Alaska Native Claims Settlement Act (ANCSA) brought action for injunctive and declaratory relief against owner of sub-surface estate in portion of corporation's land on island, alleging that owner was required to obtain village corporation's permission before removing sand and gravel. The United States District Court for the District of Alaska, H. Russel Holland, J., dismissed action. Village corporation appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) developer of sub-surface estate was required to get village corporation's consent only if land to be mined was within boundaries of native village as defined by occupancy rather than historical use, and (2) village did not occupy island, and owner thus was not required to obtain its consent.

Affirmed.

1. Statutes ⇐212.6

When construing statutory language, Court of Appeals assumes that the legislative purpose is expressed by the ordinary meaning of the words used.

2. Statutes ⇐205

Because words can have alternative meanings depending on context, Court of Appeals interprets statutes not by viewing individual words in isolation, but rather by reading the relevant statutory provisions as a whole.

3. Indians ⇐6(2)

Although some ambiguous statutory provisions should be interpreted to the benefit of Indian tribes, such canon can have no application to a case in which rights of tribes are in conflict with one another.

4. Indians ⇐6(2)

Action by village corporation organized pursuant to Alaska Native Claims Settlement Act (ANCSA), against owner of sand and gravel operation who had received sub-surface estate in village corporation's land from regional corporation, involved rights of tribes in conflict with each other, and, thus, canon requiring construction of some statutes in favor of Native Americans was inapplicable; although owner was non-Native, judgment against him would also curtail rights of Native-owned regional corporations. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

5. Indians ⇐6(2)

"Lands within the boundaries of any Native village," as used in section of Alaska Native Claims Settlement Act (ANCSA) providing that the right to develop subsurface estate in such lands was subject to consent of village corporation, consisted of land within boundaries of native village as defined by occupancy rather than historical use, not of all lands patented to village corporation under ANCSA. Alaska Native Claims Settlement Act, § 14(f), 43 U.S.C.A. § 1613(f).

See publication Words and Phrases for other judicial constructions and definitions.

6. Indians ⇐6(2)

Because Secretary of the Interior bears the principal responsibility for administering Alaska Native Claims Settlement Act (ANCSA), his interpretations of ANCSA are entitled to great weight upon judicial review. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

7. Indians ⇐6(2)

Court of Appeals may not simply impose its own construction on Alaska Native Claims Settlement Act (ANCSA) without regard to regulations promulgated by Secretary of the Interior. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

8. Indians ⇐6(2)

In interpreting Alaska Native Claims Settlement Act (ANCSA), Court of Appeals must defer to Secretary of the Interior unless his interpretation is inconsistent with the unambiguously expressed intent of Congress or is otherwise unreasonable. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

9. Statutes ⇐219(1)

Court need not conclude that an agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding; instead, court simply asks whether it is compelled to reject agency's construction.

10. Statutes ⇐212.6

In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning.

11. Statutes ⇐219(1)

Agency's interpretation of a statute need not be flawless to be reasonable.

12. Statutes ⇐217.4

Use of legislative history as a tool for statutory interpretation suffers from a host of infirmities, in that it not only is not passed by both houses of Congress and signed into law by the President, but it also need not be written with the same care, or scrutinized by those skeptical of the statute with the same care, as statutory language; reliance on such history is particularly suspect when it is inconsistent with the ordinary understanding of the words in the statute and an otherwise reasonable agency interpretation.

13. Indians ⇐16.10(1)

Native village did not occupy island on which owner of sub-surface estate wished to mine sand and gravel pursuant to grant from regional corporation, and such mining thus was not subject to consent of village corporation organized by village pursuant to Alaska Native Claims Settlement Act (ANCSA); village's application for land benefits pursuant to ANCSA stated that village, as defined by occupancy structures, existed on townships not located on island, and village corporation did not suggest that village had since expanded. Alaska Native Claims Settlement Act, § 14, 43 U.S.C.A. § 1613(f).

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Philip Blumstein, Birch, Horton, Bittner and Cherot, Anchorage, Alaska, for Chugach Alaska Corporation, amicus curiae.

On Appeal from the United States District Court for the District of Alaska; H. Russel Holland, District Judge, presiding. D.C. No. CV–96–00361–HRH.

Before: FARRIS, O'SCANNLAIN, and MICHAEL DALY HAWKINS, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must determine whether a "Village Corporation" may prevent a "Regional Corporation" from authorizing sand-and-gravel mining near Kodiak under the Alaska Native Claims Settlement Act.

I

In 1971, Congress enacted the Alaska Native Claims Settlement Act ("ANCSA"), *see* Act of December 18, 1971, Pub.L. No. 92–203, 85 Stat. 688 (codified at 43 U.S.C. § 1601–1629a), a "legislative compromise" designed to resolve land disputes between the federal government, the state of Alaska, Alaskan Natives, and non-native settlers. *City of Ketchikan v. Cape Fox Corp.*, 85 F.3d 1381, 1383 (9th Cir.1996). Under this compromise, Alaskan Natives received, in exchange for the extinction of all claims of aboriginal title, approximately forty-four million acres of land and nearly $1 billion in federal funds. *See* 43 U.S.C. §§ 1605, 1607, 1613. Much of this land was distributed in fee simple to "Regional Corporations" [1] and to "Village Corporations." [2] ANCSA divided the state of Alaska into twelve geographic regions, each with a Native-owned Regional

1. A "Regional Corporation" is defined as "an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this chapter." 43 U.S.C. § 1602(g).

2. A "Village Corporation" is "an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this chapter." 43 U.S.C. § 1602(j).

Corporation. *See* 43 U.S.C. § 1606(a). Within these twelve regions are many villages represented by Village Corporations, over 200 in total. *See* 43 U.S.C. § 1607.

Unfortunately, through the years, the Regional and Village Corporations have often found themselves in court as adversaries. *See, e.g., Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir.1994); *Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727 (9th Cir.1988). The litigation has had much to do with the fact that twenty-two million acres of ANCSA land are "dually owned": The *surface* estate belongs to the Village Corporations, and the *subsurface* estate to the Regional Corporations. *See* 43 U.S.C. §§ 1611, 1613. Because of ambiguities in these abutting land rights, controversies have arisen.

This case is yet another chapter in the ongoing saga that pits surface-estate owner against subsurface-estate owner. In 1974, the Department of the Interior certified Leisnoi, Inc., as a Village Corporation for the Native village of Woody Island. Leisnoi thus became eligible to select over 115,000 acres of land, which it would hold and manage on behalf of the Native village of Woody Island. *See* 43 U.S.C. §§ 1611, 1613. In its application for land benefits, Leisnoi indicated that the Native village was located within two townships on the historic, western side of Woody Island. Generally, a Village Corporation like Leisnoi is allowed to select "all of the township or townships in which any part of the village is located, *plus* an area that will make the total selection equal to" its allotted acreage. 43 U.S.C. § 1611(a)(1) (emphasis added). Leisnoi selected some land on Woody Island, as well as some land on Kodiak Island and Long Island.[3] As explained above, Leisnoi's interest in this land is only in the surface estate.

The Regional Corporation of Koniag received the subsurface estate in the land that Leisnoi selected on Kodiak Island. This land is located near Kalsin Bay, some twelve miles and a channel of water away from the physical structures that identify the Village of Woody Island. Pursuant to a quitclaim deed, Koniag transferred sand-and-gravel rights in a portion of this land to Omar Stratman, who has thus stepped into Koniag's shoes for purposes of this appeal. Leisnoi and Stratman are avowed enemies who have found themselves in court on many occasions over the past twenty years. *See Leisnoi, Inc. v. Stratman*, 835 P.2d 1202, 1214 (Alaska 1992) (summarizing litigation between the two). The dispute in this case arises from Stratman's mining activity on this "dually owned" land on Kodiak Island. Since July 1996, Stratman has been extracting gravel from his subsurface estate. As one might imagine, such operation can damage the surface estate, *see Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 732 (9th Cir.1978), and destroy artifacts buried in the ground. Wishing to prevent these deleterious effects, Leisnoi asserted that Stratman must obtain its consent before proceeding. Not surprisingly, Stratman disagreed.

Seeking injunctive and declaratory relief, Leisnoi filed suit in federal district court. Stratman responded by moving to dismiss the case under Rule 12(b)(6) or, in the alternative, for summary judgment. The district court granted the motion to dismiss.[4] According to the court, under ANCSA, a subsurface-estate owner (such as Stratman) needs to obtain the consent of a Village Corporation (such as Leisnoi) only when he wishes to mine lands "within the boundaries of a[ ] Native village." *Leisnoi, Inc. v. Stratman*, No. A96–0361–CV, at 16 (D. Alaska Jul. 3, 1997) (quoting 43 U.S.C. § 1613(f) (internal quotation marks omitted)). As the district court saw it, Kodiak Island was simply not within the "boundaries" of the Native village of Woody Island.

Leisnoi timely appealed.[5]

3. Unfortunately, Leisnoi could not obtain the land on the western side of Woody Island because of an exception to the general land-selection process. Under 43 C.F.R. 2650.6, Village Corporations may not "select lands which are within 2 miles from the boundary of any home rule or first-class city." Because the western side of Woody Island lay within two miles of the home rule city of Kodiak, the land was unavailable to Leisnoi.

4. The court also dismissed Leisnoi's petition for a preliminary injunction as moot.

5. Leisnoi had also brought claims under the Archaeological Resources Protection Act, 16 U.S.C. § 470aa, and the National Environmental Policy Act, 42 U.S.C. § 4332. The district court dis-

II

Leisnoi contends that the district court misconstrued the section of ANCSA that vests in Village Corporations the power to withhold consent from, and thereby to preclude, mining operations. Section 14(f) of ANCSA provides that the right "to explore, develop, or remove minerals from the subsurface estate in the *lands within the boundaries of any Native village* shall be subject to the consent of the Village Corporation." 43 U.S.C. § 1613(f) (emphasis added). According to Leisnoi, the "lands within the boundaries of a[ ] Native village" include all lands patented to the Village Corporation, or at least all such lands that the Native village has historically used. Under either interpretation, the lands within the boundaries of the Village of Woody Island would encompass that portion of Kodiak Island on which Stratman has performed his gravel operation, and Leisnoi would be entitled to an injunction.[6] Stratman counters that the boundaries of a Native village should instead be defined by physical structures that indicate occupancy. If his view prevails, then Leisnoi's consent is not required, as the Village of Woody Island has structures only on Woody Island, not on Kodiak Island.

A

[1–4] When construing statutory language, this court assumes "that the legislative purpose is expressed by the ordinary meaning of the words used." *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341 (1990) (quoting *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962) (internal quotation marks omitted)). Of course, because words can have alternative meanings depending on context, we interpret statutes, not by viewing individual words in isolation, but rather by "reading the relevant statutory provisions as a whole." *City of Ketchikan*, 85 F.3d at 1385 (internal quotation and citation omitted). We thus interpret the phrase, "lands within the boundaries of any Native village," by looking, first, to the surrounding words in § 14(f) (the subsection containing the consent proviso), and then, to other provisions in ANCSA.[7]

> [5] Section 14(f) reads, in relevant part: When the Secretary *issues a patent to a Village Corporation for the surface estate in lands* . . ., he shall issue to the Regional Corporation for the region in which the lands are located a patent to the subsurface estate in such lands . . .: Provided, That the right to explore, develop, or remove minerals from the subsurface estate in the *lands within the boundaries of any Native village* shall be subject to the consent of the Village Corporation.

43 U.S.C. § 1613(f) (emphasis added). Quite significantly, the statute expressly contemplates two distinct concepts: first, lands "patent[ed] to a Village Corporation," and second, lands "within the boundaries of a[ ] Native village." *Id.* Whereas a Village Corporation receives title to all "patent[ed]" lands, it has the power to prevent mining, by

missed these claims as well. Because Leisnoi has not appealed on these issues, we do not consider them here.

6. In its complaint, Leisnoi asserted that, as evidenced by archeological findings, the Village of Woody Island historically used this land on Kodiak Island. Because we are reviewing a Rule 12(b)(6) dismissal, we must accept this allegation as true. *See Warshaw v. Xoma Corp.* 74 F.3d 955, 957 (9th Cir.1996).

7. Leisnoi urges the court to rely on another canon of statutory construction. According to Leisnoi, because Congress designed ANCSA for the benefit of Native Americans, the statute should be construed in their favor. To be sure, some ambiguous provisions should be interpreted to the benefit of Tribes. *See, e.g., Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (noting "general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"). However, the canon can have no application to a case such as this one, in which the rights of Tribes are in conflict with one another. Although Leisnoi is suing Stratman, a non-Native, a judgment against Stratman would also curtail the rights of Native-owned Regional Corporations, who have title to subsurface estates elsewhere in Alaska. Moreover, we have previously held that this canon does not apply to ANCSA. *See Seldovia Native Ass'n*, 904 F.2d at 1342; *Haynes v. United States*, 891 F.2d 235, 239 (9th Cir.1989). *But see Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1294 (9th Cir.1996) (applying the canon), *rev'd, Alaska v. Native Village of Venetie Tribal Gov't*, — U.S. —, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998).

withholding consent, only on those lands "within the boundaries of a[ ] Native village."

Congress's use of two distinct phrases leads us to conclude that two different meanings were intended. *See* 2A Sutherland, *Statutory Construction* § 46.06 (5th ed. 1992 & Supp.1997) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."). As the district court noted, "[h]ad Congress intended the consent term of subsection (f) to have general application, it would have chosen language requiring consent as to all patented lands, not the restrictive 'within the boundaries' language." In other words, if Congress wanted the consent requirement to apply to *all* patented lands instead of a mere *subset* of those lands, Congress would have simply written the proviso as follows: "Provided, That the right to explore, develop, or remove minerals from the subsurface estate in *all lands patented to any Village Corporation* shall be subject to the consent of the Village Corporation." Thus, we agree with the district court that, because Congress envisioned two different concepts, the boundaries of the Native village do not include *all* lands patented to the Village Corporation.

Other sections of ANCSA support this construction; they similarly contemplate a distinction between all lands patented and those lands within the boundaries of the Native village. Take, for example, the provision that makes certain federal land available for ANCSA patents by withdrawing it from the pool of land otherwise subject to appropriation under the public-land laws. *See* 43 U.S.C. § 1610. Significantly, this section withdraws *more* than those lands that lie within the boundaries of the Native villages. All told, it withdraws:

> (A) The lands in each township that encloses all or part of any Native village . . .;
> (B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and
> (C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

43 U.S.C. § 1610(a)(1). The Native villages are located *solely* in the townships mentioned in Paragraph (A); no Native village lies within the townships described in Paragraphs (B) or (C). These additional townships are nevertheless available for patents to Village Corporations. Thus, § 1610 confirms that all lands "patent[ed]" is a broader concept than those lands "within the boundaries of [the] Native village."

Another example of how ANCSA contemplates a distinction between these two concepts is the statutory provision that authorizes Village Corporations to select the land they want patented to them. *See* 43 U.S.C. § 1611. This section reads in relevant part:

> [T]he Village Corporation for each Native village . . . shall select . . . all of the township or townships in which any part of the village is located, *plus* an area that will make the total selection equal to the acreage to which the village is entitled. . . .

43 U.S.C. § 1611(a)(1) (emphasis added). Of course, the word "plus" implies that a Village Corporation is entitled to more area than those "townships in which any part of the village is located." Because a Village Corporation ends up with more land than that which underlies the Native village, the lands patented to a Village Corporation must be more expansive than the boundaries of the Native village.

Finally, ANCSA provides that, after a Village Corporation selects its land, the Secretary of the Interior shall issue to the corporation a patent to the surface estate in land, a portion of which lies outside the Native village:

> The lands patented shall be the lands within the township or townships that enclose the Native village, *and any additional lands* selected by the Village Corporation from the surrounding townships withdrawn for the Native village. . . .

43 U.S.C. § 1613(b). To be sure, this patent includes more than the lands within the boundaries of the Native village. Not only does the total include all land within the townships enclosing the Native village, but also "any additional lands" from surrounding townships.

Thus, the text of ANCSA draws a clear distinction between the lands patented to the Village Corporation and the boundaries of the Native village. The land within the Native village is a subset of the total patented lands. Hence, when Congress wrote in § 14(f), "[t]hat the right to explore, develop, or remove minerals from the subsurface estate *in the lands within the boundaries of any Native village* shall be subject to the consent of the Village Corporation," Congress was not requiring consent for mining in "all patented lands." The plain language of the statute is unambiguous. The district court was correct to reject Leisnoi's contrary construction.

B

This conclusion, however, does not end our inquiry. We must still determine exactly where the boundaries lie. Although the preceding analysis indicates that the boundaries fall somewhere within the outer limits of the total patented lands, it does not help us decide their precise location. Are the boundaries marked by the Native village's historical use, as Leisnoi contends, or occupancy of the land, as Stratman contends?

Turning to this question, we learn that a federal agency has already interpreted the consent provision in ANCSA § 14(f). *See* 43 C.F.R. § 2651.2(b)(2). Pursuant to ANCSA § 25, which authorizes regulations necessary for carrying out the Act, *see* 43 U.S.C. § 1624, the Secretary of the Interior has established requirements that a village must meet before it can receive ANCSA land benefits. One of the requirements is that the village must have "an identifiable physical location *evidenced by occupancy* consistent with the Natives' own cultural patterns and life style." 43 C.F.R. § 2651.2(b)(2) (emphasis added). The mere existence of *an* "identifiable physical location" requirement is unremarkable; the statute itself anticipates each Native village will have a recognizable geographic location. *See, e.g.,* 43 U.S.C. § 1610(a)(1)(A) (withdrawing from public appropriation those "lands in each township that encloses all or part of any Native village"); 43 U.S.C. § 1611(a)(1) (permitting Village Corporation to select land from "the township or townships in which any part of the village is located"). What is relevant to this appeal, we think, is *how* the Secretary determines this location. The Secretary identifies a Native village by looking for "*evidence[ ][of] occupancy* consistent with the Natives' own cultural patterns and life style." 43 C.F.R. § 2651.2(b)(2) (emphasis added). Thus, in the Secretary's view, the "boundaries of a[ ] Native village" are defined by reference to this physical evidence of occupancy.

[6–8] Because the Secretary of the Interior bears "[t]he principal responsibility for administering [ANCSA]," his interpretations are entitled to "great weight" upon judicial review. *Doyon, Ltd. v. Bristol Bay Native Corp.,* 569 F.2d 491, 496 (9th Cir.1978); *see also Seldovia Native Ass'n,* 904 F.2d at 1342 ("[A]n administrative agency's interpretation of a statute it is charged with administering is accorded substantial deference."). We may not "simply impose [our] own construction on the statute" without regard to the Secretary's regulations. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Rather, we must defer to the Secretary unless his interpretation is inconsistent with the "unambiguously expressed intent of Congress" or is otherwise unreasonable. *Id.* at 842–43, 104 S.Ct. 2778.

1

Leisnoi contends that identifying the boundaries of a Native village by means of occupancy, as the Secretary has done, is indeed inconsistent with express congressional intent. According to Leisnoi, Congress provided a definition of "Native village" that unambiguously requires boundaries to be determined by the Tribe's historical use—not its occupancy—of the land:

> "Native village" means any *tribe, band, clan, group, village, community, or association* in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was . . . composed of twenty-five or more Natives.

43 U.S.C. § 1602(c) (emphasis added). Leisnoi argues that, because Congress used words such as "tribe, band, clan, group, village, community, [and] association," Con-

gress must have intended an expansive definition of "Native village," one which extends to the Natives' "entire community." From this premise, Leisnoi jumps to the conclusion that courts should define the "boundaries of a[ ] Native village" by referencing the areas in which the Natives historically hunted, fished, hiked, and camped.

We do not dispute Leisnoi's premise. At the risk of belaboring the obvious, the simple fact that Congress included "community" in its list of words defining a "Native village" indicates that the boundaries of the village extend over the "entire community." Nonetheless, there is a fatal flaw in Leisnoi's reasoning: the conclusion simply does not follow from the premise. There is no reason to believe that "community" must be defined by hiking and fishing instead of by occupancy. Indeed, the ordinary understanding of the word "community" might suggest that the opposite is true. Commonly defined, a "community" is a "people with common interests *living in a particular area.*" *Webster's Ninth New Collegiate Dictionary* 267 (1986) (emphasis added). Hence, contrary to Leisnoi's contention, ANCSA's definition of "Native village" is not evidence of congressional intent to determine boundaries by means of historical use; indeed, the definition may actually support the Secretary's understanding.

2

[9] We thus inquire whether the Secretary's interpretation is otherwise "reasonable." *See Chevron*, 467 U.S. at 843–44, 104 S.Ct. 2778; *Seldovia Native Ass'n*, 904 F.2d at 1342. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. 2778. Instead, we simply ask whether we are "compell[ed]" to reject the Secretary's construction. *See Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1070 (9th Cir.1997) (internal quotations and citation omitted).

