approved for conveyance did have standing under 43 CFR 4.902 (now 43 CFR 4.410(b)) to appeal a failure by BLM to reserve public easements under section 17(b)(1) of ANCSA. 5 ANCAB at 241-42, 88 I.D. at 468. Section 17(b)(1), 43 U.S.C. § 1616(b)(1) (1976), directs the Joint Federal-State Land Use Planning Commission for Alaska (Planning Commission) to identify public easements across lands selected by village corporations (as here) and regional corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee, inter alia, access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important. In Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), the court noted that the purpose of such public easements was to provide access across lands selected by the Native corporations to lands not selected. See also 43 CFR 2650.4-7.

Nowhere in the brief statement of reasons on appeal 1/ does appellant charge error in BLM's failure to reserve public easements in the lands approved for conveyance. Nowhere does appellant allege public use of the desired easements as set forth in Joseph C. Manga, supra at 245, 88 I.D. at 469. We do find, however, that appellant's request for "50 foot trail easements" in his statement of reasons compensates for these deficiencies in his allegations. As set forth in BLM's decision of September 30, 1982, a "50 foot trail easement" is one of four specifically defined public easements to which the instant conveyed lands could have been subjected. Appellant's use of this phrase is sufficient to support a finding that he has standing to appeal BLM's failure to provide the requested easements across the conveyed lands. Counsel's motion to dismiss is, therefore, denied. Patricia and William Nordmark, 6 ANCAB 157, 88 I.D. 1028 (1981). See also Patrick J. Bliss, 6 ANCAB 181, 88 I.D. 1039 (1981).

[2] Appellant's statement of reasons does not point out any specific error by BLM in failing to reserve a public easement for his mining claims. In Northway Natives, Inc., 69 IBLA 219 (1982), this Board quoted from Appeal of Goldbelt, Inc., ANCAB G 80-1, decided October 9, 1981, for the proposition that "when an appellant appeals a BLM easement determination made pursuant to ANCSA and its enabling regulations, the burden of proof is upon the party challenging the determination to show that the determination is erroneous." Id. at 2. 2/ Appellant's failure to specify errors of any nature in BLM's decision of September 30, 1982, does not meet the standard.

1/ Counsel for BLM moves to dismiss Waterfield's appeal on a second ground, viz., appellant's failure to file a timely statement of reasons. As noted in the text, appellant did, in fact, file a statement of reasons, and its receipt by BLM on Nov. 4, 1982, appears from the record to be timely. However brief, the statement is sufficient to support denial of the motion to dismiss on this ground.

2/ See United States Fish and Wildlife Service, 72 IBLA 218 (1983), which overruled Northway Natives, Inc., supra, on another holding.

We would point out that whatever private access appellant enjoys to his mining claims is unaffected by BLM's decision of September 30, 1982. Section 17(b)(2) of ANCSA, 43 U.S.C. § 1616(b)(2) (1976), provides: "[A]ny valid existing right recognized by this chapter shall continue to have whatever right of access as is now provided for under existing law and this subsection [dealing with public easements] shall not operate in any way to diminish or limit such right of access." Mining claims are specifically recognized in section 22(c) of ANCSA, 43 U.S.C. § 1621(c) (1976), and the possessory rights of the locator are protected. Theodore J. Almasy, 69 IBLA 160 (1982); 43 CFR 2650.3-2. Furthermore, the BLM decision at page 7 reiterates the above-quoted provision from section 17(b)(2), leaving unaffected whatever private access rights appellant may have to his claims.

Our discussion above has assumed, arguendo, the validity of appellant's mining claims. We expressly abstain from making any statement as to the validity of the claims at this time.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, as amended, 43 FR 26390 (June 18, 1982), the motion to dismiss is denied and the decision of the Alaska State Office is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

The majority's result is satisfactory as far as it goes. But there is an important class of people whose "property interest in land" could be adversely affected by a conveyance and whose standing should continue to be recognized, namely, owners of private property (e.g., mining or homestead patentees) access to which would be cut off by the proposed conveyance. See, e.g., 43 CFR 2650.4-7(b); Patricia and William Nordmark, 6 ANCAB 157, 88 I.D. 1028 (1981); Joseph C. Manga, 5 ANCAB 224, 88 I.D. 460 (1981). Whether or not their private property would have sufficient public use to warrant creation of a public easement to their land -- or only to surrounding public lands -- would be a question of fact in the particular situation. But certainly they should have standing as a matter of law to raise that question, since 43 CFR 4.410(b) only requires a property interest "in land." After the conveyance, the conveyed land could no longer be made subject to a public easement without condemnation proceedings.