[10] In this case, we are certainly not so compelled. ANCSA expressly contemplates that a Native village has a geographic "locat[ion]." *See* 43 U.S.C. § 1611(a)(1) (authorizing selection of land in "all of the township or townships in which any part of the village is located"); *cf.* 43 U.S.C. § 1613(b) ("The lands patented shall be the lands within the township or townships that enclose the Native village, and any additional lands selected by the Village Corporation from the surrounding townships. . . ."). In everyday usage, the "location" of a town, city, or village is "a position or site *occupied* or available for *occupancy* or marked by some distinguishing feature." *Webster's Ninth New Collegiate Dictionary* 701 (1986) (emphasis added); *see also Webster's Third New International Dictionary* 1327 (1986) (defining "location" as "a position or site occupied or available for *occupancy* (*as by a building*) or marked by some distinguishing feature") (emphasis added). Recognizing this ordinary understanding of the word "location," which is substantially identical to the Secretary's understanding, we would be hard pressed to say that the Secretary was unreasonable. Indeed, "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 117 S.Ct. 660, 664, 136 L.Ed.2d 644 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). Without a contrary statutory definition to unsettle this assumption, the Secretary did not make an unreasonable choice by following the ordinary understanding of the word "location." *Cf. Louisiana–Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1574 (9th Cir.1994) ("The reasonableness of this interpretation is demonstrated by our analysis of what we have concluded to be the plain meaning of the statute.").

Admittedly, in ANCSA, Congress may not have "*directly* addressed the precise question" of whether boundaries should be defined by occupancy or historical use; Congress's use of the word "locat[ion]" may be too casual to constitute an "unambiguous[ ] express[ion]" of intent, as required to disregard an agency interpretation. *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778 (emphasis added). However, the commonly understood meaning of the word is indeed enough to render the

Secretary's regulation "a permissible construction of the statute." *Id.*

a

Leisnoi nevertheless challenges this interpretation as unreasonable for three reasons. First, Leisnoi argues, demarcating boundaries by means of occupancy would render nugatory the consent provision insofar as the Native village of Woody Island is concerned. In other words, according to Leisnoi, if we adopt the Secretary's interpretation, the Native village of Woody Island would have *no* power to withhold consent and to preclude mining on *any* land. Leisnoi does not own the surface estate of the land on which the village's structures and dwellings are located; Leisnoi could not receive patents to such land because it lies within two miles of a "home rule" city, the City of Kodiak. 43 C.F.R. § 2650.6(a) ("Notwithstanding any other provisions of the act, no village or regional corporation may select lands which are within 2 miles from the boundary of any home rule or first-class city. . . ."). Therefore, its argument goes, if Village Corporations may withhold consent *only* when they own the underlying surface estate, Leisnoi would have no power to withhold consent over any land.

[11] We need not decide whether Leisnoi's presumption—that the consent power is limited to land which the Village Corporation owns (as well as occupies)—is correct. Assuming it to be true, we hold that the Secretary's construction, which is consistent with if not recommended by the plain meaning of ANCSA, is nevertheless reasonable. Our conclusion might lead to perceived unfairness in a few rare situations, such as this one, but perfection is not to be expected from a statutory scheme such as ANCSA, which attempts to settle land claims in over 200 villages across the largest state in our Union. Moreover, under *Chevron*, an agency's interpretation of a statute need not be flawless to be reasonable. *See San Bernardino Mountains Community Hosp. Dist. v. Secretary of Health and Human Servs.*, 63 F.3d 882, 889 (9th Cir.1995); *see also Appalachian Regional Healthcare, Inc. v. Shalala*, 131 F.3d 1050, 1054 (D.C.Cir.1997) (Sentelle, J., dissenting) ("We are all in agreement that to survive the two-step analysis drawn from [*Chevron*], the Board's ruling . . . need not be perfect, or even the best, but only reasonable."). We therefore reject Leisnoi's first argument.

b

[12] Leisnoi's second argument is that the Secretary's interpretation is inconsistent with legislative history. We disagree. The passage Leisnoi cites, an excerpt of a House Report, is inconclusive:

> Section 14(f) of the Settlement Act provides that the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village are to be subject to the consent of the Village Corporation. This provision provides protection to villages from a precipitate decision by Regional Corporations to develop the subsurface estate. This provision seeks to avoid potential conflicts between *villages which are holders of the surface estate and which may be made concerned with preserving the use of the land in accordance with traditional local life-styles and subsistence economy* and Regional Corporations which are holders of the subsurface estate and which may have as their focus the generation of revenues from the land.

H. Rep. No. 94–729, at 26 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2376, 2393 (emphasis added). As this court has emphasized, the use of legislative history as a tool for statutory interpretation suffers from a host of infirmities: not only is legislative history "not passed by both houses of Congress and signed into law by the President," but it also "need not be written with the same care, or scrutinized by those skeptical of the statute with the same care, as statutory language." *See Puerta v. United States* 121 F.3d 1338, 1344 (9th Cir.1997); *see also Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring in judgment) (analogizing use of legislative history to "entering a crowded cocktail party and looking over the heads of the guests for one's friends"). Reliance on such history is particularly suspect when it is inconsistent with the ordinary understanding of the words in the statute and an otherwise reasonable agency interpretation.

In any event, the language to which Leisnoi points is ambiguous and arguably consistent with the Secretary's interpretation of the statute. The House Report simply expresses a desire to allow Village Corporations to "preserv[e] the use of *the land* in accordance with traditional local life-styles and subsistence economy." The Report does not identify this land, aside from the fact that it is "within the boundaries of a[ ] Native village." In other words, the Report does not indicate whether the land referenced is all land historically used (for fishing, hiking, etc.) or only land on which occupancy structures have been built. Because the legislative history is unclear, it cannot displace the Secretary's understanding of the text of the statute.

c

Finally, Leisnoi contends that the Secretary's interpretation is in tension with a "Congressional policy of fostering economic growth." In the preamble of the statute, Congress proclaimed that the ANCSA land settlement "should be accomplished ... in conformity with the real economic ... needs of Natives." 43 U.S.C. § 1601(b). Leisnoi asserts in its brief that defining boundaries by occupancy stifles this policy: Surface estates would "effectively be rendered unmarketable and off-limits to any construction of homes or improvements, since subsurface owners could at any time dig out beneath the foundations of any improvements to exercise what the district court granted as an unfettered right to extract sand and gravel without notice and consent." We are unpersuaded for two reasons. First, we do not reach the question of whether Alaska property law precludes mining activity that unreasonably interferes with the rights of surface-estate owners. Second, surface and subsurface-estate owners can, of course, resolve potential future disputes by way of contract. *Cf. Alaska v. Native Village of Venetie Tribal Gov't*, — U.S. —, 118 S.Ct. 948, 951, 140 L.Ed.2d 30 (1998) (noting that ANCSA does not restrict land transfers by Village or Regional Corporations). Theoretically, at least, given a world of no transaction costs, economic optimality does not depend on the allocation of a property right (such as the power to authorize mining) to one party or another; the two parties can simply bargain to the optimal solution. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 2–15 (1960). Assuredly, theory might not survive practice; however, the determinations of whether theory prevails and, if not, whether economic growth is maximized by granting the property right to the surface-estate owner, instead of the subsurface-estate owner, should not be made by the judiciary. We are ill-equipped to hypothesize on the consequences of imperfect information or other impediments to bargaining.[8] "Such policy arguments are more properly addressed to legislators or administrators ..." *Chevron*, 467 U.S. at 864, 104 S.Ct. 2778. Because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest" are best left to the elected branches of government, *id.* at 866, 104 S.Ct. 2778, we do not hold the Secretary's interpretation unreasonable. The "boundaries of a[ ] Native village" are defined by occupancy, not historical use.

III

[13] Implementing this test, we simply examine whether the Native village of Woody Island has demonstrated evidence of occupancy on Kodiak Island. It has not. When the Native village applied for land benefits in 1973, pursuant to the Secretary's regulations, it reported its "locat[ion]"—defined by occupancy structures—as follows:

> The Native Village of Woody Island is located within Townships: T27S and T28S, Range 19W, Seward Meridian, Alaska, as shown on the enclosed map.

These townships, the map reveals, are on Woody Island, not Kodiak Island. The Bureau of Indian Affairs confirmed this location later that year. Although it is conceivable that—through normal village expansion—a Native village's boundaries might today be different from what they were in 1973, that is not the case here. Leisnoi has never suggested that the village has expanded to occu-

8. For an analysis of obstacles to bargaining and their economic effects, see generally Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 Yale L.J. 611 (1989).

py Kodiak Island. Thus, Stratman, having already received a deed from Koniag, does not need Leisnoi's additional consent to proceed with his mining there. The district court did not err in granting the Rule 12(b)(6) dismissal.

AFFIRMED.

MacArthur CARIAGA, dba Line Master, Plaintiff–Appellee,

v.

LOCAL NO. 1184 LABORERS INTERNATIONAL UNION OF NORTH AMERICA; Construction Laborers Trust Funds for Southern California, Defendants–Appellants.

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, HIGHWAY AND STREET STRIPERS, LOCAL UNION 1184, AFL–CIO; Laborers Health and Welfare Fund for Southern California; Construction Laborers Pension Trust for Southern California; Construction Laborers Vacation Trust for Southern California; Laborers Training & Re–training Trust Fund for Southern California; Fund for Construction Industry Advancement; Center for Contract Compliance; Laborers Contract Administration Trust Fund for Southern California, Plaintiffs–Appellants,

v.

MacArthur CARIAGA, Defendant–Appellee.

Nos. 97–55188, 97–55958.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 5, 1998.

Decided Sept. 9, 1998.

Subcontractor petitioned to vacate arbitration award requiring it to pay damages to union and union trust funds for failure to pay contributions to funds, and union filed complaint to confirm the award. Following removal of subcontractor's action from state court, the United States District Court for the Central District of California, Ronald S. Lew, J., rendered judgment in favor of subcontractor, and union appealed. The Court of Appeals, Fitzgerald, Senior District Judge, held that: (1) subcontract failed to clearly and unequivocally incorporate by reference the arbitration procedure of master labor agreement, and (2) subcontractor was not an "employer" for purposes of liability for delinquent contributions to union trust funds.

Affirmed.

1. Labor Relations ⇐411

Issue of whether subcontractor, through paragraph of subcontract providing that subcontractor agreed to comply with terms and conditions of general contractor's labor agreements, agreed to be bound to the master labor agreement arbitration procedures involved interpretation of a subcontract between two employers, and thus was governed by state contract law, and not by the LMRA. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

2. Federal Courts ⇐776

The interpretation and meaning of contract provisions are questions of law reviewed de novo.

3. Arbitration ⇐7.3

Because arbitration is a matter of contract, a party will not be required to submit to arbitration unless the party has agreed to do so.

4. Contracts ⇐166

Under California law, for one contract document to incorporate another document by reference, the reference to the incorporated document must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the contracting parties.

5. Labor Relations ⇐433.2

Paragraph of subcontract providing that subcontractor agreed to comply with terms and conditions of general contractor's labor agreements failed to clearly and unequivocally incorporate by reference the arbitration procedure of the master labor agreement

any duress. The district judge asked Andrade–Larrios several times, in different ways, whether he was entering the plea freely and voluntarily. Each time Andrade–Larrios confirmed that he was not being coerced. Andrade–Larrios' attorney also stated that he believed Andrade–Larrios' plea was voluntary. Based on his observation of Andrade–Larrios, and Andrade–Larrios' response to his questions, the district judge specifically found that Andrade–Larrios was free of coercive influence.

On appeal, Andrade–Larrios argues that the inquiry should have been more searching, because defense counsel said that "it is a very delicate situation." The judge responded to this by asking "What is so delicate?" He explored the "delicacy" fully, and found that it seemed to be some reluctance by defense counsel to clarify that he was claiming to have an 11(e)(1)(C) deal rather than a mere 11(e)(1)(B) deal. The delicacy, as explained on the record, had nothing to do with duress.

D. Effective Assistance

Andrade–Larrios argues on appeal that he was denied effective assistance of counsel because his family members paid his lawyers fees, and his lawyer was serving their interests rather than his when he advised him to change his plea. We do not reach the legal issues which this argument might raise, because no factual basis for it was established until the second motion. The judge could have no inkling of this from anything Andrade–Larrios put before him on the first motion.

E. Breach of Agreement

Andrade–Larrios argues that the prosecutor breached the plea agreement, by prosecuting his brothers anyway. But there is nothing in the record on the first order to support either the proposition that he had a plea agreement that his brothers would not be prosecuted, or even that his brothers were in fact prosecuted.

F. Evidentiary Hearing

[7] As has been explained, there was nothing in the record to show the district court why it needed an evidentiary hearing to resolve some material factual dispute. The district judge acted within his discretion in denying an evidentiary hearing on the § 2255 motion because the files and records conclusively showed that the movant was not entitled to relief. 28 U.S.C. § 2255; *Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir.), *cert. denied*, 493 U.S. 869, 110 S.Ct. 195, 107 L.Ed.2d 149 (1989); *Watts v. United States*, 841 F.2d 275, 277 (9th Cir.1988).

AFFIRMED.

KONIAG, INC., Plaintiff–Appellee,

v.

KONCOR FOREST RESOURCE; Ouzinkie Native; Natives of Kodiak VXM, Inc.; HZB, Inc., Defendants–Appellants.

KONIAG, INC., Plaintiff–Appellant,

v.

KONCOR FOREST RESOURCE; Ouzinkie Native; Natives of Kodiak VXM, Inc.; HZB, Inc., Defendants–Appellees.

Nos. 93–36138, 93–36164.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 2, 1994.

Decided Nov. 4, 1994.

Regional corporation under Alaska Native Claims Settlement Act (ANCSA) which owned subsurface rights to land brought action seeking injunction prohibiting partnership of village corporations which owned surface rights from using subsurface rock, and partnership brought counterclaim seeking declaration that it had right to use rock free of charge. The United States District Court for the District of Alaska, James K. Singleton, Jr., J., denied both parties primary relief

requested and awarded regional corporation damages for past use but issued permanent injunction allowing use of rock at set price, and both parties appealed. The Court of Appeals, Canby, J., held that: (1) partnership had right to reasonable use of subsurface rock for purposes of economic development of surface land which was conditioned on there being no other source of rock; (2) partnership was required to pay reasonable price for use of rock; (3) remand was required for factual determination by district court as to fair price for use of rock; and (4) limitations on use of rock contained in injunction were reasonable.

Affirmed in part, vacated in part, and remanded.

1. United States ⇐105

Congress enacted ANCSA to settle through grants of combination of land and money all claims by Natives of Alaska. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

2. United States ⇐105

To administer grants of land and money made under ANCSA to settle claims by Natives of Alaska, state was divided into twelve geographic regions and Natives within each region became shareholders in regional corporation organized under Alaska law, and each of approximately 200 Native villages was required to form village corporation with its villagers as shareholders. Alaska Native Claims Settlement Act, §§ 7, 8, 43 U.S.C.A. §§ 1606, 1607.

3. Public Lands ⇐114(4)

In determining whether land patented from United States is burdened by implied servitude, court looks to several factors, including congressional intent, degree of necessity for easement, whether consideration was given for land, whether claim is against United States or against simultaneous conveyee, and terms of patent itself.

4. United States ⇐105

Intent of Congress in granting land to partnership of Native village corporations under ANCSA is important factor in determining existence and extent of partnership's rights to use subsurface which is owned by regional corporation under ANCSA. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

5. United States ⇐105

Congress contemplated that land granted under ANCSA would be put primarily to use for village expansion, subsistence, and capital for economic development; of potential uses, Congress clearly expected economic development would be most significant. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

6. United States ⇐105

There would be little purpose in requirement under ANCSA that Natives form corporations to receive and administer land granted to them if Congress did not expect natives to benefit from economic development of their land. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

7. United States ⇐105

Congress intended that those Native corporations which received grants of land under ANCSA and which did select land for its economic potential would be able to develop that land and realize that potential. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

8. Indians ⇐16.10(1)

Congress did not intend to grant partnership of village corporations under ANCSA land the value of which could be reduced to zero by fiat of regional corporation which owned subsurface rights to land and which refused to sell to partnership the rock needed for development or which charged unreasonably high price for rock. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

9. Indians ⇐16.10(1)

Facts that partnership of village corporations under ANCSA had no other practical source of rock required for roads for timber harvesting on land granted to it by Congress under ANCSA and that, without reasonable access to rock contained in subsurface of

land, rights to which were owned by regional corporation under ANCSA, partnership's land was economically worthless pointed strongly in favor of easement in favor of partnership to use rock. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.; Restatement of Property § 476 comment.

10. United States ⇐105

Grants of land under ANCSA were made to settle Native aboriginal claims to land in Alaska and to compensate Alaska Natives for past takings of aboriginal title and must reasonably be viewed as having been supported by valuable consideration, notwithstanding fact that grants were not made as part of direct sale. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

11. Indians ⇐16.10(1)
United States ⇐105

Construing titles to estates held by partnership of village corporations and regional corporation under ANCSA in surface and subsurface rights, respectively, of land as not having been supported by consideration, as would preclude finding of easement in favor of partnership to use subsurface rock owned by regional corporation, would potentially render worthless partnership's estate and would be inconsistent with Congress' compensatory goals under ANCSA. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

12. United States ⇐58(1)

Ordinarily, when United States grants land, reserving certain rights to itself, doubts over extent of reservation are to be resolved in favor of United States.

13. Indians ⇐16.10(1)
United States ⇐105

In determining extent of subsurface rights to land which were reserved by United States and simultaneously granted to regional corporation under ANCSA when surface rights were granted to partnership of village corporations under ANCSA, normal presumption that doubts over extent of reservation of rights by United States be resolved in favor of United States did not apply, and regional corporation which was granted subsurface rights did not stand in shoes of United States for purposes of determining whether partnership had implied to use subsurface rock in developing economic potential of surface. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

14. Easements ⇐17(1)

As general rule, when estate is split and simultaneously conveyed to two parties, case for implied easement is much stronger than when grantor retains his interest. Restatement of Property § 476 comment.

15. Indians ⇐16.10(1)

Title held by regional corporation to subsurface rights of land granted to it under ANCSA was subject to valid rights existing at time of conveyance. Alaska Native Claims Settlement Act, § 14(g), 43 U.S.C.A. § 1613(g).

16. Indians ⇐16.10(1)

Right of regional corporation formed under ANCSA which was granted subsurface rights to land to develop any portion of estate within boundaries of Native village was subject to consent of Native village corporation. Alaska Native Claims Settlement Act, § 14(f), 43 U.S.C.A. § 1613(f).

17. Indians ⇐16.10(1)

Subsurface rights to land granted to regional corporation under ANCSA at same time that surface rights were granted to partnership of village corporations under ANCSA were burdened with servitude in favor of partnership, and partnership had right not to be unreasonably denied access to subsurface rock, where partnership had no other source of rock needed to utilize its surface rights in land. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

18. Indians ⇐16.10(1)

Congress imposed requirement under ANCSA that regional corporations redistribute to other regional corporations 70% of all income derived from subsurface resources in recognition that Native corporations would not all receive land of equal value. Alaska

Native Claims Settlement Act, § 7(i), 43 U.S.C.A. § 1606(i).

19. Indians ⇐16.10(1)

Fact that ANCSA does not require Native village corporations to share revenue does not imply congressional intent that village corporations should be able to obtain from regional corporations, without payment, all resources necessary to develop their surface estates. Alaska Native Claims Settlement Act, § 7(i), 43 U.S.C.A. § 1606(i).

20. Indians ⇐16.10(1)

Partnership of village corporations granted surface rights to land under ANCSA were required to pay reasonable price to regional corporation which held subsurface rights to land for use of subsurface rock which was necessary to economic development of land; fact that regional corporation could not deny partnership access to rock achieved ANCSA's purpose of allowing partnership to benefit economically from its surface estate, and fact that partnership was required to pay for rock it used promoted ANCSA's equally important goal of ensuring that revenues derived from subsurface resources be shared among all Natives. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. 1601 et seq.

21. Indians ⇐16.10(1)

Right of access held by partnership of village corporations which had been granted surface rights in land under ANCSA to subsurface rock, the rights to which had been granted to regional corporation under ANCSA, was limited in two important respects; right was conditioned on their being no other practical source of rock for partnership's needs, and right was not right to free access but right to reasonable access. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

22. Federal Civil Procedure ⇐103.2

Party which has suffered no injury has no standing to seek aid of court.

23. Federal Civil Procedure ⇐2285

District court in making factual finding of fair price to be paid by partnership of village corporations under ANCSA, which has been granted surface rights to land, to regional corporation under ANCSA, which owns subsurface rights, for use of rock must make findings that are sufficiently detailed to allow Court of Appeals to discover how and why district court reached price that it did. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

24. Injunction ⇐14

Threat of irreparable injury is not prerequisite for permanent injunction; it is sufficient that plaintiff show that it has no legal remedy.

25. Indians ⇐16.10(1)

District court could conclude that regional corporation under ANCSA had no adequate remedy at law and was entitled to injunction to prevent partnership of village corporations which owned surface rights in land and had right to reasonable use of subsurface rock, to which regional corporation owned rights, from extracting rock without paying fair price to regional corporation where only recourse for regional corporation if partnership continued to extract rock without paying fair price would be multiplicity of damage suits. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

26. Federal Courts ⇐7

District court has broad discretion in fashioning equitable relief.

27. Indians ⇐16.10(1)

District court did not abuse discretion in issuing injunction providing that partnership of village corporations under ANCSA which owned surface rights to land could use subsurface rock in cut-and-fill construction operations without paying regional corporation under ANCSA which owned subsurface rights as long as rock was used in same project and not hauled more than 500 feet. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

Jacquelyn R. Luke, Middleton, Timme & Luke, Anchorage, AK, for plaintiff-appellee-cross-appellant.

David P. Wolf, David N. Goulder, Copeland, Landye, Bennett & Wolf, Portland, OR, for defendants-appellants-cross-appellees.

Appeals from the United States District Court for the District of Alaska.

Before: PREGERSON, CANBY, and BOOCHEVER, Circuit Judges.

CANBY, Circuit Judge:

In *Tyonek Native Corp. v. Cook Inlet Region, Inc.*, 853 F.2d 727 (9th Cir.1988), we held that rock, sand, and gravel are part of the subsurface estate in dually owned lands conveyed to native regional corporations under the Alaska Native Claims Settlement Act, and that village corporations that own the surface have no right to these materials for the purpose of commercial extraction and sale. We left open, however, the question whether a village corporation has any right to use rock, sand, and gravel on site, incidental to the enjoyment of its surface estate. That question is now before us. We conclude that when there is no other practical source for these materials, the subsurface owner on these dually owned lands may not unreasonably deny the surface owner access to rock, sand, and gravel necessary for surface development.

I

[1, 2] Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.*, to settle, through grants of a combination of land and money, all "claims by Natives of Alaska." H.R.Rep. No. 92–523, 92d Cong., 1st Sess. 3, *reprinted in* 1971 U.S.C.C.A.N. 2193 (hereinafter H.R.Rep. 92–523). To administer this land and money, the state was divided into twelve geographic regions, and the Natives within each region became shareholders in a regional corporation organized under Alaska law. 43 U.S.C. § 1606. Additionally, each of approximately 200 Native villages was required to form a village corporation with its villagers as shareholders. 43 U.S.C. § 1607.

The United States patented to the village corporations the surface estate in approximately 22 million acres of land. 43 U.S.C. §§ 1611, 1613 (1978). The underlying subsurface estate was patented to the appropriate regional corporation. *Id.* Lands divided in this way are referred to as "dually owned lands." *Tyonek*, 853 F.2d at 728. The regional corporations also received both the surface and subsurface estate in an additional 16 million acres. 43 U.S.C. § 1611(c). These wholly owned lands are referred to as "fee lands." *Tyonek*, 853 F.2d at 728.

Koncor Forest Resource Management Company is a partnership whose general partners are the wholly owned subsidiaries of four Native village corporations. Two of Koncor's partners hold title to surface estates on Afognak Island, south of Anchorage, Alaska, and have assigned to Koncor their rights to the timber on that land, "and all rights necessary to harvest the timber." [1] Koniag is the regional corporation that holds title to the subsurface—including rock, sand, and gravel—underlying Koncor's timber. Since it began harvesting timber over ten years ago, Koncor has used Koniag's rock [2] for road building and other construction connected with its logging operations. Despite Koniag's repeated demands, Koncor consistently has refused to pay for the rock it uses.

In 1988, Koniag brought this action in federal district court, seeking an injunction ordering Koncor to stop using rock except on terms and conditions acceptable to Koniag, and seeking damages for the rock Koncor already had used. Koncor counterclaimed, seeking, inter alia, a declaration that it has a right to use Koniag's rock to the extent necessary to harvest its timber, without payment to Koniag. The district court denied both parties the primary relief they requested. Although it awarded Koniag damages for Koncor's past use of rock, it issued a permanent injunction authorizing Koncor to

1. Because Koncor thus stands in the shoes of a village corporation with respect to the issues presented in this case, for convenience we refer to Koncor throughout as though it itself were a village corporation.

2. For convenience, we shall use "rock" to refer to rock, sand, and gravel, collectively. Nothing in our decision turns on the differences among these substances.

use Koniag's rock at a price set by the court, provided Koniag does not have a competing use. It also authorized Koncor to use rock in "cut-and-fill" operations without payment.

Koncor appeals, arguing that it should be permitted to use Koniag's rock without payment. In the alternative, it argues that the district court's definition of "cut-and-fill" is too narrow. Koniag cross-appeals, arguing that Koncor should be enjoined from using rock without Koniag's consent.

II

Koncor's position is simply stated. It maintains that Congress intended that it benefit economically from the land it received under ANCSA. It notes, however, that it is faced with a potential barrier to the realization of that goal. Its land is valuable principally as a source of timber, which cannot be harvested without using rock to build roads and other facilities. The only practical source of rock for those purposes is the subsurface estate owned by Koniag. Consequently, if Koniag has absolute control over the disposition of its rock, it can block Koncor's timber harvesting by setting an unreasonably high price, or by refusing to sell rock at all. Koncor contends that such control, with its potential for reducing the value of Koncor's land to zero, is inconsistent with Congress's intent that Koncor be able to develop its land. It argues, therefore, that when the United States simultaneously conveyed the surface estate to Koncor and the subsurface to Koniag, it must also have granted Koncor, by implication, the right to use rock from the subsurface to the extent necessary to harvest its timber, thus imposing a servitude on the subsurface estate. In short, Koncor contends that it has, in effect, an easement of necessity to use Koniag's rock. We agree to a point.

III

[3] In determining whether land patented from the United States is burdened by an implied servitude, we look to several factors, including congressional intent, the degree of necessity for the easement, whether consideration was given for the land, whether the claim is against the United States or against a simultaneous conveyee, and the terms of the patent itself. *See Superior Oil Co. v. United States*, 353 F.2d 34, 36–37 & n. 5 (9th Cir.1965).[3] Analysis of each of these factors indicates that Koniag's land is subject to a servitude whereby Koniag may not unreasonably deny Koncor access to rock.

A. Congressional intent

[4–6] Congress's intent in granting Koncor its land is an important factor in determining the existence and extent of Koncor's rights to use Koniag's land. *See Superior Oil*, 353 F.2d at 36 & n. 2; *cf. Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 53–56, 103 S.Ct. 2218, 2228–30, 76 L.Ed.2d 400 (1983) (congressional intent as to surface use paramount in determining extent of mineral reservation). ANCSA's legislative history makes clear that Congress contemplated that land granted under ANCSA would be put primarily to three uses—village expansion, subsistence, and capital for economic development. *See* H.R.Rep. 92–523 at 5, 1971 U.S.C.C.A.N. at 2195. Of these potential uses, Congress clearly expected economic development would be the most significant:

> The 40,000,000 acres is a generous grant by almost any standard.... The acreage occupied by the Villages and needed for normal village expansion is less than 1,000,000 acres. While some of the remaining 39,000,000 acres may be selected by the Natives because of its subsistence use, *most of it will be selected for its economic potential.... [T]here will be little incentive for the Natives to select*

3. In *Superior Oil*, we considered an easement in the traditional sense of the term: the right of access over the land of another. The easement we consider here—the right to acquire a portion of the property of another through its severance from the servient estate—traditionally was termed a profit a prendre. *See Restatement of Property* § 450, Special Note. However, because the rules applying to easements and to profits are the same, *id.*, our analysis does not depend on the term used. Therefore, we use the term "easement" throughout, and freely draw on authority dealing both with easements and profits. *See generally* 3 Powell, *Powell on Real Property* § 34.01[1] (1994).

lands for subsistence use because during the foreseeable future the Natives will be able to continue their present subsistence uses regardless of whether the lands are in Federal or State ownership.

Id. (emphasis added). *See also Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 731 (9th Cir.1978). While the Act itself does not speak directly to this congressional expectation, it is reflected in ANCSA's requirement that Natives form corporations to receive and administer the land they receive. There would be little purpose in this requirement if Congress did not expect Natives to benefit from the economic development of their land.

[7] Koniag contends, nonetheless, that because village corporations were required to select land near their villages, and because some villages are in areas where the surface has little economic potential, Congress could not have intended that all village corporations develop their land. We agree, but find the argument irrelevant. On the basis of the legislative history and the Act's requirement that Natives incorporate, we have no doubt that Congress intended, at least, that those Native corporations that did select land for its economic potential would be able to develop that land and to realize that potential.

[8] Koncor carefully selected its land for the value of the timber on it. Accordingly, we conclude that Congress did not intend to grant Koncor land whose value could be reduced to zero by fiat of a subsurface owner that refused to sell it rock needed for development, or that charged an unreasonably high price for that rock. *See Hunter v. United States*, 388 F.2d 148, 153–54 (9th Cir.1967) (noting the "well-settled rule that the grant of a right in real property includes all incidentals possessed by the [grantor] and without which the property granted cannot be fully enjoyed.")

B. Necessity

[9] There is no dispute that Koncor has no other practical source of rock required for its timber harvesting, and that without reasonable access to Koniag's rock its land is economically worthless. This degree of necessity points strongly in favor of the easement Koncor claims. *See Restatement of Property* § 476, comment g. ("If the necessity of an easement is such that without it the land cannot be effectively used, nothing less than explicit language in the conveyance negating the creation of the easement will prevent its implication.")

C. Consideration

[10, 11] Although ANCSA land grants were not made as part of a direct sale, they must reasonably be viewed as having been supported by valuable consideration. The ANCSA grants were made to settle Native aboriginal claims to land in Alaska, and to compensate Alaska Natives for past takings of aboriginal title. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1020–21 (D.Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.1980), *cert. denied*, 449 U.S. 888, 101 S.Ct. 243, 66 L.Ed.2d 113 (1980). Construing Koncor's and Koniag's titles to their respective estates in a way that potentially renders worthless Koncor's estate would be inconsistent with Congress's compensatory goals.

D. Simultaneous conveyance

[12–14] Ordinarily, when the United States grants land, reserving certain rights to itself, doubts over the extent of the reservation are to be resolved in favor of the United States. *See Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617, 98 S.Ct. 2002, 2009–10, 56 L.Ed.2d 570 (1978). Here, however, the United States did not retain an interest in the land, but simultaneously conveyed both the surface and the subsurface to third parties. Therefore, we need not indulge in this normal presumption; Koniag does not stand in the shoes of the United States. Moreover, as a general rule, when an estate is split and simultaneously conveyed to two parties, the case for an implied easement is much stronger than when the grantor retains his interest. *See Restatement of Property* § 476, comment f. ("It is reasonable to infer that a conveyor who has divided his land among simultaneous conveyees intends that very considerable privileges of use shall exist between them.")

E. Language of the patents

[15, 16] Koniag notes that its patent to the subsurface underlying Koncor's estate contains certain restrictions. For example, Koniag's title to the subsurface is subject to valid rights existing at the time of the conveyance. 43 U.S.C. § 1613(g). Similarly, its right to develop any portion of its estate within the boundaries of a Native village is subject to the consent of the village corporation. 43 U.S.C. § 1613(f). Citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S.Ct. 1905, 1910–11, 64 L.Ed.2d 548 (1980), Koniag contends that because Congress enumerated these specific restrictions on its title, we should not read additional restrictions into its patent. *Glover*, however, stands only for the proposition that, "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, *in the absence of evidence of contrary legislative intent.*" *Id.* (emphasis added). To the extent that this rule of construction is relevant in the present context, it presents no barrier to our conclusion; as discussed above, we find a clear congressional intent that Koncor benefit from development of its surface estate.

Koniag's citation to *United States v. Wood*, 466 F.2d 1385, 1387 (9th Cir.1972) is similarly unavailing. In *Wood* we stated that a patent from the United States conveys the entire interest possessed by the United States except that which is specifically reserved. *Id.* Koniag contends, therefore, that because there is no specific reservation of an easement in its patent, *Wood* prohibits us from finding one by implication. However, in *Wood*, we carefully qualified our statement of the general rule by noting the possibility of finding an easement by implication or by estoppel. *Id.* at 1388 n. 3. We have found one.

F. Conclusion

[17] Consideration of these factors, particularly Congress's intent that Native corporations benefit from the land they selected, and the fact that Koncor has no other source of the rock needed to utilize its land, compels the conclusion that when the United States conveyed dually owned land to Koncor and Koniag, it conveyed to Koncor, as surface owner, a right not to be unreasonably denied access to subsurface rock as long as there is no other practical source. Koniag's estate is burdened with a corresponding servitude.[4] The district court, therefore, properly denied Koniag's request for an injunction that would have given it absolute control over the disposition of its rock.

IV

Our conclusion does not imply, however, that Koncor has a right to use Koniag's rock without payment.

Koncor proposes what it describes as the "dormant estate" theory in support of its contention that it has a right to use Koniag's rock without paying for it. According to Koncor, Koniag's subsurface estate is "dormant," because Koniag has no potential buyers for its rock. In this circumstance, Koncor argues, it ought to be able to use the rock free of charge because in doing so it will not be depriving Koniag of money it might otherwise receive for that rock.

The obvious flaw in this argument is that Koniag has a potential buyer for its rock: Koncor. When Koncor uses rock without paying for it, Koniag loses the money that Koncor otherwise would be paying, along with the opportunity to sell the rock at some time in the future, when there may be other buyers. The fact that Koniag presently lacks *other* potential buyers for its rock does not render the rock worthless. Koncor's position as the sole current potential purchaser for Koncor's rock is counterbalanced by Koniag's monopoly over rock on the island.

[18] A greater flaw in Koncor's position is that it conflicts with the purpose underlying one of ANCSA's most important provisions. ANCSA section 7(i) (43 U.S.C. § 1606(i)), requires regional corporations to

4. To ensure that Koncor receives the benefits that Congress intended from the settlement, it is clear that the right of reasonable access to rock is not personal to Koncor, but rather runs with the surface estate. For similar reasons, Koniag's burden is not personal, but runs with the subsurface estate.

redistribute to other regional corporations 70% of all income derived from their subsurface resources.[5] Congress imposed this requirement in recognition that Native corporations would not all receive land of equal value. *Chugach*, 588 F.2d at 732. The redistribution of revenue partially mitigates the disparity in the quality of land various corporations received, and therefore helps "achieve a rough equality in assets among all the Natives." *Id.*

We relied on section 7(i) in *Chugach* and *Tyonek*, where we determined that rock, sand, and gravel are part of the subsurface estate both on fee land (*Chugach*) and on dually owned land (*Tyonek*). We reasoned:

> Sand and gravel are resources that are only valuable if located near developing centers. The high cost of transportation makes it unprofitable to ship them over great distances. Construing sand and gravel to be part of the surface estate would give those Corporations near large cities and developing areas a significant economic advantage over the others.

Chugach, 588 F.2d at 732. Because "it is precisely this unequal distribution of resources that section 7(i) is intended to counter," we concluded that rock, sand, and gravel must be part of the subsurface estate. *Id.* (quoting *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F.Supp. 862, 867 (D.Alaska 1976)); *Tyonek*, 853 F.2d at 729.

[19] The surface of Afognak Island, with Koncor's active timber harvesting, is the kind of developing region we referred to in *Chugach*. Allowing Koncor to use Koniag's rock without payment would allow Koncor, which is not required to share its revenues with other Native corporations, to capture the entire value of the rock it uses—rock which we determined in *Chugach* and *Tyonek* must be subject to section 7(i)'s revenue sharing provisions.[6]

[20] Accordingly, while Koniag may not unreasonably deny Koncor access to rock necessary for its timber harvesting operations, Koncor must pay a reasonable price for the rock it uses. This requirement ensures that, in the situation presented in this case, ANCSA's goals are not thwarted. That Koniag may not unreasonably deny Koncor access to its rock achieves ANCSA's purpose of allowing Koncor to benefit economically from its surface estate. That Koncor must pay for the rock it uses promotes ANCSA's equally important goal of ensuring that revenues derived from subsurface resources be shared among all Natives.

V

The district court's injunction requires Koniag to sell Koncor rock at $0.30 per cubic yard, gravel at $0.30 per cubic yard, and sand at $0.75 per cubic yard. For the reasons set out below, we vacate the injunction.

[21, 22] Koncor's right of access to Koniag's rock is limited in two important respects. First, it is conditioned on there being no other practical source of rock for Koncor's needs. Second, it is not a right to free access; it is a right to reasonable access. Therefore, before Koncor can expect courts to intervene on its behalf, it must establish two things. First, it must demonstrate that Koniag owns the only practical source of material for development of its surface estate. It already has done this. Second, Koncor has the burden of showing that it has been unreasonably denied access to Koniag's rock. Unless Koncor can demonstrate that Koniag is unreasonably denying it access to

5. Section 7(j) then requires that each regional corporation distribute 50% of the funds thus received to the village corporations in its region.

6. Koncor argues the fact that, because section 7(i) does not require village corporations to share revenues, Congress must have intended that regional corporations are to receive no money, in any way, derived from the sale of resources owned by village corporations. It argues that requiring it to pay for rock it uses in timber harvesting is contrary to this intent, because such payments reduce its net profits from the sale of timber.

There is no basis for the inference Koncor wants to draw. The fact that ANCSA does not impose a legal requirement that village corporations share revenues with regional corporations does not imply a congressional intent that the village corporations should be able to obtain from regional corporations, without payment, all resources necessary to develop their surface estates.

rock it needs for development, it suffers no injury, and therefore has no standing to seek the aid of the court. *See Lujan v. Defenders of Wildlife*, — U.S. —, —, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

[23] The district court never addressed this second issue. Instead, it determined that $0.30 per cubic yard is a "fair price" for Koniag's rock. However, even if $0.30 per cubic yard is a fair price,[7] it does not follow that the price Koniag is demanding—currently $0.75 per cubic yard—is unreasonable. What counts as a reasonable price is not subject to precise mathematical definition. In any location, for any resource, there will be a range of prices, perhaps a wide range, none of which are unreasonable. On the record before us, we cannot conclude that the price Koniag is demanding clearly falls outside or inside that reasonable range.

Accordingly, we vacate the district court's injunction. If the parties do not settle on a mutually agreeable price, on remand Koncor has the burden of showing that the price[8] Koniag demands for rock is unreasonably high, or that Koniag is refusing to sell Koncor rock at any price. If Koncor carries this burden, the district court may issue an injunction requiring Koniag to sell Koncor rock, sand, and gravel at prices that the district court determines are reasonable.

[24, 25] If Koncor fails to carry its burden, then it either must pay the price Koniag demands, or stop using its rock. If it continues to use the rock without paying a reasonable price, as it has in the past, the district court may, in its discretion, issue an injunction ordering Koncor to stop using Koniag's rock unless it pays the reasonable price Koniag demands.[9]

VI

Cut-and-fill construction involves preparing land by leveling those portions that are above the desired grade, and using the material thus removed to fill in those portions that are below the desired grade. The district court's injunction provides that Koncor can use rock in cut-and-fill operations without payment, as long as it is used in the "same project" from which it was obtained. According to the injunction, " 'same project' refers to such things as camp sites, log sort yards, or log transfer sites, each considered separately." In the case of road construction, the injunction provides that Koncor need not pay for cut-and-fill material provided that it is moved no more than 500 feet for use in the same roadbed. Any material "blasted, hauled by truck, put through a crusher or obtained from a borrow pit or quarry" is not considered cut-and-fill.

Once again, both parties are unhappy with the terms of the injunction. Koniag contends that Koncor must pay for all rock it uses. Koncor contends that the "same project" and 500 foot limits placed on its use of

7. We express no view whether $0.30 per cubic yard in fact is a fair price. In light of our disposition, we need not reach this issue. We note, however, that even were we to attempt to address the issue, we would be forced to remand for additional findings. The district court arrived at the figure of $0.30 per cubic yard after hearing testimony from a variety of witnesses who gave estimates ranging from $0.00 to $0.75 per cubic yard. However, the district court's findings of fact and conclusions of law provide no indication how it arrived at the figure it finally concluded was fair. Indeed, from the little the district court did say, it appears that it merely picked a number close to halfway between the highest and lowest estimates it received. Such findings are inadequate. The district court must make findings that are sufficiently detailed to allow us to discover how and why it reached the price it did. *Cf. United States v. Merz*, 376 U.S. 192, 199, 84 S.Ct. 639, 643–44, 11 L.Ed.2d 629 (1964).

8. In the event the parties have difficulty in reaching such an agreement, the district court may in its discretion encourage the parties to use mediation or arbitration procedures. We believe it is to both parties' advantage to reach such agreements without the costs and delays of litigation.

9. In this circuit, the threat of irreparable injury is not a prerequisite for a permanent injunction. *Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir.1994). It is sufficient that a plaintiff show that it has no adequate legal remedy. *Id.* If Koncor continues to use Koniag's rock without paying a reasonable price, Koniag's only recourse, short of an injunction, is a multiplicity of damage suits. In this circumstance, a district court may conclude that Koniag has no adequate remedy at law. *See id.; See generally* 1 Dobbs, *Remedies* 750–52, 807–11 (2d ed. 1993).

cut-and-fill are too narrow. It insists that whenever it needs to cut down some surface, it ought to be able to use the material thus removed whenever and wherever it wishes, without payment.