Will A. Irwin
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

The majority opinion holds that an owner of an unpatented mining claim has standing to object to the failure of BLM to reserve a public easement to provide access to his mining claims located on lands not involved in the conveyance. This holding is, itself, based on two prior decisions of the Alaska Native Claims Appeal Board, i.e., Patricia and William Nordmark, 6 ANCAB 157, 88 I.D. 1028 (1981), and Joseph C. Manga, 5 ANCAB 224, 88 I.D. 460 (1981). Inasmuch as it is my view that both of these prior decisions of ANCAB are erroneous, for reasons which I set forth, infra, I would dismiss the instant appeal for lack of standing under 43 CFR 4.902 (1981).

Concurrent with the transfer of the jurisdiction of appeals arising under ANCSA to this Board, the Department promulgated an interim rule which preserved the requirement of standing formerly set forth in 43 CFR 4.902 (1981). The current interim rule, 43 CFR 4.410(b) (47 FR 26392 (June 18, 1982)), provides: "For decisions rendered by Departmental officials relating to land selections under the Alaska Native Claims Settlement Act, as amended, any party who claims a property interest in land affected by the decision * * * shall have a right to appeal to the Board." (Emphasis added.)

In Patricia and William Nordmark, supra, as noted above, ANCAB ruled that appellants therein had standing. ANCAB recognized that while a potential appellant could not claim a property interest in a public easement, nevertheless, to the extent that a public easement provides access across Native lands to a private inholding, the easement necessarily affects that private interest and, therefore, affords the holder standing to appeal. In so doing, ANCAB reaffirmed its holding in Joseph C. Manga, supra at 240, 88 I.D. at 467, where it stated that a decision to convey land and a decision to reserve an easement across land "affect property differently," which "application of the standing test in 43 CFR 4.902 must take into account." ANCAB concluded that "appellants may rely on their homesite, located outside the conveyance, as a property interest, for purposes of meeting the standing requirements of 43 CFR 4.902." I cannot agree with this line of reasoning.

Functionally, I believe these decisions of ANCAB misapplied various concepts in reaching the conclusion that a private landowner has an actionable interest in a public easement. The basic analysis by which ANCAB reached its conclusion appears in Joseph C. Manga, supra. In that case, three individuals appealed a decision of the Alaska State Office refusing to reserve segments of two easements in an interim conveyance. One, Joseph C. Manga, held various unpatented mining claims adjacent to and, in part, surrounded by the lands to be conveyed. Manga alleged that he had constructed two access roads across the lands to be conveyed which provided him with alternate access to his claims depending upon weather conditions. The other two appellants alleged past use of the trails for hunting, recreation, and access to other lands in the area.

A motion was filed by the Solicitor's office seeking to have the appeal dismissed because of a lack of standing on the part of the appellants. Specifically, the Solicitor adverted to 43 CFR 4.902 (now 43 CFR 4.410(b)) which limits the right of appeal in cases involving land selections under ANCSA to

"any party who claims a property interest in land affected by the decision, an agency of the Federal Government or a regional corporation."

In denying this motion, ANCAB made a number of points. First, it rejected an argument pressed by the appellants that the mere fact that they were adversely affected by the determination below invested them with standing to appeal. Id. at 236, 88 I.D. at 465-66.

ANCAB then analyzed the question whether appellants possessed "a property interest in land affected by a determination" by BLM. ANCAB characterized the issue before it as involving the question "whether any member of the public, even one who claims a private property interest, has standing under the test in 43 CFR 4.902 to appeal a public easement decision," and noted that there were "fundamental legal differences between the effect of a decision to convey title and the effect of a decision to reserve a public easement." Id. at 237, 239, 88 I.D. at 466, 467. The decision continued:

> An easement reservation under § 17(b)(1) does not involve a competing title interest. A potential appellant desiring to appeal a public easement decision cannot claim a property interest in the land underlying the easement, because, pursuant to ANCSA, title to the land underlying the easement goes to the selecting Native corporation. Likewise, a potential appellant cannot claim a private property interest in a § 17(b)(1) easement because these are public easements. The concept of private ownership of a public easement is a contradiction in terms.
>
> The argument that an appellant must have a property interest in the land to be conveyed, regardless of the subject matter of the appeal, ignores the fact that a decision to convey land and a decision to reserve an easement across land affect property differently.
>
> * * * The Board holds that decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

The problem with this part of ANCAB's analysis is that, whether intentionally or not, ANCAB substituted the concept of "title" interest (presumptively meaning a fee interest) for the regulation's much broader concept of "property" interest. There is nothing in the language of 43 CFR 4.902 which implies that a property interest in the land to be conveyed, less than a fee interest was an insufficient basis upon which to predicate standing. Thus, for example, a leasehold interest in lands to be conveyed would, I believe, obviously be sufficient under the regulation to afford a party adversely affected by a conveyance decision to appeal. If an individual claimed that he had an existing right-of-way, granted by the Federal Government, which right-of-way had not been reserved in the conveyance, such an individual would likewise be vested with standing to appeal the failure to reserve that

right-of-way. In any event, ANCAB failed to establish a basis for its conclusion that since a decision to convey land was different from a decision to reserve an easement this fact somehow resulted in a variable standing test.

Having determined that there was somehow a different standing test when section 17(b) was involved, ANCAB then proceeded to examine the purpose of the public easement provision, quoting extensively from the District Court's decision in Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977). 1/

ANCAB then arrived at its central ruling:

> Since the purpose of a 17(b)(1) public easement is to provide access across Native lands to lands not selected, the Board concludes that a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(41) easement decision, may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

Id. at 241-42, 88 I.D. at 467-68.

Two points should be made about the above-quoted language. First of all, it was not the purpose of the public easement provision to provide access to all lands not conveyed. The purpose was, as the court in Alaska Public Easement Defense Fund v. Andrus, supra, clearly held, to provide access across Native lands to public lands not conveyed. 2/

1/ In essence, the district court had held that the purpose of section 17(b) was to provide the public with access across land conveyed to Federal land not conveyed.

2/ ANCAB focused on a single sentence of Judge von der Heydt's opinion where he stated that "[i]t appears, therefore, that the public easements were to be reserved to provide access to the lands not selected, and they were not intended to provide the public with a right to use the Native lands for recreational activities." 435 F. Supp. at 674. While this isolated sentence may give support for ANCAB's interpretation, when it is read in the context of Judge von der Heydt's entire decision it becomes clear that he was referring to public lands not conveyed.

Thus, the sentence immediately preceding the quoted sentence explained the purpose behind this provision: "Congress was justifiably concerned that certain portions of the State which were to remain in the public domain would become inaccessible, or landlocked by Native land." Id. (emphasis supplied). Subsequently, in discussing various earlier versions of section 17(b), the court noted that "there seems little doubt that the public easements identified and recommended by the LUPC would have had to have been to provide access to public lands." Id. at 675. While Judge von der Heydt pointed out that various changes occurred in the statutory language prior to enactment, he also

This is an important distinction. Nothing in the public easement provision (with one important exception noted below) related in any way to access to private inholdings. Rather, the nature of this provision indicates that Congress was concerned, and, I believe, justifiably so, with access to public lands which might become inaccessible unless express provision were made to provide access. This is not to say that Congress ignored the problems of private inholdings. On the contrary, Congress also made express provisions for protection of such access as well.

In order to understand the legislative scheme of ANCSA, it is useful to briefly review the rights of access which public land and mineral entryman possessed prior to its adoption. Initially, I would note that there were certain express statutory provisions providing for access to private inholdings where they were surrounded by public land. Thus, section 1 of the Act of June 4, 1897, 30 Stat. 36, 16 U.S.C. § 478 (1976), expressly provided for the ingress and egress of actual settlers within the boundaries of national forests. Of far greater effect, however, were the provisions of the Act of July 26, 1866, R.S. 2477, 14 Stat. 253, 43 U.S.C. § 932 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2793).

This statute, originally part of the mining law of 1866, simply stated that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." It was an in praesenti grant which, upon acceptance by a state, became fixed in accordance with State law. United States v. 9,947.71 Acres of Land, 220 F. Supp. 328, 335 (D. Nev. 1963); Homer D. Meeds, 26 IBLA 281, 293, 83 I.D. 315 (1976). The Supreme Court of Alaska has held the Territorial Legislature of Alaska accepted the grant provided by R.S. 2477. See Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (1975). In Alaska, the grant became fixed either by "dedication" of the road as a public highway or by public use of a character sufficient to show acceptance by the public of the statutory grant. Compare Girves v. Kenai Peninsula Borough, supra, with Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). Thus, either dedication of a road by the state or competent instrumentality or sufficient use by the public would result in the establishment of a right-of-way.