[26, 27] A district court has broad discretion in fashioning equitable relief. *S.E.C. v. United Fin. Group*, 474 F.2d 354, 358–59 (9th Cir.1973). We find no abuse of discretion in this instance. Koniag does not dispute that Koncor has a right to prepare sites by cutting down high spots or digging depressions when necessary. Nor does it contend that Koncor must necessarily pay for material it so removes. It contends, instead, that Koncor must pay for that material only if Koncor uses it as fill. Yet if Koncor may remove material without payment, it makes no legal or economic sense to compel Koncor to pay for that material merely because it happens to dispose of it in a manner beneficial to Koncor, rather than in a manner that is of no benefit to anyone. Koniag cites, and we can discover, no decision holding that a surface owner must compensate a subsurface owner for material thus moved. Therefore, we reject Koniag's position that Koncor must pay for any and all rock it moves in cut-and-fill construction.

This case, however, presents some unique concerns. In what we imagine is the ordinary case, cut-and-fill construction involves relocation of relatively valueless material, of no concern to the subsurface owner. Such is not the case here. Therefore, any ruling that Koncor may use all rock obtained by necessary cutting without compensating Koniag is open to potential abuse. For example, rather than cutting only when necessary, Koncor could maximize its use of cut-and-fill construction by choosing to route roads along the sides of hills rather than over flat land. Similarly, it could choose to site camps on land that requires a great deal of leveling and grading. There is evidence in the record that Koncor does precisely these things. Such tactical decisions, made not because they are topographically necessary, but in order to obtain as much rock as possible without paying for it, unfairly deprive Koniag of revenues from the sale of rock, and fall outside the range of what we consider legitimate incidental uses that do not require payment to Koniag.

The limitations the district court placed on the definition of cut-and-fill are intended to minimize the potential for such abuses, with a minimum of future judicial intervention. In creating those limitations, the district court did not abuse its discretion. Koncor appealed to the court's equitable powers, and the court, in our view, fashioned an equitable solution, protecting the rights of both parties. Accordingly, we affirm that portion of the district court's injunction concerned with cut-and-fill.

CONCLUSION

Apart from Koniag's rock, there are no practical sources of rock for development of Koncor's surface estate, consistent with the intent of ANCSA. Therefore, Koncor, as surface owner, has a right not to be unreasonably denied use of rock from Koniag's subsurface estate. The benefits and burdens of this servitude run with the respective estates.

However, on the record before us, there is insufficient evidence to determine whether Koniag presently is violating Koncor's right to reasonable access. Accordingly, we vacate the district court's injunction except insofar as it applies to cut-and-fill operations, and remand to the district court for further proceedings not inconsistent with this opinion. Each party will bear its own costs on appeal.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

SECTION 7(i) SETTLEMENT AGREEMENT

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under this Agreement or Section 7(i).

41 Section 7. Sand and Gravel. The parties to this Agreement recognize that the ruling of the United States Court of Appeals for the Ninth Circuit that sand and gravel are Section 7(i) Resources has made it disproportionately difficult in relation to the benefits to the Corporations to determine their Section 7(i) obligations with regard to these resources, because (i) sand and gravel deposits usually are small and localized; (ii) the cost of development is high in relation to their potential value; (iii) the cost of accounting is high; and (iv) it is difficult to arrive at a satisfactory method of accounting for use by the Corporations and the Village Corporations. The parties to this Agreement also recognize that it is desirable to permit Village Corporations to use sand and gravel on their own lands for their own local needs without incurring a financial obligation to the Corporations. For these reasons, the parties agree that, in each Fiscal Year, the first one hundred thousand dollars ($100,000) of gross revenues received by a Corporation from the sale or disposition of sand, stone, gravel, pumicite or cinder resources shall be excluded from Gross Section 7(i) Revenues, and the items of cost associated with such revenues shall be excluded from Section 7(i) Costs. The parties further agree to use their best efforts to cause Congress to amend ANCSA to exclude sand, stone, gravel, pumicite, and cinders from the sharing requirements of Section 7(i). On the effective date of any such amendment or legislation excluding sand, stone, gravel, pumicite and cinders from the sharing requirements of Section 7(i), such resources shall cease to be Section 7(i) Resources under this Agreement.

Form 1860-9
(November 1984)

The United States of America

To all to whom these presents shall come, Greeting:

AA-6661-C

WHEREAS

Eklutna, Inc.

is entitled to a patent pursuant to Sec. 14(a) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(a), of the surface estate in the following-described lands:

Seward Meridian, Alaska

T. 15 N., R. 2 E.
Sec. 5, lots 1 to 4, inclusive, S2N2, S2;
Sec. 7, W2SE4NE4, W2NE4SE4;
Sec. 8, lots 9, 10 and 11, NW4NW4, SW4SW4;
Sec. 9, lots 2, 3, 4 and 6, NE4NW4.

Containing 972.54 acres, as shown on plat of survey accepted February 28, 1979.

T. 16 N., R. 2 E.
Sec. 17, NW4, E2NW4SW4, E2SW4;
Sec. 20, W2, SE4.

Containing 740.00 acres, as shown on plat of survey accepted February 28, 1979.

Aggregating 1,712.54 acres.

NOW KNOW YE, that there is, therefore, granted by the UNITED STATES OF AMERICA, unto the above-named corporation the surface estate in the lands above described; TO HAVE AND TO HOLD the said estate with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said corporation, its successors and assigns, forever.

EXCEPTING AND RESERVING TO THE UNITED STATES from the lands so granted:

1. The subsurface estate therein, and all rights, privileges, immunities, and appurtenances, of whatsoever nature, accruing

50-86-0636

Patent Number

unto said estate pursuant to the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(f);

2. Pursuant to Sec. 17(b) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1616(b), the following public easements, referenced by easement identification number (EIN) on the easement map attached to this document, a copy of which will be found in case file AA-6661-EE, are reserved to the United States. All easements are subject to applicable Federal, State, or Municipal corporation regulation. The following is a listing of uses allowed for each type of easement. Any uses which are not specifically listed are prohibited.

60 Foot Road - The uses allowed on a sixty (60) foot wide road easement are: travel by foot, dogsleds, animals, snowmobiles, two- and three-wheel vehicles, small and large all-terrain vehicles (ATVs), track vehicles, four-wheel drive vehicles, automobiles, and trucks.

25 Foot Trail - The uses allowed on a twenty-five (25) foot wide trail easement are: travel by foot, dogsleds, animals, snowmobiles, two- and three-wheel vehicles, and small all-terrain vehicles (ATVs) (less than 3,000 lbs. Gross Vehicle Weight (GVW)).

a. (EIN 20 B, D1, D2, D9) An easement sixty (60) feet in width (30 feet each side of centerline) for an existing road from the Eklutna River Road terminus in Sec. 8, T. 15 N., R. 2 E., Seward Meridian, southeasterly, along the northeast shore of Eklutna Lake to site

easement EIN 33a, B, C4, D2, D9, L in Sec. 19, T. 14 N., R. 3 E., Seward Meridian. The uses allowed are those listed above for a sixty (60) foot wide road easement.

b. (EIN 22 D2, L) An easement twenty-five (25) feet in width for an existing access trail from road easement EIN 20 B, D1, D2, D9 in Sec. 8, T. 15 N., R. 2 E., Seward Meridian, northerly, to public lands.

c. (EIN 24 D9) An easement twenty-five (25) feet in width for an existing access trail from the north end of Eklutna Lake in Sec. 8, T. 15 N., R. 2 E., Seward Meridian, southerly to Sec. 20, T. 15 N., R. 2 E., Seward Meridian. The uses allowed are those listed above for a twenty-five (25) foot wide trail easement.

d. (EIN 65 C4) An easement one hundred (100) feet in width (50 feet on either side of centerline) for an existing aqueduct (pressure tunnel) from the Eklutna Power Project intake facilities in Sec. 8, T. 15 N., R. 2 E., Seward Meridian, northerly to the Eklutna Powerhouse in Sec. 17, T. 16 N., R. 2 E., Seward Meridian. The uses allowed are those associated with construction, reconstruction, operation and maintenance of a pressure tunnel, and the right to keep the lands clear of any activity which would threaten the integrity of the tunnel.

e. (EIN 64 C4) An easement seventy-five (75) feet in width (37.5 feet on either side of centerline), for an existing powerline from the Eklutna Powerhouse in Sec. 17,

T. 16 N., R. 2 E., Seward Meridian, northeasterly and then northerly to Palmer.

f. (EIN 119 C4) An easement sixty (60) feet in width for an existing road from the Eklutna River Road ("Omnibus Road") in the NW4 of Sec. 8, T. 15 N., R. 2 E., Seward Meridian, southerly to the Eklutna Power Project dam site in Sec. 8, T. 15 N., R. 2 E., Seward Meridian. The uses are those listed above for a sixty (60) foot wide road easement.

g. (EIN 121 C4, C5) An easement twenty-five (25) feet in width for an existing access trail from road easement EIN 20 B, D1, D2, D9 in Sec. 9, T. 15 N., R. 2 E., Seward Meridian, easterly, to public lands.

THE GRANT OF THE ABOVE-DESCRIBED LANDS IS SUBJECT TO:

1. Valid existing rights therein, if any, including but not limited to those created by any lease (including a lease issued under Sec. 6(g) of the Alaska Statehood Act of July 7, 1958, 48 U.S.C. Ch. 2, Sec. 6(g)), contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Further, pursuant to Sec. 17(b)(2) of the Alaska Native Claims Settlement Act of December 18, 1971 (ANCSA), 43 U.S.C. 1601, 1616(b)(2), any valid existing right recognized by ANCSA shall continue to have whatever right of access as is now provided for under existing law;

2. Requirements of Sec. 14(c) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(c), as amended, that the grantee hereunder convey those portions, if any, of the lands hereinabove granted, as are prescribed in said section;

3. An easement and right-of-way to operate, maintain, repair and patrol an overhead open wire and underground communication line or lines, and appurtenances thereto, in, on, over and across a strip of land fifty (50) feet in width, lying twenty-five (25) feet on each side of the centerline of the Alaska Communication System's open wire or pole line and/or buried communication cableline, conveyed to RCA Alaska Communications, Inc., by easement deed dated January 10, 1971 (serial No. AA-6187), pursuant to the Alaska Communications Disposal Act of November 14, 1967, 40 U.S.C. 771-792, located in the NW4 and NW4SW4 of Sec. 17, T. 16 N., R. 2 E., Seward Meridian, Alaska;

4. Any right-of-way interest in Eklutna Lake Road (FAS Route No. 5561) transferred to the State of Alaska by the Quitclaim Deed dated June 30, 1959, executed by the Secretary of Commerce under the authority of the Alaska Omnibus Act, Public Law 86-70, 73 Stat. 141, located in Sec. 8, T. 15 N., R. 2 E., Seward Meridian, Alaska;

5. An easement for highway purposes, including appurtenant protective, scenic, and service areas, extending one hundred fifty (150) feet each side of the centerline of the Glenn Highway, as established by Public Land Order No. 1613, 23 F.R. 2376, pursuant to the act of August 1, 1956, 43 U.S.C. 971a, as amended and supplemented, and transferred to the State of Alaska pursuant to the Alaska Omnibus Act, Public Law 86-70, 73 Stat. 141, as to: Sec. 17, T. 16 N., R. 2 E., Seward Meridian, Alaska;

6. Those rights for the Eklutna water pipeline and related facilities as have been granted to the Municipality of Anchorage for the public lands involved, subject to the terms and conditions of the grant dated March 6, 1984, as amended (serial No. AA-51163), pursuant to the act of October 21, 1976, 43 U.S.C. 1761-1771, located in the N2N2 of Sec. 8, T. 15 N., R. 2 E., Seward Meridian, Alaska;

7. A right-of-way, AA-56697, for the right to construct, operate, maintain, and terminate an overhead and/or underground electrical distribution line, pole placements and guy and anchor sites, except for portions specified to be underground within Park boundary, subject to the terms and conditions of the grant dated May 19, 1986, to Matanuska Electric Association, Inc., pursuant to the Act of October 21, 1976, 43 U.S.C. 1701, 1761-1771, located in Secs. 7, 8, and 9, T 15 N., R. 2 E., Seward Meridian, Alaska; and

8. The terms and conditions of the North Anchorage Land Agreement of March 15, 1982, as amended, entered into pursuant to Sec. 1425 of the Alaska National Interest Lands Conservation Act of December 2, 1980, 94 Stat. 2371, 2515. A copy of the North Anchorage Land Agreement was recorded in the Anchorage Recording District, Book No. 708, Pages 295-456 on March 18, 1982, and in the Palmer Recording District, Book No. 290, Pages 396-557 on January 25, 1983, as amended.

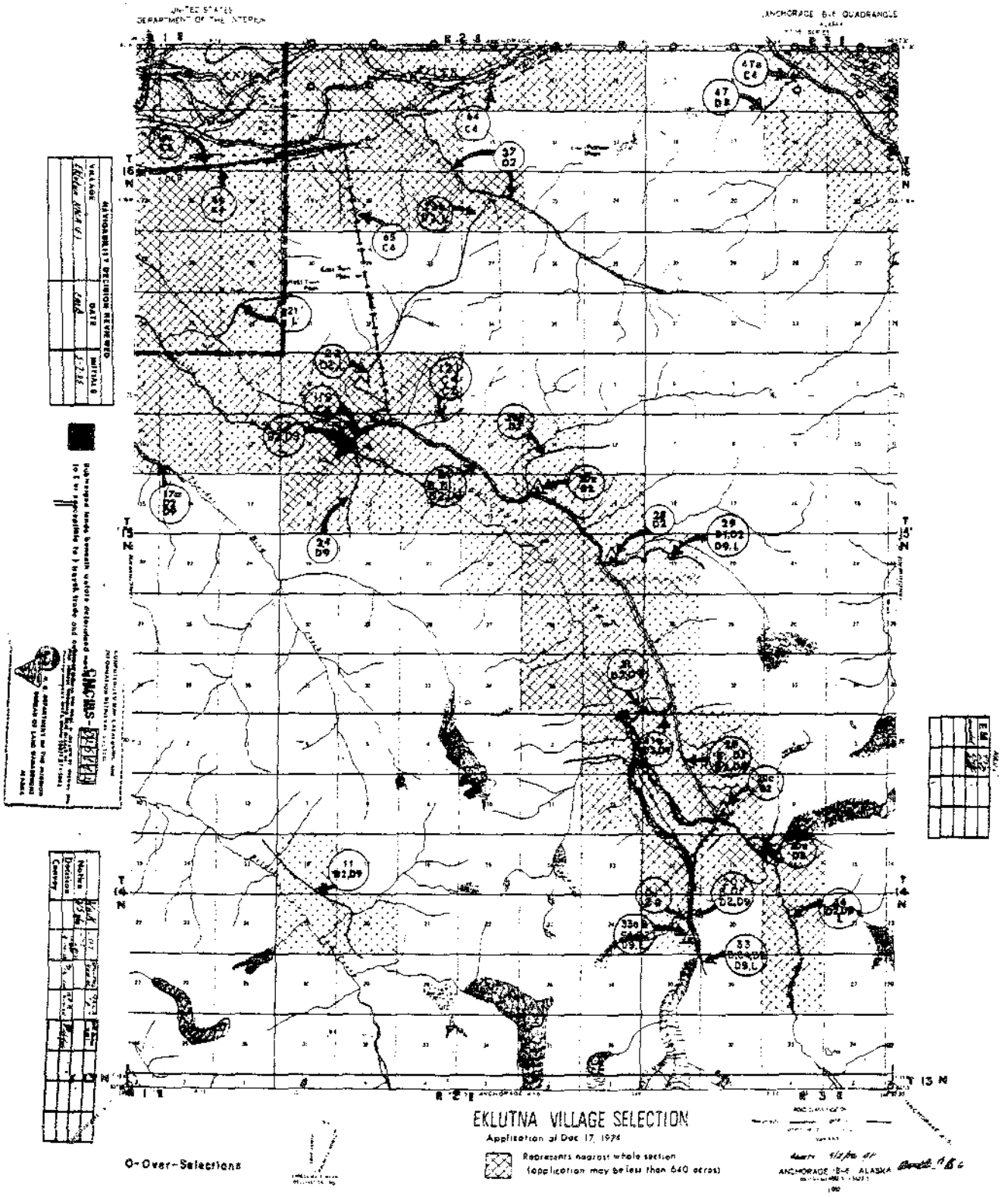
IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

[SEAL]

GIVEN under my hand, in ANCHORAGE, ALASKA the THIRTIETH day of SEPTEMBER in the year of our Lord one thousand nine hundred and EIGHTY-SIX and of the Independence of the United States the two hundred and ELEVENTH.

Patent Number 50-86-0636

By Ann Johnson
Ann Johnson
Chief, Branch of ANCSA Adjudication



EKLUTNA VILLAGE SELECTION

Application of Dec 17, 1974

Represents nearest whole section
(application may be less than 640 acres)

Core Township

ANCHORAGE (B-6) ALASKA

Bureau of Land Management
Alaska State Office
SEP 30 1985
DATE
Anchorage, Alaska

I hereby certify that this reproduction is a copy of the official record on file in this office.

AUTHORIZED SIGNATURE

50-86-0636

Form 1860-9
(November 1984)

The United States of America

To all to whom these presents shall come, Greeting:

AA-8448-A

WHEREAS

Koniag, Inc., Regional Native Corporation

is entitled to a patent pursuant to Sec. 14(f) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(f), of the subsurface estate reserved to the United States in the hereinbelow identified patent for the surface estate in the following described lands:

Patent No. 50-86-0634

Seward Meridian, Alaska

T. 27 S., R. 19 W.
Tract G.

Containing 1.0 acre, as shown on plat of survey accepted April 11, 1978.

NOW KNOW YE, that there is, therefore, granted by the UNITED STATES OF AMERICA, unto the above-named corporation the subsurface estate in the lands above described; TO HAVE AND TO HOLD the said estate with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said corporation, its successors and assigns, forever.

THE GRANT OF THE ABOVE-DESCRIBED LANDS IS SUBJECT TO:

1. All the easements and rights-of-way referenced in the aforementioned patent of the surface estate, and to valid existing rights therein, if any, in the said subsurface estate, including but not limited

50-86-0635

Patent Number

Form 1860-10
(September 1985)

to those created by any lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him; and

2. The requirements of Sec. 14(f) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(f), that the right to explore, develop, or remove minerals from the subsurface estate in the lands herein conveyed which are within the boundaries of the Native village of Woody Island shall be subject to the consent of Leisnoi, Inc.

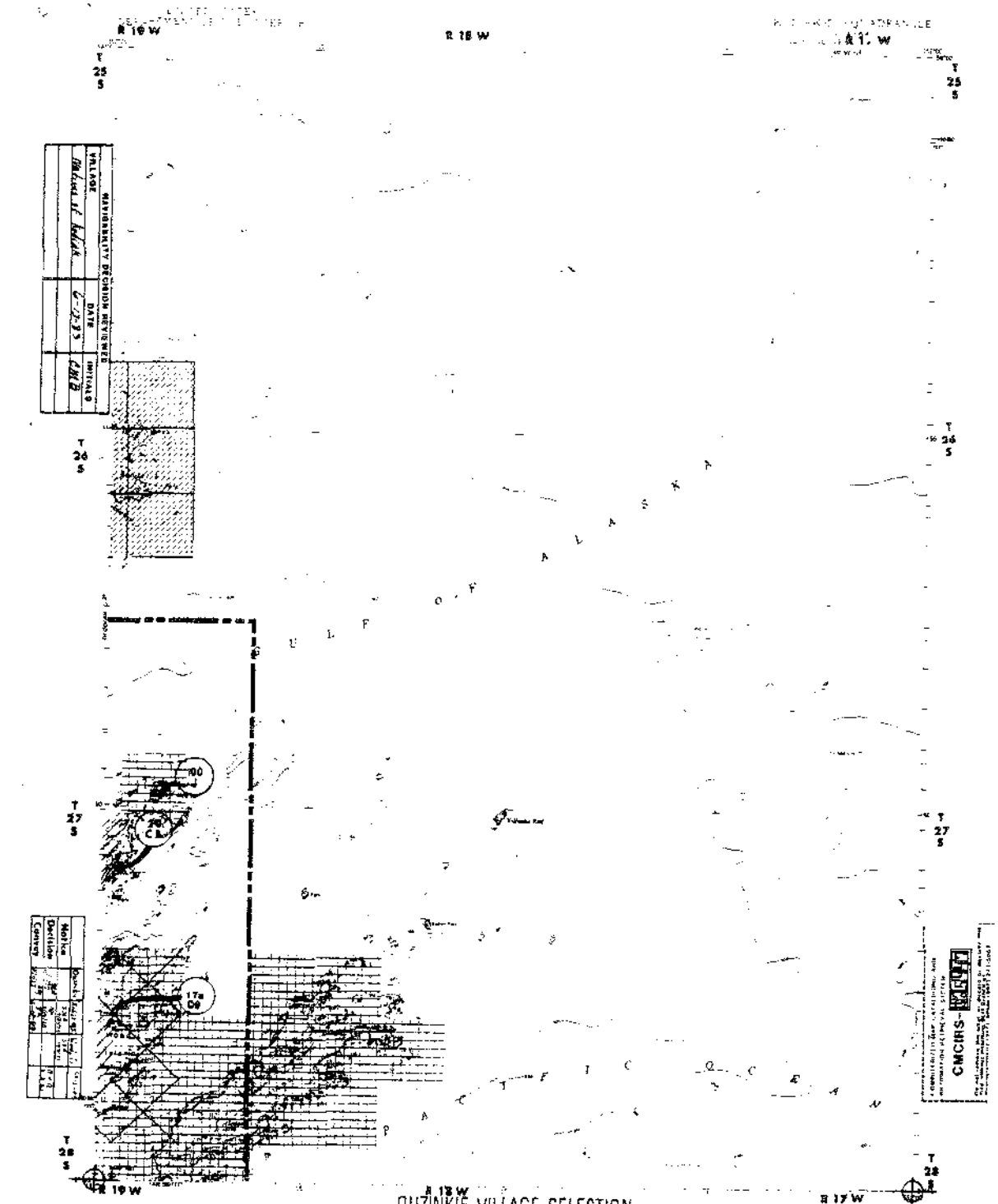
IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

[SEAL]

GIVEN under my hand, in ANCHORAGE, ALASKA the THIRTIETH day of SEPTEMBER in the year of our Lord one thousand nine hundred and EIGHTY-SIX and of the Independence of the United States the two hundred and ELEVENTH.

Patent Number 50-86-0635

By Ann Johnson
Ann Johnson
Chief, Branch of ANCSA Adjudication



KODIAK, 4 CITIES SELECTION

OUZINKIE VILLAGE SELECTION
Application of Dec 17 1974
Represents nearest whole section.
(application may be less than 640 acres)

WOODY ISLAND VILLAGE SELECTION

PCO 12/10/75
OUZINKIE

KODIAK (D-1) ALASKA

12-20-78 Esmts 12/5/85
4-10-80

V/Sel 8/2/83

Bureau of Land Management
Alaska State Office
SEP 30 1986 Anchorage, Alaska
DATE

50-86-0635

I hereby certify that this reproduction is a copy of the official record on file in this office.

AUTHORIZED SIGNATURE

Fidelity Title Agency of Alaska
title insurance policy provisions

4. The land referred to in this policy is described as follows:

Tract 1, MEA EKLUTNA GENERATION SUBDIVISION, according to the official plat thereof, filed under Plat No. 2009-98, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska, EXCEPTING THEREFROM the subsurface estate and all rights, privileges, immunities and appurtenances of whatsoever nature accruing unto said estate pursuant to the Alaska Native Claims Settlement Act of December 18, 1971 (85 Stat 688, 704; 43 USC 1601, 1613 (f) (1976) as reserved by the United States of America in the Patent of said land.

SPECIAL EXCEPTIONS

1. **Reservations and exceptions** as contained within United States Patents and Interim Conveyances, and/or in acts authorizing the issuance thereof; said documents being recorded as follows:
Patent No. 50-74-0164 recorded September 9, 1975 in Book 46 at page 551 which was rerecorded October 7, 1975 in Book 53 at page 469 and also recorded April 9, 1985 in Book 1249 at page 810 and was modified by instrument recorded March 21, 2003 under Reception 2003-025660-0; Interim Conveyance No. 1211 recorded September 2, 1986 in Book 1485 at page 195; and Patent No. 50-86-0356 recorded September 11, 1986 in Book 1489 at page 928; Interim Conveyance No. 1287 recorded November 28, 1986 in Book 1531 at page 102 as modified by Patent No. 50-93-0601 recorded December 17, 1993 in Book 2559 at page 197 which was also recorded May 31, 2006 under Reception No. 2006-035302-0

2. **Terms, covenants, conditions and provisions**, including rights-of-way and easements as contained in the Alaska Native Claims Settlement Act dated December 18, 1971, U.S. Public Law 92-203, 85 Stat. 688, 43 U.S.C.A. 1601, et seq, and any amendments and additions thereto, and any regulations arising therefrom.

Order No. [redacted]

Pacific Northwest Title of Alaska, Inc.

PROPERTY REPORT

Date: May 18, 2010

[redacted]

This is a Property Report as of **May 10, 2010 at 8:00 AM** on the following described property:

PARCEL 1

[redacted]

PARCEL 2

[redacted]

PARCEL 3

[redacted]

PARCEL 4

[redacted]

A search of the Company's property records for the [redacted] Recording Office reveals that title to the property described herein is vested on the date shown above in:

[redacted], **an estate in fee simple, as to Parcels 1 and 2;**
[redacted], **an estate in fee simple, as to the surface estate of Parcel 3;** [redacted]
[redacted], **an estate in fee simple, as to the surface estate of Parcel 4; and** [redacted]
[redacted], **an estate in fee simple, as to the subsurface estate of Parcels 3 and 4**

Order No. [redacted]

SUBJECT only to the exceptions shown herein:

GENERAL EXCEPTIONS:

1. Encroachments or questions of location, boundary and area, which an accurate survey may disclose and which are not disclosed by the public records; public or private easements, claims of easements, liens or encumbrances which are not disclosed by the public records, including but not limited to rights of the state and/or public in and to any portion of the land for right of way as established by federal statute RS 2477; rights or claims of persons in possession, or claiming to be in possession, not disclosed by the public records; material or labor liens or statutory liens under State Acts not disclosed by the public records; any service, installation or construction charges for sewer, water or electricity.
2. Right of use, control or regulation by the United States of America in the exercise of powers over navigation.
3. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
4. (1) Mining claims; (2) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (3) water rights, claims or title to water, or matters relating thereto, whether or not the matters excepted under (1), (2) or (3) are shown by the public records.

SPECIAL EXCEPTIONS:

1. [redacted]
2.
3.
4.
5.
6.
7.
8.
9.

10. [redacted]

11. EXCEPTIONS, RESERVATIONS, AGREEMENTS, EASEMENTS AND USE RIGHTS as set forth in Interim Conveyance :
Recorded: [redacted]
Book/Page: [redacted]
Affects: Parcels 3 and 4

12. TERMS, COVENANTS, CONDITIONS AND PROVISIONS, including rights of way and easements, as contained in the Alaska Native Claims Settlement Act, dated December 18, 1971, U.S. Public Law 92-203, (85 Stat. 688, 704; 43 U.S.C. 1601, et seq.).

NOTE: No assurance is given as to the location of the common boundary dividing the surface and subsurface estates as provided in said Act.

Affects: Parcels 3 and 4

13. [redacted]

14. [redacted]

15. [redacted]

[redacted]

First American Title Insurance Company
title insurance policy provisions

Legal description wherein only the surface estate is conveyed:

Lot __, Block _____, _____ SUBDIVISION, according to the official plat thereof, filed under Plat Number _____, Records of the _____ Recording District, Fourth Judicial District, State of Alaska.

EXCEPTING THEREFROM THE SUBSURFACE ESTATE and all rights, privileges, immunities and appurtenances of whatsoever nature accruing unto said estate pursuant to the Alaska Native Claims Settlement Act of 12-18-71 (85 Stat 688, 704; 43 U.S.C. 1601, 1613(f) (1976) as reserved by the United States of America.

Exceptions that may be used, depending on the circumstances:

1. Terms, reservations, conditions and provisions contained in the interim conveyance from the United States of America as herein noted,
Recorded:
Recording Information:

2. Any defect or invalidity of the title to said land based on the fact that no patent has been issued by the United States of America. Upon the issuance of said patent and recordation thereof in the Anchorage Recording District, said land will be subject to all the provisions and reservations contained therein.

3. The terms, covenants, conditions and provisions, including rights-of-way and easements as contained in the Alaska Native Claims Settlement Act, dated December 18, 1971, U.S. Public Law 92-203, 85 Stat. 688, 43 U.S.C.A. 1601, et seq.

4. Reservation of the subsurface estate in said land including, but not limited to, rights of entry to explore, develop or remove minerals from said subsurface estate, as set forth in Sections 14(f) and 14(g) of the Alaska Native Claims Settlement Act referred to hereinabove.
NOTE: No assurance is given as to the vertical delineation of the surface and subsurface estates in said land as provided in said act.

30

ALASKA

2009-073315-0

Recording Dist: 301 - Anchorage
11/20/2009 10:31 AM Pages: 1 of 3

(2) F-22238
CC x 3

Non Development Covenant

COOK INLET REGION, INC. (CIRI), an Alaskan Corporation, whose business address is 2525 C Street, Anchorage, Alaska 99503 (P.O. Box 93330, Anchorage, Alaska 99509-3330), for and in consideration of Ten Dollars ($10.00) and other good and valuable considerations, the receipt of which is hereby acknowledged, does hereby grant unto Eklutna, Inc. (hereinafter called "Surface Owner"), whose business address is 16515 Centerfield Drive, Eagle River, Alaska 99577, a Non-Development Covenant in consideration of the foregoing and the terms and conditions hereinafter set forth.

RECITALS

A. CIRI owns title to the Subsurface Estate pursuant to the Alaska Native Claims Settlement Act (ANCSA), (Public Law 92-203, 85 Stat. 688, 43 U.S.C. 1601 et seq, as amended), in the following described lands, recorded in the Anchorage Recording District, Third Judicial District, State of Alaska (the "Property"):

> Tract 1, MEA EKLUTNA Generation Site Subdivision, according to the plat thereof filed under Plat No. 2009-2009-98 in the Anchorage Recording District, Third Judicial District, State of Alaska.

B. The Surface Owner owns the title to the Surface Estate in the Property.

C. The Surface Owner has requested CIRI to covenant to limit its rights to develop and use the Subsurface Estate, and CIRI is willing to covenant under the terms and conditions hereinafter provided.

TERMS

Section 1. DEFINITIONS.

A. "Gravel Resources" includes gravel, sand, pumicite, rock, stone and other stony materials that are not (and are not proposed to be) mined or milled or smelted as mineral ore.

B. "Commercial Use" means, with respect to Gravel Resources, any use of Gravel Resources for or in the reasonable expectation of profit or commercial benefit

including but not limited to the sale, lease or use of Gravel Resources for an airstrip, road, highway, railroad or dock.

C. "Off-Premises Use" means, with respect to Gravel Resource, any use of Gravel Resources either (1) off the premises of the Property, or (2) if the Property is divided or subdivided into two or more parcels, off the Premises of any such parcel even though the use is or would be on another parcel divided or subdivided from the Property.

Section 2. NON-DEVELOPMENT BY CIRI.

A. CIRI shall not disrupt the Surface Estate, disturb the lateral or subjacent support of the Property or exercise any of its right to the Subsurface Estate to a depth of 250 feet of the Surface Estate.

B. CIRI shall not object to the entry and use of the Property by the Surface Owner.

1. To a depth not to exceed two hundred fifty (250) feet from the natural surface contour of the Property as of the date of this Non-Development Covenant for purposes of excavation for and placement and maintenance of foundations, pilings, pipe and septic systems and utility facilities; and

2. To such a greater depth than two hundred fifty (250) feet as may be necessary or convenient for purposes of drilling a well to produce a sufficient and adequate supply of water for use on the premises of the Property;

Provided, however that this subsection 2(B) (2) of this Non-Development Covenant does not and shall not authorize any extraction or use of resources, other than water, from the Subsurface Estate of the Property.

Section 3. USE OF GRAVEL RESOURCES.

CIRI shall not object to an Incidental Use of Gravel Resources on, within or under the Property, for the purposes of fill for grade and contour leveling and road construction, backfill for foundations and the construction of building pads and driveways. Commercial and/or Off-Premises uses by the Surface Owner are prohibited.

Section 4. COVENANT RUNS WITH THE LAND.

This Non-Development Covenant shall run with the land and inure to the respective benefit of the heirs, successors and assigns therein of the parties hereto.

COOK INLET REGION, INC.

By: Kim Cunningham
Kim Cunningham
Its: Director, Land & Resources
Date: October 14, 2009

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

THIS IS TO CERTIFY that on the 14th day of October, 2009, before me, the undersigned, a Notary Public in and for the State of Alaska, personally appeared Kim Cunningham to me known and known to me to be the Director, Land and Resources for Cook Inlet Region, Inc., and she acknowledged to me that she had in her official capacity executed the foregoing instrument as the free act and deed of the said corporation for the uses and purposes therein stated, and that she was duly authorized to do so on behalf of said corporation.

WITNESS MY HAND and official seal.

CYNTHIA K. BETTIN NOTARY PUBLIC STATE OF ALASKA My Commission Expires July 5, 2012

Cynthia K Bettin
Notary Public in and for the State of Alaska
My Commission Expires: July 5, 2012

RETURN THIS INSTRUMENT TO:

Cook Inlet Region, Inc.
P.O. Box 93330
Anchorage, AK 99509-3330
Attn: Director, Land & Resources

Aguilar Materials

Aguilar v. United States, 474 F.Supp. 840 (D. Alaska 1979)

Stipulated Procedures for Implementation of the Order in Aguilar v. United States of America, No. A76-271 Civil

Excerpt from Chapter I - Introduction, Bureau of Land Management *Aguilar* and Title Recovery Handbook for Native Allotments)

A Guide to Aguilar Proceedings for Current Landowners and Interest Holders (Excerpt from Appendix 3, Bureau of Land Management *Aguilar* and Title Recovery Handbook for Native Allotments)

determined until it is established by an evidentiary hearing that the conditions of the prison were in fact so substandard as to constitute an Eighth Amendment violation. If this is proven, defendants will then have the burden to show that they had a good faith belief in the legality of the jail conditions. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975) *cert. dismissed*, 423 U.S. 925, 96 S.Ct. 264, 46 L.Ed.2d 249 (1976). Therefore a motion to dismiss based on the defense of qualified immunity cannot be ruled upon at this time.

Accordingly, the case shall be set down for an evidentiary hearing before the United States Magistrate for this District, Richmond Division, within 60 days as of the date of this order, 28 U.S.C. § 636(b)(1), (3).

Let the Clerk send a copy of this order to the plaintiff, to counsel for the defendants, and to the United States Magistrate for this District, Richmond Division.

Ethel AGUILAR, Elmer Hotch, Ester Hotch, Donald Hotch, Smith J. Matsuch, Sr., Larry Jacquot and Henry Jacquot, Individually and on behalf of all others similarly situated, Plaintiffs,

v.

UNITED STATES of America, Defendant.

No. A76-271 Civil.

United States District Court, D. Alaska.

July 31, 1979.

Alaska natives brought action challenging Department of Interior's rejection of their allotment applications without a hearing on ground that the subject land had been conveyed to the State of Alaska. Cross motions for summary judgment were filed, as was motion to vacate class certification. The District Court, von der Heydt, Chief Judge, held that: (1) use and occupancy prior to state selection gave the native claimants "preference right" under Alaska Native Allotment Act; (2) fact that plaintiffs did not file an application for allotment until after the land was selected by the state did not eliminate the "preference right" protection given their prior use and occupancy; (3) Government's decision not to recover the land before it held a hearing to determine the facts was arbitrary and capricious; and (4) if defendant had mistakenly or wrongfully conveyed land to the State of Alaska to which plaintiffs had a superior claim, it was the responsibility of the defendant to recover that land.

Motion to vacate denied; defendant's motion for summary judgment denied; plaintiffs' motion for partial summary judgment granted and case was remanded with instructions.

1. United States ⇐105

Where Alaska natives used and occupied land prior to selection thereof by the state, such use and occupancy gave the natives "preference right" under the Alaska Native Allotment Act, and, thus, the United States had no authority to convey such lands to the state. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3; Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

2. Public Lands ⇐63

Until passage of the Alaska Native Claims Settlement Act, land occupied by natives was not available for state selection. Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

3. Indians ⇐13(4)

Alaska Native Allotment Act grants to qualified applicants a preference right to the allotment of land occupied by such applicant. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3.

4. Indians ⟹13(4)

Fact that Alaska natives did not file for an allotment until after the land had been selected by the state did not eliminate the protection given their prior use and occupancy as a preferential right under the Alaska Native Allotment Act. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3; Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

5. Indians ⟹13(4)

Preference right granted Alaskan natives under the Alaska Native Allotment Act is very similar to the right of preemption frequently granted white settlers who occupied public lands on the American frontier before the lands were surveyed and therefore were not available for sale. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3.

6. Indians ⟹13(1)

Potential conflict between provision of Alaska Native Claims Settlement Act governing extinguishment of aboriginal title and provision saving any application for an allotment pending before Department of Interior on December 18, 1971 created an ambiguity in ANCSA that was to be resolved in favor of native claimants. Alaska Native Claims Settlement Act, §§ 4, 4(a), 18(a), 43 U.S.C.A. §§ 1603, 1603(a), 1617(a).

7. Indians ⟹4

In its relationship with native Americans the Government owes a special duty analogous to those of a trustee; such exacting fiduciary standards apply to the federal Government in its conduct toward Alaskan natives. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3; Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

8. Indians ⟹13(4)

The "preference right" given Alaskan natives under Alaska Native Allotment Act gives qualified applicants first choice in the land included in a pending allotment application; if through an adjudication an applicant can establish the facts which he alleges would establish his right to allotment he has an equitable interest in such allotment. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3; Alaska Native Claims Settlement Act, § 2 et seq., 43 U.S.C.A. § 1601 et seq.

9. Indians ⟹10

Protection of Indian property rights is an area where the trust responsibility of the federal Government has its greatest force.

10. Constitutional Law ⟹250.4
United States ⟹105

Department of Interior's decision not to recover lands which were selected by the State of Alaska but which allegedly were subject to "preference rights" of Alaska natives based on prior use and occupancy, without holding a hearing to determine the facts, was arbitrary and capricious; rejection of allotment applications without a fact-finding hearing was a violation of natives' rights to due process. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3; U.S.C.A.Const. Amends. 5, 14.

11. Public Lands ⟹63

If the United States mistakenly or wrongfully conveyed land to the State of Alaska to which Alaska natives had a "preference right" under Alaska Native Allotment Act based on use and occupancy prior to state selection, it was responsibility of the federal Government to recover that land. Alaska Native Allotment Act, 43 U.S.C. (1970 Ed.) §§ 270–1 to 270–3.

Luther A. Granquist, Gregory M. O'Leary, Alaska Legal Services Corp., Anchorage, Alaska, for plaintiffs.

Stephen Cooper, Asst. U. S. Atty., Fairbanks, Alaska, Alexander O. Bryner, U. S. Atty., Anchorage, Alaska, for defendants.

Barbara J. Miracle, Asst. Atty. Gen., Anchorage, Alaska, for State of Alaska amicus curiae.

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

THIS CAUSE comes before the court on plaintiffs' motion for partial summary

judgment and for a remand to the Department of Interior, defendant's motion for summary judgment and for an order vacating the class certification.

The plaintiffs in this case are Alaskan Natives who have made timely applications to the U.S. Department of Interior for an allotment under the Alaska Native Allotment Act (May 17, 1906, 34 Stat. 197, as amended Aug. 2, 1956, Ch. 891, 70 Stat. 954; former 48 U.S.C. §§ 270–1–270–3, repealed but with a savings clause for applications pending on December 18, 1971, by P.L. 92–203, 85 Stat. 70). In *Ethel Aguilar*, 15 IBLA 30 (1974), the Interior Board of Land Appeals affirmed the rejection of their allotment applications without a hearing because the land they claim for the allotment has already been conveyed to the State of Alaska. The plaintiffs claim that the use and occupancy upon which their allotments applications are based commenced prior to the conveyance of the land to the State of Alaska.

The court has previously certified a class under Fed.R.Civ.P. 23(a) and (b)(2) as follows:

> All Alaska Native allotment applicants each of whom commenced use of the land for which he or she applied prior to the filing with the Department of Interior of an application for conveyance of the same land to the State of Alaska and whose allotment application was or will be rejected, in whole or part, because the land described therein was conveyed to the State of Alaska prior to adjudication of the allotment application.

The defendant has moved to vacate this class but the court finds no merit in the grounds cited by defendant. Oral argument has been requested but in view of the extensive briefs and in order to expedite the business of the court oral argument is denied. Local Rule 5(C)(1). In order to decide these motions the court must determine what kind of interest an Alaskan Native Allotment applicant has in his claim that he uses and occupies, and what the responsibility of the federal government is to protect that interest.

I. The Interest of the Allotment Claimants in the Land Conveyed to the State

The Alaska Native Allotment Act of 1906 was the first statute passed which allowed the Natives of Alaska to perfect their title to the land occupied and used by them. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1015 (D. Alaska 1977). The Committee on Public Lands described to the House of Representatives how the land used and occupied by Alaskan Natives could be selected by others and cause them to be dispossessed because no legal means existed to secure their rights:

> The necessity for this legislation arises from the fact that Indians in Alaska are not confined to reservations as they are in the several States and Territories of the United States, but they live in villages and small settlements along the streams where they have their little homes upon land to which they have no title, nor can they obtain title under existing laws. It does not signify that because an Alaska Indian has lived for many years in the same hut and reared a family there that he is to continue in peaceable possession of what he has always regarded his home. Some one who regards that particular spot as a desirable location for a home can file upon it for a homestead, and the Indian or Eskimo, as the case may be, is forced to move and give way to his white brother.