In addition to these specific statutory authorizations, however, it was long recognized that a right of access was granted to entrymen on the public lands. As Acting Solicitor Fritz noted, "It has traditionally been customary for mining locators, homestead and other public land entrymen to build and/or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims." Rights of Mining Claimants to Access Over Public Lands To Their Claims, 66 I.D. 361, 362 (1959). Such right, however, was a permissive one, and, as

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fn. 2 (continued)
stated that none of these changes "suggest that the appropriate purpose of the public easements was altered in any way." Id. It is clear from the entire opinion, therefore, that the court held that the purpose of the public easement provision was to provide access across Native lands to public lands.

such, arguably subject to unilateral abrogation by action of the Federal Government. See Sun Studs, Inc., 27 IBLA 278, 291, 83 I.D. 518, 524 (1976).

It is unnecessary to decide whether Congress could deprive such inholdings of access rights without compensation, because it is clear Congress has affirmatively sought to protect these access rights. The proviso of section 17(b)(2) expressly provides "that any valid existing right recognized by this chapter shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access." 43 U.S.C. § 1616(b)(2) (1976). Similarly, in proposing regulations with respect to public easements, the Department noted: "Easements solely for private purposes shall not be reserved since they do not fall within the scope of section 17(b) of ANCSA. However, it should be noted that sections 14(g) and 17(b)(2) protect valid existing rights, including those private rights of access which are recognized under existing law." 43 FR 22620 (May 25, 1978).

This proviso not only affirmatively protects such right of access as was formerly permitted, it also clearly recognizes a dichotomy between private rights of access and those relating to public access. 3/ As subsequent events have made clear, absent specific provision for public easements, no access to isolated public land could be implied after a conveyance of the surrounding land to a Native corporation.

Thus, the Supreme Court in Leo Sheep Co. v. United States, 440 U.S. 668 (1979), held that the Government did not have an implied easement by necessity to cross lands patented under the Union Pacific Grant Act of 1862 in order to reach lands retained in Federal ownership. In addition, the court in Alaska Public Easement Defense Fund v. Andrus, supra, expressly held that the existence of a floating easement (i.e., one not fixed in location at the time of conveyance) was inimical to the purpose of ANCSA, even where there existed prior statutory authorization for such easements. Thus, in the absence of an expressly designated easement, there would be no implied easement by which the United States might obtain access to isolated Federal land. It was to provide such access that Congress authorized the reservation of public easements.

It is clear, therefore, that ANCSA has provided differing protection for three separate classes: (1) For easements and rights-of-way in existence on December 18, 1971, including roads established pursuant to RS 2477, all conveyances are to be made subject thereto; (2) where there was no specific right-of-way established, but there was an existing right of access, such access is protected after conveyance to the same extent it existed prior to conveyance; and (3) for access to public lands, the Secretary is authorized

3/ Moreover, it is clear that the provision does not relate to access provided by rights-of-way established under R.S. 2477. Once such a public highway has been established, its continued existence no longer rests on Government acquiescence. Rather, it is a vested right subject to compensation upon a taking. See United States v. 9,947.71 Acres of Land, supra. As such, any conveyance is expressly subject thereto under the provisions of section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1976).

to reserve such easements as were reasonably necessary to guarantee international treaty obligations and a full right of public use and access to Federal inholdings for recreation, hunting, transportation, utilities, docks, and other such public uses.

Thus, the fact that an individual has an inholding is legally irrelevant to the question of whether a public easement should be established. There is simply no nexus between the rights of access to a mining claim or homestead and the right of the Government to assure that access to its holdings is provided. Since the existence of a private inholding is an irrelevancy for the purpose of section 17(b)(1), I fail to see how it can provide the interest in land necessary to establish standing to appeal a conveyance decision which failed to reserve a public easement.