H.R.Rep.No.3295, 59th Cong., 1st Sess. (1906). In order to remedy this problem the Congress passed the Alaska Native Allotment Act which

> authorized the Secretary "in his discretion and under such rules as he may prescribe" (§ 270–1) to allot up to 160 acres of vacant, unappropriated, and unreserved land in Alaska to any qualified Alaska Native. To qualify, the Native applicant must make "proof satisfactory to the Secretary . . . of substantially continuous use and occupancy of the land for a period of five years." (§ 270–3) The Secretary's regulations construe the Act to allow for customary and seasonal patterns of use and occupan-

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United States Department of Justice
Federal Building and U.S. Courthouse
Room C-252, Mail Box 9
700 "C" Street
Anchorage, Alaska 99513
907-271-5071

FILED

FEB 07 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ETHEL AGUILAR, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

STIPULATED PROCEDURES FOR IMPLEMENTATION OF ORDER

Docket No. A76-271 Civil

The parties by and through their attorneys stipulate, subject to the Order of the Court, to the following procedures to implement the Order of the Court dated July 31, 1979, that the Department of the Interior adjudicate the substantive claims of the plaintiffs to land patented to the State.

1. The Bureau of Land Management (BLM) will review each allotment application file to determine whether there are any legal defects in the application. Legally defective applications which are incapable of being corrected will be rejected, and rejection by the authorized BLM official shall be final for the Department.

2. Where an applicant whose application is not rejected pursuant to paragraph 1 of this stipulation is

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deceased, the Office of Hearings and Appeals will determine the applicant's heirs before BLM proceeds.

3. Where the merits of the application turn on whether the applicant's use and occupancy predate the commencement of the rights of the State, the BLM will examine the file. The examination, and all further proceedings until a federal court action to cancel the State's patent is initiated, shall be for investigatory purposes only and shall not constitute an administrative agency adjudication of the rights of third parties. If the application and contents of the file indicate that the applicant's use and occupancy began after the rights of the State arose, the BLM will inform the applicant by letter of the date of commencement of the State's rights and that the application will be rejected unless the applicant files an affidavit within ninety days alleging, with particularity, specific use prior to the date on which the rights of the State arose.

4. If the application and contents in the file indicate that use and occupancy began before the State's rights arose, or if an affidavit to that effect is received pursuant to section 3 of this stipulation, the BLM will send a letter to the applicant informing the applicant that based upon the file, it appears that the application may be found valid. The letter will invite any additional evidence such

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as witness statements and photographs, which the applicant may wish to present to bolster the claim. At the same time, the BLM will send a letter to the State stating that it appears that the application may be found valid and inviting any evidence or comments the State may have to dispute the claim of the applicant. Both the State and the applicant will have ninety days to respond.

5. If, either because no comments or evidence are received questioning or disputing the claim of the applicant or, if on the basis of the case file and comments and evidence received, the BLM concludes that the application is valid, the BLM will find the application valid and refer the matter to the Solicitor's Office for settlement or referral to the Department of Justice.

6. If the BLM concludes that the applicant has failed to provide sufficient proof of entitlement, the BLM will conduct a hearing. The applicant will be notified of the hearing date and the reasons for the proposed rejection. The hearing will be informal with a designated BLM decision-maker as the presiding officer. The presiding officer may ask questions, and the applicant and the State shall have the opportunity to present evidence and cross-examine witnesses. The hearing will be taped, but not necessarily transcribed by BLM. Based on evidence presented at the

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hearing or contained in the case file, the BLM presiding officer will make a decision to reject or refer the claim t the Solicitor's Office, which decision shall be final for the Department, provided that the hearing examiner may not rely on any matter not admitted in evidence at the hearing to reject an application.

7. The BLM shall have discretion to order a field report before a hearing, in order to gather evidence or to more accurately determine the location. All parties referenced in paragraph 13 of this Stipulation shall be notified of the field exam, given the opportunity to be present, and provided a copy of the report.

8. The Solicitor's Office will attempt to settle the allotment claims referred to it by BLM, by requesting a quitclaim of the land from the State.

9. If settlement is not possible the matter will be referred to the Department of Justice with a recommendation that suit to cancel patent be instituted. Nothing in this stipulation or in the procedure which it establishes in any way affects the discretion of the Attorney General of the United States with respect to any such recommendation. The parties referenced in paragraph 13 of this Stipulation shall be notified of the referral.

10. If at any time the State wishes to quitclaim all of its interest in the land and tenders a valid and

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appropriate deed, the United States shall accept the quit-claim and issue an allotment to the applicant, and the acreage shall be credited to the State entitlement under which the lands were originally conveyed. Provided, this paragraph shall not apply to any application which would be determined invalid for legal defects as described in paragraph 1.

11. If at any time the State is willing to convey a portion of the allotment, or the entire allotment subject to reservations, in settlement of the applicant's claim and tenders a valid and appropriate deed, the Solicitor's Office will forward the offer to the applicant and coordinate the settlement. Counseling for the applicant will be available from the BIA. Provided, this paragraph shall not apply to any application which would be determined invalid for legal defects as described in paragraph 1.

12. If after counseling, the applicant wishes to accept the settlement, a settlement agreement will be drawn up and submitted to the Court for approval. Acreage received by the applicant shall be credited to the State entitlement under which the lands were originally conveyed.

13. Copies of all notices sent to the applicant will be sent to Alaska Legal Services, applicant's private counsel, if any, the Bureau of Indian Affairs, and the State.

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14. If at any point the BLM becomes aware of the identity of a third party claiming an interest in the land, whether independently or through purported conveyance by the State, it shall afford the third party the same notice and procedural rights as those afforded the State under this stipulation.

Respectfully submitted,

DATED: 2/2/83

MICHAEL R. SPAAN
United States Attorney

DATED: 2/2/83

CRAIG TILLERY
Alaska Legal Services Corporation

FILED

FEB 09 1983

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IT IS SO ORDERED:

DATED: Feb. 9, 1983

JUDGE
United States District Judge

cc: Craig Tillery
Michael Spaan

A GUIDE TO AGUILAR PROCEEDINGS

For Current Landowners and Interest Holders

Introduction

This information is being provided to help you understand the enclosed letter.

The property described in the letter was originally owned by the Federal government and has been claimed by an Alaskan Native under the Native Allotment Act of May 17, 1906.[1] You are receiving the enclosed letter because the Bureau of Land Management's (BLM) research indicates that you are a current owner of the property or that you currently hold an interest in the property. The letter shows that copies have been furnished to the individuals and entities listed. If you know of others with an interest in this property, please provide their names and addresses to the BLM so that they may be notified of these proceedings.

Your interest in the property is not being taken away or formally challenged by the enclosed letter and this explanatory information. Rather, this material explains why other claims to the land are being considered at this time and the procedures that apply to the current review. Even if there is a valid Native allotment claim to the land, the following information will explain procedures to protect all parties and some possible defenses that may apply to you.

Under the Native Allotment Act, Alaskan Natives received a preference right to Federal lands used and occupied by them. This preference right became perfected upon the completion of five years use and occupancy and upon the filing of an application for allotment. This legal preference right has been recently clarified through administrative and court decisions. Two of these court decisions found that in certain situations Native allotment applicants had been denied due process under the law. Allotment applications should not have been rejected by the BLM without first giving the applicant an opportunity to present oral testimony supporting his claim of use and occupancy.[2] And filing his application, an intervening claim by someone else could not be used by the BLM as the only reason for rejection of the allotment application.[3] In the latter case, the District Court for Alaska ruled that the BLM must determine whether Federal lands were mistakenly or wrongfully conveyed to someone other than the Native allotment

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[1] As amended by the Act of August 2, 1956, 34 Stat. 197, as amended, 70 Stat. 954; 43 U.S.C. 270-1 through 270-3 (1970). Repealed but with a savings clause for applications pending on December 18, 1971, by the Alaska Native Claims Settlement Act, 85 Stat. 688, 710; 43 U.S.C. 1601, 1617. See also Sec. 905 of the Alaska National Interest Lands Conservation Act of December 2, 1980. 94 Stat. 2371, 2435: 43 U.S.C. 1634.

[2] Pence et al. v. Kleppe, 529 F.2d 135 (1976).

[3] Ethel Aguilar v. United States of America, 474 F. Supp. 840 (D. Alas. 1979)

applicant.[4] If it appears that the land was wrongfully conveyed, it is the BLM's responsibility to recover the land for the applicant or his heirs.

Aguilar Procedures

The Aguilar Stipulated Procedures for Implementation of Order dated February 9, 1983, tell the BLM how to proceed in such cases.

One of the first steps is the issuance of the enclosed letter. The information received by the BLM as a result of this letter will be used to supplement the information already contained in the Native allotment applicant's case file. **Please note that the case file is available for public inspection at the BLM public rooms located in the Federal Building at 701 C Street, Anchorage and at the BLM office at 1150 University Avenue, Fairbanks. If you would like to examine the case file, call (907) 271-5960 (Anchorage) or (907) 474-2240 (Fairbanks) for hours and procedures.**

When the 90-comment period provided for by the letter has ended, the BLM will review all of the available evidence and make a preliminary finding for rejection or approval of the allotment application. If the BLM concludes that the applicant has failed to provide sufficient proof of entitlement, it is required to hold an informal hearing. Following the hearing, the hearing officer will issue a decision approving or rejecting the allotment application. If a hearing is required, you will be notified so that you may be present to testify and to cross-examine the applicant and any witnesses. The decision of the BLM hearing officer on the allotment claim's validity is final for the Department of the Interior and is not subject to administrative appeal. If any party is dissatisfied, he can file an action in court. However, as a current owner, title cannot be taken from you unless court action is filed; you can assert defenses and other arguments at that time.

If the BLM determines that the allotment application is valid, the case will be referred to the BLM's attorneys who will then take all appropriate actions to recover title to the land. If recovered, title will then be conveyed to the Native allotment applicant. Title may be recovered through a negotiated settlement or by District Court order.

General Information

Before a Native Allotment application can be found valid, the applicant must show substantial and continuous use of the land taking into account seasonality of use consistent with Native lifestyle and culture. He also must show that the resources associated with the claimed uses are (or were) present and that he used the parcel as an independent citizen at least potentially exclusive of others. The applicant's use of the land must also be such that anyone entering the land could have observed or found out about it. Substantial cessation of use by the applicant prior to the filing of his application and prior to the segregation of the land by another claimant's

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[4] This ruling was extended to all land conveyed by the federal government in State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alas. 1985)

application is a possible reason for rejection of the allotment application.[5]

The standards which the BLM applies in determining whether an applicant's use and occupancy entitles him to an allotment are found in Title 43 of the Code of Federal Regulations, subpart 2561 and in a body of administrative decisions from the Interior Board of Land Appeals (IBLA). Copies of the IBLA decisions are available for use by the public in the Alaska Resources Library located on the first floor of the Federal Building in Anchorage and through the BLM public room in Fairbanks.

In Aguilar proceedings, the burden of proof is on the Native allotment applicant to show by a preponderance of the evidence that his use and occupancy of the land meets the requirements of the statute and regulations.

You may be able to claim you are a bona fide purchaser as a defense in these proceedings. The existence of a bona fide purchaser is recognized as a legal defense to a federal suit to recover title. Bona fide purchasers are individuals or entities who have acquired the land from the original patentee or a subsequent owner for valuable consideration (i.e. money or performance).

The transaction must have been made in good faith, and the buyer must have been unaware of the allotment applicant's conflicting claim, or unaware of anything which would have led him to check further (for instance, physical evidence of prior use of the land, the presence of others on the land, or information from others that there was a conflicting claim would be reasons to check further). A hearing will be held to allow the Native allotment applicant and the property owner to present evidence concerning the claimed defense. Based on the evidence and testimony provided by both parties, the BLM hearing officer will determine whether a bona fide purchases exists thus barring recovery of the land.

If you believe that you qualify as a bona fide purchaser, you should submit evidence to support your claim. Such evidence could include a copy of your title insurance policy, copies of documents pertaining to the transaction whereby you acquired your interest in the property or affidavits from you and others familiar with the history of the land.

The process described in this guide could affect your property rights. If you have additional question, please call (907) 271-5768 and ask for the Bureau employee who signed your letter. You may also wish to consult an attorney.

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[5] U.S. v. Flynn & Orock, 53 IBLA 208 (1981)

CHAPTER I - INTRODUCTION

A. Background. In 1971, Ethel Aguilar timely filed a Native allotment application with the Department of the Interior. The Bureau of Land Management (BLM) rejected her application, along with seven others, because the lands for which these applicants applied were patented to the State of Alaska in the early 1960's. The Interior Board of Land Appeals (IBLA) affirmed BLM's decision in Ethel Aguilar et al., 15 IBLA 30 (1974), stating that even though a patent may have been issued by mistake, it vested title in the State and removed from jurisdiction of the Department of the Interior the right to inquire into and consider any disputed issues. The applicants challenged the IBLA decision in U. S. District Court.

In 1979, the District Court in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979) (see Appendix 1), remanded the cases back to the Department of the Interior with instructions to adjudicate. In the decision, Judge von der Heydt held that use and occupancy prior to a State selection gave Native allotment applicants a preference right which was not eliminated simply because the State filed an application prior to the Native filing an application. (See Native Allotment Handbook, Chapter II. A. Effect of Filing a Native Allotment Application for more information on preference rights.) Therefore it was ruled that the Department of the Interior has a responsibility to determine whether land conveyed to the State of Alaska was mistakenly or wrongfully conveyed based on the fact that a Native allotment application, filed subsequent to the conveyance, claims use prior to the State selection application. The court ordered the Department to adjudicate the allotment claims and found that, if the allottees have a superior claim "it is the responsibility of the defendant [United States] to recover the land."

In 1983, the parties in the Ethel Aguilar case, agreed to Stipulated Procedures for the implementation of the 1979 order (see Chapter II and Appendix 2). These stipulations are the basis for the Aguilar procedures and guidelines set out in Chapter II of this handbook.

Title recovery is not always associated with the Aguilar process. It can be used in certain instances with Native allotments where following the Aguilar stipulations is not necessary (see below under B. Scope) or it can be used with other case types. Chapter III of this handbook is intended to cover all title recovery steps involving Native allotments. The 1985 Title Recovery and

Conveyance Correction Handbook is still current and should be used for all other case types and for document correction.

B. Scope. Although the Aguilar stipulations address the process for adjudication of Native allotment claims on land patented to the State, they also fulfill the due process requirements for adjudication of allotment applications in similar situations, such as land tentatively approved (TA'd) to the State, patented or interimly conveyed (IC'd) to a Native corporation, or patented to a private party. See State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985); State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 254, 91 I.D. 331, 341 (1984). Therefore, the use of the Aguilar stipulations has been extended to all types of conveyed land.

Aguilar procedures will also be used for lands approved to the State under the Mental Health Enabling Act. These approvals must be treated like tentative approvals (see Tyonek Native Corp. v. Secretary of Interior, 836 F. 2d 1237 (9th Cir. 1988) and Solicitor's opinion of April 11, 1988).

The Aguilar procedures will not be used if title recovery is required due to adjudication error (e.g., failure to exclude a valid allotment with the correct location shown on the record at the time the land was conveyed to another party). In these cases, go directly to title recovery.

Aguilar procedures also do not apply if the allotment is on TA'd land in a core township.

If an allotment was excluded from a TA or an IC, and as a result of survey the legal description of the allotment has shifted within the TA'd or IC'd boundary, it is not necessary to follow the Aguilar process if the State concurs in or if the Native corporations affirm the TA'd or IC'd boundary, respectively, as excluding the allotment as surveyed. See Native Allotment Handbook, Chapter VIII. Title Affirmation/Concurrence, for special procedures in these cases.

If an allotment was not excluded from a conveyance but was legislatively approved pursuant to the Alaska National Interest Lands Conservation Act (ANILCA) (i.e. title passed from the United States after June 1, 1981 and all ANILCA criteria are met), do not follow the Aguilar procedures and proceed directly to requesting voluntary reconveyance (see Chapter II. J. Request for Voluntary Reconveyance). Since the applicant is not required to prove use and occupancy on a legislatively approved allotment, a stipulation no. (Stip.) 4 letter is not necessary.

cy, but require that there must be actual possession and use, potentially exclusive of others, and not merely intermittent use. 43 C.F.R. § 2561.0-5(a). Thus, an applicant can meet the required qualifications by showing seasonal use of the claimed land, potentially exclusive of others, for five consecutive years for such customary purposes as hunting, fishing, or berry picking.

Pence v. Kleppe, 529 F.2d 135, 137 (9th Cir. 1975). The Allotment Act states "Any person qualified for an allotment as aforesaid shall have the *preference right to secure by allotment the nonmineral land occupied by him* not exceeding one hundred and sixty acres. (emphasis added). 34 Stat. 197, (former 43 U.S.C. § 270-1).

The Ninth Circuit Court of Appeals interpreted the legislative history of the Act to mean "that the Native applicants here have a sufficient property interest to warrant due process protection . . . This is a clear indication that Congress intended to create or to recognize rights in Alaska Natives to the land that they occupy for the statutory period, and not, as the Secretary contends, merely a hope that the government will give them the land." *Pence v. Kleppe*, 529 F.2d at 141-42.

[1] The plaintiffs contend that their use and occupancy prior to the state selections reserved the land from selection by the state, and therefore that the United States had no authority to convey the lands claimed by the Native allotment applicants to the State. This court finds that the "preference right" granted by the Native Allotment Act, the relevant case law, and the decisions of the Department of Interior support the claims of the plaintiffs.

[2, 3] Until the passage of the Alaska Native Claims Settlement Act, land occupied by Natives was not available for state selection. *State of Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), cert. denied 397 U.S. 1076, 90 S.Ct. 1522, 25 L.Ed.2d 811 (1970). But these plaintiffs need not rely on a naked aboriginal title. The Native Allotment Act grants to qualified applicants a preference right to the allotment of land occupied by such applicants. *Herbert H. Hilscher*, 67 I.D. 416 (1960). "Conveyance of land in derogation of a Congressional directive to respect and protect Native occupancy would be void and legally ineffective to extinguish aboriginal title." *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009 at 1020 n. 45.

In *Cramer v. United States*, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923), the United States on behalf of three Indians in California brought suit to cancel a portion of a patent issued by the United States to the Central Pacific Railway Company because that land was occupied and used by the Indians and therefore could not validly be conveyed to the railroad. The Court held that the Indians' pre-existing right of possession excepted the lands occupied by the Indians from the grant to the railroad. The discussion of the government policy involved and the Interior Department cases upholding it is very instructive in the instant case and will be quoted at length:

> Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. *Beecher v. Wetherby*, 95 U.S. 517, 525 [24 L.Ed. 440]; *Minnesota v. Hitchcock*, 185 U.S. 373, 385 [, 22 S.Ct. 650, 46 L.Ed. 954]. It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight. *Midway Co. v. Eaton*, 133 U.S. 602, 609 [22 S.Ct. 261, 46 L.Ed. 347]; *Hastings & Dakota R. R. Co. v. Whitney*,

132 U.S. 387, 366 [, 10 S.Ct. 112, 33 L.Ed. 363]. That department has exercised its authority by issuing instructions from time to time to its local officers to protect the holdings of non-reservation Indians against the efforts of white men to dispossess them. See 3 L.D. 371; 6 L.D. 341; 22 L.D. 282. In *Poisal v. Fitzgerald*, 15 L.D. 19, the right of occupancy of an individual Indian was upheld as against an attempted homestead entry by a white man. In *State of Wisconsin*, 19 L.D. 518, there had been granted to the State certain swamp lands within an Indian reservation, but the right of Indian occupancy was upheld, although the grant in terms was not subject thereto. In *Ma-Gee-See v. Johnson*, 30 L.D. 125, Johnson had made an entry under § 2289, Rev.Stats., which applied to "unappropriated public lands." It appeared that at the time of the entry and for some time thereafter the land had been in the possession and use of the plaintiff, an Indian. It was held that under the circumstances the land was not unappropriated within the meaning of the statute, and therefore not open to entry. In *Schumacher v. State of Washington*, 33 L.D. 454, 455, certain lands claimed by the State under a school grant, were occupied and had been been improved by an Indian living apart from his tribe, but application for allotment had not been made until after the State had sold the land. It was held that the grant to the State did not attach under the provision excepting lands "otherwise disposed of by or under authority of an act of Congress." Secretary Hitchcock, in deciding the case, said:

"It is true that the Indian did not give notice of his intention to apply for an allotment of this land until after the State had made disposal thereof, but the purchaser at such sale was bound to take notice of the actual possession of the lands by the Indian if, as alleged, he was openly and notoriously in possession thereof at and prior to the alleged sale, and that the act did not limit the time within which application for allotment should be made."

Congress itself, in apparent recognition of possible individual Indian possession, has in several of the state enabling acts required the incoming State to disclaim all right and title to lands "owned or *held by any Indian or* Indian tribes." See 25 Stat. 676, c. 180, § 4, par. 2; 26 Stat. 107, c. 138, § 3, par. 2.

The action of these individual Indians in abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating and improving the soil and establishing fixed homes thereon was in harmony with the well understood desire of the Government which we have mentioned: To hold that by so doing they acquired no possessory rights to which the Government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.