Implicit in the rationale employed by the majority opinion is the theory that the private inholder has standing to represent the public interest in reserving access to public lands as some sort of private attorney general. 4/ While this may be a comforting theoretical premise, the practice of appellant discloses a far different reality. Thus, the appellants in Nordmark noted in response to an ANCAB inquiry:

> The first question asked if the appellants request a public easement in addition to a "private" easement. The answer is "No." The appeal on behalf of the public access was submitted in case there were no other way to get legal access to the homesite. If legal access to the homesite can be assured either by direct

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4/ Insofar as the concurring opinion is concerned, the argument which it suggests, namely that private parties have standing to seek public access to private lands, has no basis in ANCSA, the regulations, the District Court's decision in Alaska Public Easement Defense Fund v. Andrus, supra, or in either of the ANCAB decisions which it cites.

In Manga, ANCAB found standing only for the named appellant who held unpatented mining claims. As ANCAB expressly noted "[Manga] asserts public use by himself and others of an existing trail through the conveyance area to again access to his mining claims and to the public lands on which they are located." 5 ANCAB at 352, 88 I.D. at 469.

While Nordmark did involve a patented homesite, the easement sought ran not to the homesite but from "Parks Highway to the public waters of the Nenana River." 6 ANCAB at 164, 88 I.D. at 1031. Such an easement, if located adjacent to appellants' property would have provided appellants access to the same highway. But, ANCAB did not hold that appellants had standing to obtain a public easement to their homesite. On the contrary, ANCAB suspended consideration of the merits of the appeal pending a determination of whether the Nenana River was navigable, an action necessary since only if the Nenana River were navigable could the waters arguably be considered public lands. Id. at 175-76, 88 I.D. at 1036-37. There would, of course, have been no reason to suspend consideration if ANCAB had been ruling that appellants had standing to obtain access to their homesite. In point of fact, ANCAB expressly refused to grant appellants a private easement to assure that they would have access to any public easement that might eventually be reserved. Id. at 177-78, 88 I.D. at 1037.

> interpretation of the land claim act or by a "private" easement, then we request you drop consideration of a public easement.

(Letter of August 26, 1981).

Appellant Waterfield's statement of reasons for this appeal reads, in toto:

> Gentlemen:
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> On Oct. 13, 1982, I received your letter of decision dated September 30, 1982, referred to above.
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> The enclosures DOI Form 1842-1 and Appeal Regulations were not enclosed or received by me.
>
> I am enclosing a copy of a map showing the location of my lode claims in Section 2, 3, and 11, T. 21 N., R. 50 W., S.M. and the 50 foot trail easements requested about 1972.
>
> I have no objections to any of the native selections as long as the mining claims (BLM Ser. Nos. AA 031212 through AA 031230) are not selected and reasonable access is assured, preferably on the trails shown on the enclosed map.
>
> Sincerely yours,
>
> /s/
>
> Henry W. Waterfield

I fail to discern a scintilla of evidence that the appellant is seeking to protect public access. What appellant clearly seeks is private access to his mining claims, nothing less, and certainly nothing more. I think it plain that we distort the animating purpose of these appeals when we attempt to metamorphose what is a purely private concern into a public matter. Such appellants should not be accorded standing to protest failure to reserve a public easement.

It may be that such a holding would considerably limit those parties who might appeal decisions relating to public easements. Such an observation, however, is really beside the point. The whole purpose of requiring a showing of a property interest which has been adversely affected as a precondition of standing is to limit the category of those who may administratively appeal. Its purpose is not to forestall such judicial remedies as may exist; indeed, it has no effect on such remedies. Rather, its purpose is to expedite administrative decisionmaking to the end that final resolution of Native land claims can be expeditiously made. I would hold, therefore, that appellants herein have failed to establish their standing to appeal the failure of BLM to reserve a public easement. To the extent that anything in Joseph C. Manga, supra, or Patricia and William Nordmark, supra, impels a contrary result, I think they are contrary to the law and should be overruled.

I fear that the ultimate effect of the decisions in Nordmark, Manga, and the instant case will be extremely detrimental to the interests of the appellants therein. Not a single appellant has yet to prove successful in reversing a decision not to reserve a public easement. Since implicit in the finding of standing is a holding that these appellants do not have any other access right protected under ANCSA (for, if they did, regardless of whether they had a "property interest," failure to reserve a public easement would not "adversely affect" them), a logical conclusion is that such individuals have no right of access whatsoever. Because it is my view that such a result is inimical to the Congressional scheme as promulgated in ANCSA, I dissent. 5/

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

5/ Inasmuch as this case does not present the issue, I express no opinions as to whether State lands are public lands for the purposes of section 17(b)(1), or whether the State, as parens patriae, may have the requisite standing to appeal from public easement determinations on behalf of the citizens of Alaska.