Cramer v. United States, 261 U.S. at 227-29, 43 S.Ct. at 344. While some of the language in this decision is unfortunately paternalistic, the legal principles announced in *Cramer* would appear to have even more force when applied to a right of occupancy protected by the Native Allotment Act of 1906. No statute or treaty protected the right of occupancy litigated in *Cramer* while the right of occupancy of these plaintiffs is explicitly given a preference under the Native Allotment Act. *See also Minnesota v. Hitchcock*, 185 U.S. 373, 388-92, 22 S.Ct. 650, 46 L.Ed. 954 (1902) (a grant to Minnesota from the United States was held not to include Indian land protected by treaty but not formally set aside as an Indian reservation). *Leavenworth, Lawrence and Galveston Railroad v. United States*, 92 U.S. 733, 23 L.Ed. 634 (1876) (a grant to Kansas from the United States for the purpose of building a railroad was held not to include Indian land protected by treaty stipulations). While the two cases just cited involved Indian lands protected by treaty, there is no apparent reason why less protection should be given to lands of Native Alaskans that are protected by a statute such as the Allotment Act.

[4, 5] The fact that these Natives did not file an application for an allotment until after the land was selected by the State does not eliminate the protection given their right of use and occupancy. The departmental decisions and rules regarding allotment rights are in some respects similar to those governing settlement and homestead. *Herbert H. Hilscher*, 67 I.D. at 414. The preference right granted Alaskan Natives under the allotment act is very similar to the right of preemption frequently granted white settlers who occupied public lands on the American frontier before the lands were surveyed and therefore were not available for sale. The right of preemption gave the settlers first chance to purchase the land. *Shepley v. Cowan*, 91 U.S. 330, 23 L.Ed. 424 (1875) involved a dispute between state selection rights and a settler's pre-emption rights. The plaintiff based his claim on a patent received from the State of Missouri and the defendant based his claim on a patent issued by the United States to a settler claiming pre-emption rights. The Court noted that as against each other (in the instant case the right of Alaska as against the allotment applicants), "the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be first in right." *Shepley v. Cowan*, 91 U.S. at 338. But the Court earlier in its opinion had held that the first initiatory act for a pre-emption settlement takes effect at settlement. "Thus the patent upon a State selection takes effect as of the time *when the selection is made* and reported to the land-office; and the patent upon a pre-emption settlement takes effect *from the time of* the *settlement* as disclosed in the declaratory statement or proofs of the settler to the register of the local land-office." *Shepley v. Cowan*, 91 U.S. at 337 (emphasis added). The Court held that the patent based upon the pre-emption right was superior. In much the same way the preference right of the Alaskan Natives in this case was acquired upon their first use and occupancy of the land. *See also Stockley v. United States*, 260 U.S. 532, 544, 43 S.Ct. 186, 189, 67 L.Ed. 390 (1923) (A homestead claim that was not yet patented was held a valid existing right excepted from a Presidential withdrawal order because, "[t]he effect of a preliminary homestead entry is to confer upon the entryman an exclusive right of possession, which continues so long as the entryman complies in good faith with the requirements of the homestead law.")

Two departmental decisions also support the position of the plaintiffs in this case. In *Yakutat and Southern Railway v. Setuck Harry, Heir of Setuck Jim*, 48 I.D. 362 (1921) it was held that actual occupancy and use of a tract of land by an Alaskan Native prior to its inclusion in the Tongass National Forest confers upon the occupant a preference right to a Native Allotment, although the application for the allotment was filed subsequent to the proclamation creating the National Forest. In a more recent decision of the Interior Board of Land Appeals it was held that the use and occupancy of an allotment applicant would preclude State selection under the Statehood Act even though the application for the allotment was filed after the tentative approval of the State selection. *Lucy S. Ahvakana*, 3 IBLA 342 (1971). The foregoing cases convince this court that the plaintiffs are correct in their contention that land in an allotment claim used and occupied for subsistence purposes by an Alaskan Native was not available for conveyance to the State of Alaska.

[6] The State of Alaska as *amicus* has argued that the contention of the plaintiffs is foreclosed by this court's decision in *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009 (D. Alaska 1977) which held that § 4(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603(a), extinguished all claims based upon aboriginal title at conveyance or tentative approval of conveyance to the State of Alaska. None of the principles announced in this decision disturb that decision because the claims of the plaintiffs are not based upon aboriginal title but are based on the first preference given these Natives by the Allotment Act passed in 1906. Rather than extinguishing

the claims of plaintiffs, ANCSA repealed the Allotment Act but provided "any application for an allotment that is pending before the Department of the Interior on December 18, 1971, may, at the option of the Native applicant, be approved . . .", § 18(a), U.S.C. § 1617(a). Acceptance of the State's argument would mean that what the Congress saved in § 18(a) it had already extinguished by § 4. It would create the anomalous situation where Natives who happened to use and occupy land conveyed to the State had their allotment rights taken away, while Natives living on federal land had their allotment preserved. The State or the defendants have referred to no part of the legislative history of ANCSA that would support such an act of discrimination on the part of the Congress. At most the potential conflict between § 4 and § 18(a) creates an ambiguity in ANCSA that must be resolved in favor of the Natives. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918), *Bryan v. Itasca Co.*, 426 U.S. 373, 392-93, 96 S.Ct. 2102, 38 L.Ed.2d 710 (1976); *Alaska Public Easement Defense Fund v. Andrus*, 435 F.Supp. 664, 671 (D. Alaska 1977).

The claims of these plaintiffs are in no way comparable to the amorphous trespass claims asserted in the *ARCO* case. No applicant for a Native allotment can receive more than 160 acres and no Native who does not already have an application pending before the Department of Interior as of December 18, 1971, could benefit from this decision.

II. The Federal Government's Responsibility to Recover Lands Wrongfully Conveyed to the State

The defendant has refused to adjudicate the plaintiffs' applications so that it can determine the validity of their allotment claims. The Department of Interior only made an informal investigation and determined that the conveyances to the State are valid. The existence or sufficiency of the plaintiffs' use and occupancy cannot be determined on a motion for summary judgment. But the rights of the plaintiffs likewise cannot be determined without a formal adjudication under *Pence v. Kleppe*, 529 F.2d 135, 137 (9th Cir. 1976).

[7] In its relationship with Native Americans the government owes a special duty analogous to those of a trustee. *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912); *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). These "exacting fiduciary standards" apply to the federal government in its conduct toward Alaskan Natives. *Alaska Pacific Fisheries v. United States*, 249 U.S. 33, 39 S.Ct. 208, 63 L.Ed. 474 (1919); *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831, 202 Ct.Cl. 182 (1973); *Adams v. Vance*, 187 U.S.App.D.C. 41, 44 n. 3, 570 F.2d 950, 953 n. 3 (1978); *People of Togiak v. United States*, 470 F.Supp. 423 (D.D.C.1979); *Eric v. Secretary of HUD*, 464 F.Supp. 44 (D. Alaska 1978).

[8,9] In the previous section of this opinion the court has identified the statutorily protected interests which the plaintiffs have in the land which they use and occupy. The "preference right" gives qualified applicants first choice in the land included in a pending application. If through an adjudication the plaintiffs can establish the facts which they allege which would establish their right to an allotment, they would have an equitable interest in their allotment. The protection of Indian property rights is an area where the trust responsibility has its greatest force. *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942), *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C.1953). While the government in this litigation has not denied its trust responsibility, it evidently takes the position that it no longer has to act because it has already given away the land claimed by the plaintiffs. But this is clearly circular reasoning.

The Department of Interior refuses to hold adjudicatory hearings which the plaintiffs contend would establish that the United States wrongfully or mistakenly conveyed the disputed allotments to the State

of Alaska. The Department has contended that it has no responsibility to recover the lands because there was no mistake in the conveyance. But it then refuses to hold hearings required by *Pence v. Kleppe* that would determine whether a mistake was made on the ground that it no longer has jurisdiction since the land has already been conveyed to the state.

This court agrees with Administrative Law Judge Burski who dissented in a recent decision of the Interior Board of Land Appeals dealing with the same issue. He said:

> Moreover, under the decisions of the Ninth Circuit Court of Appeals in *Pence v. Kleppe*, 532 F.2d 135 (1976), and this Board in *Donald Peters*, 26 IBLA 235 (1976), no Native allotment application can be rejected on the basis of a disputed issue of fact without notice and an opportunity for hearing. It is true that where a decision to reject a Native allotment is premised on a purely legal determinant no hearing is required. But I must admit difficulty in following the logic of a procedure which rejects an allotment application on the basis of an issued patent where the correctness of the issuance of the patent is disputed, without ever affording the Native allotment applicant an opportunity to show his entitlement.
>
> If this Department has erroneously issued the patent to the State in derogation of the appellant's rights, it seems only elementary justice that the Department should bear the economic burdens attendant to a suit to cancel the patent. A hearing is essential before the Department can make an informed judgment as to the merits of the appellant's application. Accordingly, I would reverse the decision below rejecting the Native allotment application, order the State Office to hold further action on the application in abeyance and direct the State of Alaska to bring a contest against the allotment applicant. Should the State of Alaska decline, I would recommend that the Solicitor's Office undertake discussions with the Justice Department with a view towards the initiation of suit to cancel [the patents], to the extent of the conflict between the patents and the allotment application.

Berthyn Jane Baker, 41 IBLA 239 (1979) (Judge Burski dissenting).

[10, 11] The defendant's decision not to recover the land without first holding a hearing to determine the facts is arbitrary and capricious. The defendant's rejection of the plaintiffs' allotment applications without a fact-finding hearing is a violation of the plaintiffs' rights to due process under *Pence*. If the defendant has mistakenly or wrongfully conveyed land to the State of Alaska to which plaintiffs have a superior claim, it is the responsibility of the defendant to recover that land. *United States v. Cramer*, 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923); *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

Accordingly IT IS ORDERED:

1. THAT defendant's motion to vacate class certification is denied.

2. THAT defendant's motion for summary judgment is denied.

3. THAT plaintiffs' motion for partial summary judgment and remand to the Department of Interior is granted.

4. THAT the plaintiffs' cases are remanded to the Department of Interior with instructions to adjudicate their substantive claims of entitlement pursuant to all applicable procedures.

5. THAT the Clerk may prepare an appropriate final judgment form.

PANEL 3

RS 2477

Federal Statute: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Lode Mining Act of 1866, Section 8, 14 Stat. 253, *re-designated* as Section 2477 of Revised Statutes 1878, 43 U.S.C. 932, *repealed by* Pub.L. No. 94-579, Title VII, §706(a), 90 Stat. 2793 (1976).

Selected Alaska Cases

Hamerly v. Denton, 359 P.2d 121 (Alaska 1961). The court established that the RS 2477 grant may be accepted by the general public, through general user, even absent acceptance by governmental authorities; although, there must be sufficient continuous use to indicate an intention by the public to accept the grant. The court held that acceptance was not established in the case by infrequent and sporadic use by sightseers, hunters, and trappers, of a dead-end road running into wild, unenclosed, and uncultivated land. The court defined "public lands," subject to acceptance of a RS 2477 grant, as "lands which are open to settlement or other disposition under the land laws of the United States." Public lands do not encompass lands in which the rights of the public have passed and which have become subject to individual rights of a settler.

Mercer v. Yutan Construction Co., 420 P.2d 323 (Alaska 1966). Issuance of a grazing lease expressly subject to later rights of way did not reserve the leased land such that the government could not accept the RS 2477 grant for a right of way.

Anderson v. Edwards, 625 P.2d 282 (Alaska 1981). Where the state has not stepped in to regulate a section line right of way created via AS 19.10.010, a private citizen may use it, but only up to a width that is reasonable under the circumstances. Consequently, a citizen using a right of way who had cut trees to widen it must compensate the fee owner.

Dillingham Commercial Co. v. City of Dillingham, 705 P.2d 4110 (Alaska 1985). A road running across private property from the city docks to the town was subject to an RS 2477 right-of-way because roughly the same route had been used in the 1920's and 30's before the property was withdrawn from the public domain. The *Dillingham* court also held that once a RS 2477 right of way is established, it may be used for any purpose consistent with public travel.

Fitzgerald V. Puddicombe, 918 P.2d 1017 (Alaska 1996). The court determined that the fact that a trail was surveyed, platted and described in field survey notes did not establish acceptance of the statutory grant by the State. However, the court found the public use in the case was sufficient. The court held that the extent of public use necessary to establish acceptance of the RS 2477 grant depends upon the character of the land and the nature of the use. Conditions in Alaska present unique questions. Therefore, what might be considered sporadic use in another state or context may be consistent or constant use in Alaska. The court also confirmed that a route does not need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. Finally, the court noted that it is not necessary that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question.

(3) "municipality" means a municipality that has road construction or maintenance powers;

(4) "subdivision" has the meaning given in AS 40.15.900.

SLA 1984, ch. 56, § 1; SLA 1996, ch. 30, § 53; SLA 1998, ch. 40, § 2.

ARTICLE 5. RIGHTS-OF-WAY ACQUIRED UNDER FORMER 43 U.S.C. 932

§ 19.30.400. Identification and acceptance of rights-of-way

(a) The state claims, occupies, and possesses each right-of-way granted under former 43 U.S.C. 932 that was accepted either by the state or the territory of Alaska or by public users. A right-of-way acquired under former 43 U.S.C. 932 is available for use by the public under regulations adopted by the Department of Natural Resources unless the right-of-way has been transferred by the Department of Natural Resources to the Department of Transportation and Public Facilities in which case the right-of-way is available for use by the public under regulations adopted by the Department of Transportation and Public Facilities.

(b) The Department of Natural Resources shall conduct the necessary research to identify rights-of-way that have been accepted by public users under former 43 U.S.C. 932 and that have not been previously identified and shall annually report to the legislature by the first day of each regular session of the legislature on rights-of-way that have been identified and that are not listed in this section.

(c) The rights-of-way listed in (d) of this section have been accepted by public users and have been identified to provide effective notice to the public of these rights-of-way. The failure to include or identify a right-of-way under (d) of this section does not relinquish any right, title, or interest the public has in a right-of-way.

(d) The following rights-of-way are identified by the name of the right-of-way and the identification number the right-of-way has been assigned by the Department of Natural Resources in the Historic Trails Database, known as the "RST" number, which contains a complete description of the right-of-way:

RIGHT-OF-WAY NAME	RST NUMBER
Cobb Lakes Trail	0001
Taylor—Humboldt	0002
Hajducovich—Macomb Plateau Trail	0003
Jualin Mine Road	0004
Marvel Creek Cat Trail	0005
Taylor Creek—Serpentine Hot Springs	0006
Eureka—Rampart	0007
Harrison Creek—Portage Creek	0008
Coldfoot—Chandalar Lake Trail	0009
Chicken—Franklin	0010
Eagle—Alder Creek Trail	0011
Nabesna—Chisana	0012

(1) a reasonably comparable, established alternate right-of-way or means of access exists that is sufficient to satisfy all present and reasonably foreseeable uses;

(2) the right-of-way is within a municipality, the municipal assembly or council has requested the vacation, a reasonable alternative means of access is available, and the vacation is in the best interests of the state; or

(3) the vacation is approved by the legislature.

SLA 1998, ch. 26, § 2; SLA 1999, ch. 94, § 1.

Library References

Highways ⇐75.1, 76.
Westlaw Key Number Searches: 200k75.1; 200k76.
C.J.S. Highways §§ 112 to 115.

§ 19.30.420. Immunity from liability for damages; risk of use of right-of-way acquired under former 43 U.S.C. 932

(a) Notwithstanding AS 09.50.250 and AS 09.65.070, the state and its political subdivisions are not liable for damages, injury, or death arising from AS 19.30.400–19.30.420 and the recording of any rights-of-way identified in AS 19.30.400 or acquired under former 43 U.S.C. 932.

(b) A right-of-way identified under AS 19.30.400 or acquired under former 43 U.S.C. 932 that is not designated as part of the state highway system under AS 19.10.020 is traveled and used at the risk of the user. As to those rights-of-way and notwithstanding AS 09.50.250 and AS 09.65.070, the state and a political subdivision of the state are not liable for damages, injury, or death

(1) arising from the use of the right-of-way;

(2) arising from the failure to inspect, mark, or maintain the right-of-way;

(3) occurring in the right-of-way; or

(4) associated with the right-of-way.

SLA 1998, ch. 26, § 2.

Library References

Highways ⇐187(1), 187(3).
Westlaw Key Number Searches: 200k187(1); 200k187(3).
C.J.S. Highways §§ 249, 251, 267.

Chapter 35. Relocation Assistance [Repealed]

state land, and if the section-line easement provides a practical route to the shore; and

(ii) an access easement along a tributary waterway for access to another water body or waterway, if the easement along the tributary waterway provides a practical and reasonably direct route from the road or trail to the other water body or waterway; or

(3) a trail, road, or other overland access route to the water does not exist, but a public railroad crossing authorized by the railroad operator lies within two miles of the navigable or public water, and if overland access from the railroad crossing to the water is feasible, the department will reserve, from the railroad crossing to the water, an access easement with a minimum width of 50 feet, or with a minimum width 60 feet if the department also determines that the need for increased public access to navigable or public water may justify construction of a road along an easement.

(g) If reserving access easements under (f) of this section, the department may reserve additional access easements to a water body or waterway to accommodate existing or anticipated heavy use, to protect portage routes, or to secure access between aircraft landing sites and nearby navigable or public water.

(h) In determining the access easements to be reserved to and along navigable or public water, the department will solicit comments from the Department of Fish and Game and from a municipality or other person entitled under AS 38.05.945 to notice of the preliminary or proposed written decision under AS 38.05.035(e). (Eff. 5/3/2001, Register 158)

Authority: AS 38.04.005 AS 38.04.900 AS 38.05.035
AS 38.04.055 AS 38.05.020 AS 38.05.127

Editor's note: The subject matter of 11 AAC 51.045 was formerly located at 11 AAC 53.330. The history note for 11 AAC 51.045 does not reflect the history of the earlier section.

11 AAC 51.050. Informal adjudicatory proceeding. Repealed. (Eff. 5/14/92, Register 122; repealed 11/10/93, Register 128)

11 AAC 51.055. Identification of R.S. 2477 rights-of-way. (a) Before reporting to the legislature in accordance with AS 19.30.400(b), the department will issue a proposal to identify a historic road or trail as an R.S. 2477 right-of-way that has been accepted by the state or territory of Alaska or by public user or construction.

(b) In a proposal under (a) of this section, the department will consider if sufficient evidence

(1) exists to locate the potential R.S. 2477 right-of-way on a United States Geological Survey topographical map at a scale of

1:63,360 (one inch = one mile) or on an equivalent or more detailed map;

(2) shows that the potential R.S. 2477 right-of-way crossed federal land that was unappropriated and not reserved for public use at the time of any acceptance described in (3)(A) or (3)(B) of this subsection; and

(3) exists of historical use; that evidence must include a reliable historical account, or information supplied by a knowledgeable person, to show that

(A) public use or construction constituted acceptance of the right-of-way grant under R.S. 2477 in accordance with applicable law; or

(B) a positive act on the part of a public authority constituted acceptance of the right-of-way grant under R.S. 2477 in accordance with applicable law.

(c) The department will consider any relevant evidence that

(1) supports or is contrary to evidence considered under (b) of this section; and

(2) is offered during a public comment period of at least 30 days after the department gives public notice

(A) on the Alaska Online Public Notice System developed under AS 44.62.175, or in a newspaper of statewide circulation;

(B) in a newspaper of general circulation in the vicinity of the route;

(C) by posting at a post office in the vicinity of the route, or by public service announcements in media serving the vicinity of the route;

(D) to a municipality through whose boundaries the route passes;

(E) to a regional corporation established by 43 U.S.C. 1606(a) (sec. 7(a), Alaska Native Claims Settlement Act) through whose region the route passes and

(F) to a village corporation organized under 43 U.S.C. 1607(a) (sec. 8(a), Alaska Native Claims Settlement Act) if the route is within 25 miles of the village for which the corporation was established; and

(G) to the Department of Fish and Game.

(d) After the comment period held under (c) of this section, the department will prepare a written decision whether to identify the route, in whole or in part, as an R.S. 2477 right-of-way. The department will base its decision on evidence considered or received, and will include a response to comments received. The department will give notice of its identification decision to any person who commented during the comment period.

(e) If under (d) of this section the department identifies a historic road or trail as an R.S. 2477 right-of-way, the department will show the

approximate location of the right-of-way on a map described in (b) of this section.

(f) The department's identification decision may be appealed under 11 AAC 02 if the appellant demonstrates that questions of fact remain to be resolved on a route's qualification as an R.S. 2477 right-of-way. The possible adverse impacts that public use of a route may cause to private property are not grounds for an appeal of the department's identification of an R.S. 2477 right-of-way. However, the department will consider adverse impacts in the department's management of the right-of-way, and the property owner may raise them if petitioning under 11 AAC 51.065 to vacate or relocate the right-of-way.

(g) After reporting to the legislature under AS 19.30.400(b), the department will manage use by the general public of an R.S. 2477 right-of-way that is identified under this section unless the

(1) R.S. 2477 right-of-way is part of the state highway system or the department transfers the R.S. 2477 right-of-way to the Department of Transportation and Public Facilities for management; or

(2) department transfers management authority to a municipality, with the municipality's consent; however, management by a municipality does not include the right to vacate the right-of-way. (Eff. 5/3/2001, Register 158)

Authority: AS 19.30.400 AS 38.04.058 AS 38.05.020
AS 38.04.055 AS 38.04.900 AS 38.05.035

11 AAC 51.060. Evaluation criteria for departmental decision. Repealed. (Eff. 5/14/92, Register 122; am 11/10/93, Register 128; repealed 5/3/2001, Register 158)

11 AAC 51.065. Vacation of easements. (a) An affected person or a municipal assembly or city council may petition the department to vacate, modify, or relocate,

(1) in accordance with AS 19.30.410, an R.S. 2477 right-of-way, including a section-line easement under AS 19.10.010 that the department manages under AS 19.30.400 and AS 38;

(2) in accordance with AS 38.05.127(d), an access easement reserved under AS 38.05.127 and 11 AAC 51.045;

(3) in accordance with AS 40.15.300 — 40.15.380, a platted easement dedicated to public use and managed by the department under AS 38;

(4) on land that the state currently owns or formerly owned, a public easement reserved along a section line under AS 19.10.010; or

(5) another state-owned public easement managed by the department.

(b) A petition to the department under (a) of this section must also be submitted to the platting authority for consideration, including

any adjoining or adjacent Alaska mental health trust land without cost to the Alaska mental health trust. (Eff. 5/3/2001, Register 158)

Authority: AS 37.14.009 AS 38.05.020 AS 38.05.801

Editor's note: The subject matter of 11 AAC 51.085 was formerly located at 11 AAC 53.305. The history note for 11 AAC 51.085 does not reflect the history of the earlier section.

11 AAC 51.090. Classification. Repealed. (Eff. 5/14/92, Register 122; repealed 5/3/2001, Register 158)

11 AAC 51.100. Management of public easements, including R.S. 2477 rights-of-way. (a) The commissioner has management authority over the use of any R.S. 2477 right-of-way that is not on the Alaska highway system. Certain land use actions on R.S. 2477 rights-of-way, including road construction, may require a permit under 11 AAC 96.010, or other authorization by the department. Based on a written determination by the commissioner, the commissioner will, in the commissioner's discretion, close or restrict the use of an R.S. 2477 right-of-way over which the commissioner has management authority in order to

(1) protect public safety;

(2) protect the right-of-way and the servient estate against damage that may be caused by use during storms, floods, thawing conditions, or construction and maintenance operations; or

(3) protect or manage other resources in or near the right-of-way.

(b) If the commissioner closes or restricts the use of an R.S. 2477 right-of-way under (a) of this section, the department will

(1) post notice in a conspicuous place near the right-of-way of the closure or restricted use of the right-of-way and, at the department's discretion, place a barrier or obstruction on the right-of-way;

(2) post signs in a conspicuous place near the right-of-way indicating the location of any alternative routes.

(c) Any decision made under (a) to close or restrict the use of an R.S. 2477 right-of-way may be appealed under 11 AAC 02.

(d) The commissioner and the commissioner of the Alaska Department of Transportation and Public Facilities, by agreement, will determine if an R.S. 2477 right-of-way managed under this section will be transferred to the Alaska Department of Transportation and Public Facilities or to a local government for management purposes.

(e) If an access use or access development activity on a public easement managed under AS 38 may not occur without a permit under 11 AAC 96.010 or other authorization by the department, and if the permit or authorization sought is for new access construction

(1) that would displace or preclude a traditional means of access

struction of a road on a trail traditionally used for hiking or snowmachine travel, the department will provide public notice and an opportunity for comment of at least 14 days before deciding whether to issue the permit or authorization; or

(2) on an unsurveyed easement that crosses land not managed under AS 38, the department will provide notice and a comment opportunity of at least 14 days to the owner of the land determined to be subject to the easement before deciding whether to issue the permit or authorization.

(f) Even if notice is not required under (e)(1) or (e)(2) of this section, the department may provide notice and a comment opportunity to the owner of the land subject to an R.S. 2477 right-of-way.

(g) If a permit or authorization is sought for new access construction as described in(e)(2) of this section, the department will require the permit applicant to survey the public easement, in order to show the relationship between property boundaries and that easement and to reduce the possibility of unintentional trespass. However, the department will not require a survey if the location of the public easement may readily be determined, and if a dispute does not exist regarding whose land the easement crosses. The survey is subject to approval by the department. The survey must be conducted by a surveyor, must show the relationship of the easement to the boundaries of the land it crosses, and must be performed to Class III standards under 11 AAC 53.110.

(h) The department or a person may complete a trail easement diagram showing the location of an existing trail or road. An applicant who is subject to (g) of this section may not use a trail easement diagram as a survey unless the trail easement diagram satisfies the requirements for a survey set out in that subsection.

(i) On land subject to a public easement managed under AS 38, uses and activities by the landowner that are consistent with the landowner's property rights and that do not restrict public use of the easement do not require a permit under 11 AAC 96.

(j) If the state holds only a public easement, and another person holds the other interests in the land, the department will issue a permit under 11 AAC 96 only for uses and activities related to access. (Eff. 5/14/92, Register 122; am 11/10/93, Register 128; am 5/3/2001, Register 158)

Authority: AS 38.04.045 AS 38.04.058 AS 38.04.900 AS 38.05.020 AS 38.05.027 AS 38.05.035

Article 3.

Reserved.

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Alaska

ANCSA

December 18, 1971

Pub. Law 92-203
85 STAT. 708

Public Easements

Sec. 17(b)(1) The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and other such public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: Provided, That any valid existing right recognized by this Act 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.

(3) Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Alaska

TITLE 43--PUBLIC LANDS: INTERIOR

CHAPTER II--BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

PART 2650--ALASKA NATIVE SELECTIONS--Table of Contents

Subpart 2650--Alaska Native Selections: Generally

Sec. 2650.0-5 Definitions.

(a) Act means the Alaska Native Claims Settlement Act of December 18, 1971 (43 U.S.C. 1601) and any amendments thereto.

(b) Secretary means the Secretary of the Interior or his authorized delegate.

(e) Village corporation means a profit or nonprofit Alaska Native village corporation which is eligible under Sec. 2651.2 of this chapter to select land and receive benefits under the act, and is organized under the laws of the State of Alaska in accordance with the provisions of section 8 of the Act.

(f) Regional corporation means an Alaska Native regional corporation organized under the laws of the State of Alaska in accordance with the provisions of section 7 of the Act.

(g) Public lands means all Federal lands and interests in lands located in Alaska (including the beds of all non-navigable bodies of water), except:

(1) The smallest practicable tract, as determined by the Secretary, enclosing land actually used, but not necessarily having improvements thereon, in connection with the administration of a Federal installation; and,

(2) Land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341; 77 Stat. 223; 48 U.S.C. Ch. 2), or identified for selection by the State prior to January 17, 1969, except as provided in Sec. 2651.4 (a)(1) of this chapter.

(h) Interim conveyance as used in these regulations means the conveyance granting to the recipient legal title to unsurveyed

(i) Be reserved across Native lands only if there is no reasonable alternative route of transportation across publicly owned lands;

(ii) Within the standard of reasonable necessity, be limited in number and not duplicative of one another (nonduplication does not preclude separate easements for winter and summer trails, if otherwise justified);

(iii) Be subject only to specific uses and sizes which shall be placed in the appropriate interim conveyance and patent documents;

(iv) Follow existing routes of travel unless a variance is otherwise justified;

(v) Be reserved for future roads, including railroads and roads for future logging operations, only if they are site specific and actually planned for construction within 5 years of the date of conveyance;

(vi) Be reserved in topographically suitable locations whenever the location is not otherwise determined by an existing route of travel or when there is no existing site;

(vii) Be reserved along the marine coastline only to preserve a primary route of travel between coastal communities, publicly owned uplands, or coastal communities and publicly owned uplands;

(viii) Be reserved from publicly owned uplands to the marine coastline only if significant present existing use has occurred on those publicly owned lands below the line of mean high tide. However, for isolated tracts of publicly owned uplands, public easements may be reserved to provide transportation from the marine coastline if there is no other reasonable transportation route;

lands, and containing all the reservations for easements, rights-of-way, or other interests in land, provided by the act 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.

(i) Patent as used in these regulations means 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 the act or imposed on the land by applicable law; or the document issued after approval of the survey by the Bureau of Land Management, to confirm the boundary description of the unsurveyed conveyed lands.

(j) Conveyance as used in these regulations means the transfer of title pursuant to the provisions of the act whether by interim conveyance or patent, whichever occurs first.

(o) Major waterway means any river, stream, or lake which has significant use in its liquid state by watercraft for access to publicly owned lands or between communities. Significant use means more than casual, sporadic or incidental use by watercraft, including floatplanes, but does not include use of the waterbody in its frozen state by snowmobiles, dogsleds or skiplanes. Designation of a river or stream as a major waterway may be limited to a specific segment of the particular waterbody.

(p) Present existing use means 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. Past use which has long been abandoned shall not be considered present existing use.

(q) Public easement means any easement reserved by authority of section 17(b) of the Act and under the criteria set forth in these regulations. It includes easements for use by the general public and easements for use by a specific governmental agency. Public easements may be reserved for transportation, communication and utility purposes, for air, light or visibility purposes, or for guaranteeing international treaty obligations.

(r) Publicly owned lands means all Federal,

(ix) Be reserved along major waterways only to provide short portages or transportation routes around obstructions. However, this condition does not preclude the reservation of a trail or road easement which happens to run alongside a waterway;

(x) Not be reserved on the beds of major waterways except where use of the bed is related to road or trail purposes, portaging, or changing the mode of travel between water and land (e.g., launching or landing a boat); a specific portion of the bed or shore of the waterway which is necessary to provide portage or transportation routes around obstructions, including those that are dangerous or impassible or seasonably dangerous or impassible, may be reserved.

(xi) Not be reserved on the beds of nonmajor waterways except where use of the beds is related to road or trail purposes. However, this exception shall not be used to reserve a continuous linear easement on the streambed to facilitate access by boat.

(xii) Not be reserved simply to reflect patterns of Native use on Native lands;

(xiii) Not be reserved for the purpose of protecting Native stockholders from their respective corporations;

(xiv) Not be reserved on the basis of subsistence use of the lands of one village by residents of another village.

(2) Transportation easements shall be limited to roads and sites which are related to access. The use of these easements shall be controlled by applicable Federal, State, or municipal corporation laws or regulations. The uses stated herein will be specified in the interim conveyance and patent documents as permitted uses of the easement.

(i) The width of a trail easement shall be no more than 25 feet if the uses to be accommodated are for travel by foot, dogsleds, animals, snowmobiles,two and three-wheel vehicles, and small all-terrain vehicles (less than 3,000 lbs. G.V.W.);

(ii) The width of a trail easement shall be no more than 50 feet if the uses to be accommodated are for travel by large all-terrain vehicles (more than 3,000 lbs. G.V.W.), track vehicles and 4-wheel drive vehicles, in addition to the uses included

State, or municipal corporation (including borough) lands or interests therein in Alaska, including public lands as defined herein, and submerged lands as defined by the Submerged Lands Act, 43 U.S.C. 1301, et seq.

(s) Director means the Director, Bureau of Land Management

(t) Isolated tract means a tract of one or more contiguous parcels of publicly owned lands completely surrounded by lands held in nonpublic ownership or so effectively separated from other publicly owned lands as to make its use impracticable without a public easement for access.

(u) State means the State of Alaska.

(v) Native corporation means any Regional Corporation, any Village Corporation, Urban Corporation and any Native Group.

[38 FR 14218, May 30, 1973, as amended at 43 FR 55328, Nov. 27, 1978; 50 FR 15547, Apr. 19, 1985]

Sec. 2650.4-7 Public easements.

(a) General requirements. (1) Only public easements which are reasonably necessary to guarantee access to publicly owned lands or major waterways and the other public uses which are contained in these regulations, or to guarantee international treaty obligations shall be reserved.

(2) In identifying appropriate public easements assessment shall be made in writing of the use and purpose to be accommodated.

(3) The primary standard for determining which public easements are reasonably necessary for access shall be present existing use. However, a public easement may be reserved absent a demonstration of present existing use only if it is necessary to guarantee international treaty obligations, if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land. When adverse impacts on Native culture, lifestyle, and subsistence needs are likely to occur because of the reservation of a public easement, alternative routes shall be assessed and reserved where reasonably available. The natural environment and other relevant factors shall

under paragraph (b)(2)(i) of this section;

(iii) The width of an existing road easement shall be no more than 60 feet if the uses to be accommodated are for travel by automobiles or trucks in addition to the uses included under paragraphs (b)(2) (i) and (ii) of this section. However, if an existing road is wider than 60 feet, the specific public easement may encompass that wider width. For proposed roads, including U.S. Forest Service logging roads, the width of the public easement shall be 100 feet, unless otherwise justified. Prior to construction, trail uses which are included under paragraphs (b)(2) (i) and (ii) of this section may be permitted if otherwise justified and may continue if the road is not built. If after the road has been constructed a lesser width is sufficient to accommodate the road, the Director shall reduce the size of the easement to that width.

(iv) The width of a proposed railroad easement shall be 100 feet on either side of the center line of any such railroad.

(3) Site easements. Site easements which are related to transportation may be reserved for aircraft landing or vehicle parking (e.g., aircraft, boats, ATV's, cars, trucks), temporary camping, loading or unloading at a trail head, along an access route or waterway, or within a reasonable distance of a transportation route or waterway where there is a demonstrated need to provide for transportation to publicly owned lands or major waterways. Temporary camping, loading, or unloading shall be limited to 24 hours. Site easements shall not be reserved for recreational use such as fishing, unlimited camping, or other purposes not associated with use of the public easement for transportation. Site easements shall not be reserved for future logging or similar operations (e.g., log dumps, campsites, storage or staging areas). Before site easements are reserved on transportation routes or on major waterways, a reasonable effort shall be made to locate parking, camping, beaching, or aircraft landing sites on publicly owned lands; particularly, publicly owned lands in or around communities, or bordering the waterways. If a site easement is to be reserved, it shall:

(i) Be subject to the provisions of paragraphs (b)(1) (ii), (iii), (vi), (xii), (xiii), and (xiv) of this section.

also be considered.

(4) All public easements which are reserved shall be specific as to use, location, and size. Standard sizes and uses which are delineated in this subsection may be varied only when justified by special circumstances.

(5) Transportation, communication, and utility easements shall be combined where the combination of such easements is reasonable considering the primary purposes for which easement is to be reserved.

(6) Public easements may be reserved to provide access to present existing Federal, State, or municipal corporation sites; these sites themselves shall not be reserved as public easements. Unless otherwise justified, access to these sites shall be limited to government use.

(7) Scenic easements or easements for recreation on lands conveyed pursuant to the Act shall not be reserved. Nor shall public easements be reserved to hunt or fish from or on lands conveyed pursuant to the Act.

(8) The identification of needed easements and major waterways shall include participation by appropriate Natives and Native corporations, LUPC, State, Federal agencies, and other members of the public.

(9) After reviewing the identified easements needs, the Director shall tentatively determine which easements shall be reserved. Tentative determinations of major waterways shall also be made by the Director and shall apply to rivers, streams, and lakes. All lakes over 640 acres in size shall be screened to determine if they qualify as major waterways. Those smaller than 640 acres may be considered on a case-by-case basis. The Director shall issue a notice of proposed easements which notifies all parties that participated in the development of the easement needs and information on major waterways as to the tentative easement reservations and which directs that all comments be sent to the LUPC and the Director.

(10) The State and the LUPC shall be afforded 90 days after notice by the Director to make recommendations with respect to the inclusion of public easements in any conveyance. If the Director does not receive a recommendation from the LUPC or the State within the time period herein called for, he may proceed with his determinations.

(ii) Be no larger than one acre in size and located on existing sites unless a variance is in either instance, otherwise justified;

(iii) Be reserved on the marine coastline only at periodic points along the coast where they are determined to be reasonably necessary to facilitate transportation on coastal waters or transportation between coastal waters and publicly owned uplands;

(iv) Be reserved only at periodic points on major waterways. Uses shall be limited to those activities which are related to travel on the waterway or to travel between the waterway and publicly owned lands. Also, periodic site easements shall be those necessary to allow a reasonable pattern of travel on the waterway;

(v) Be reserved for aircraft landing strips only if they have present significant use and are a necessary part of a transportation system for access to publicly owned lands and are not suitable for reservation under section 14(c)(4) of the Act. Any such easement shall encompass only that area which is used for takeoffs and landings and any clear space around such site that is needed for parking or public safety.

(c) Miscellaneous easements. The public easements referred to in this subsection which do not fall into the categories above may be reserved in order to continue certain uses of publicly owned lands and major waterways. These public easements shall be limited in number. The identification and size of these public easements may vary from place to place depending upon particular circumstances. When not controlled by applicable law or regulation, size shall not exceed that which is reasonably necessary for the purposes of the identified easement.Miscellaneous easements may be reserved for the following purposes:

(1) Public easements which are for utility purposes (e.g., water, electricity, communications, oil, gas, and sewage) may be reserved and shall be based upon present existing use. Future easements for these purposes may also be reserved, but only if they are site specific and actually planned for construction within 5 years of the date of conveyance;

(2) Easements for air light or visibility purposes may be reserved if required to insure public safety or to permit proper use of improvements developed for public benefit

(11) Prior to making a determination of public easements to be reserved, the Director shall review the recommendations of the LUPC, appropriate Native corporation (s), other Federal agencies, the State, and the public. Consideration shall be given to recommendations for public easement reservations which are timely submitted to the Bureau of Land Management and accompanied by written justification.

(12) The Director, after such review, shall prepare a decision to convey that includes all necessary easements and other appropriate terms and conditions relating to conveyance of the land. If the decision prepared by the Director is contrary to the LUPC's recommendations, he shall notify the LUPC of the variance(s) and shall afford the LUPC 10 days in which to document the reasons for its disagreement before making his final decision. The Director shall then issue a Decision to Issue Conveyance (DIC)

(13) The Director shall terminate a public easement if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001, whichever occurs first, He may terminate an easement at any time if he finds that conditions are such that its retention is no longer needed for public use or governmental function. However, the Director shall not terminate an access easement to isolated tracts of publicly owned land solely because of the absence of proof of public use. Public easements which have been reserved to guarantee international treaty obligations shall not be terminated unless the Secretary determines that the reasons for such easements no longer justify the reservation. No public easement shall be terminated without proper notice and an opportunity for submission of written comments or for a hearing if a hearing is deemed to be necessary by either the Director or the Secretary.

(b) Transportation easements. (1) Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native corporations. Such purposes may also include transportation to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in number to constitute a public use, and government reservations or installations. Public easements may also be reserved for railroads. If public easements are to be reserved, they shall:

or use; e.g., protection for aviation or navigation aids or communications sites;

(3) Public easements may be reserved to guarantee international treaty obligations or to implement any agreement entered into between the United States and the Native Corporation receiving the conveyance. For example, the agreement of May 14, 1974, related to Naval Petroleum Reserve Number Four (redesignated June 1, 1977, as the National Petroleum Reserve-Alaska) between the United States Department of the Navy and the Arctic Slope Regional Corporation and four Native village corporations, shall be incorporated in the appropriate conveyances and the easements necessary to implement the agreement shall be reserved.

(d) Conveyance provisions. (1) Public easement provisions shall be placed in interim conveyances and patents.

(2) Permissible uses of a specific easement shall be listed in the appropriate conveyance document. The conveyance documents shall include a general provision which states that uses which are not specifically listed are prohibited.

(3) The easements shall be identified on appropriate maps which shall be part of the pertinent interim conveyance and patent.

(4) All public easement shall be reserved to the United States and subject, as appropriate, to further Federal, State, or municipal corporation regulation.

(5) All conveyance documents shall contain a general provision which states that pursuant to section 17(b)(2) of the Act, any valid existing right recognized by the Act shall continue to have whatever right of access as is now provided for under existing law.

[43 FR 55329, Nov. 27, 1978]

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Alaska

DEPARTMENT OF THE INTERIOR
DEPARTMENTAL MANUAL

Public Lands **Part 601 Federal Areas Within States**

Chapter 4 Administration of ANCSA 17(b) Easements 601 DM 4.1

4.1 Purpose. This chapter sets out procedures for the administration of easements under the Department of the Interior jurisdiction that have been reserved pursuant to Section 17(b) of the Alaska Native Claims Settlement Act, (43 U.S.C. 1616(b)). Easements serving lands under other Federal agency administration shall be the responsibility of that agency.

4.2 Policy. An easement reserved pursuant to Section 17(b) of the Alaska Native Claims Settlement Act shall be administered by the Interior bureau whose land is accessed by the easement. Site easements which are a necessary and integral part of the access easement shall also be administered by the bureau whose land is accessed by the linear easement. Where that easement accesses or is a part of the access to a conservation system unit, that easement shall become part of that unit and be administered accordingly. When an easement accesses non-Federal lands, the easement shall be administered by the Bureau of Land Management. If an easement connects two conservation system units managed by two different bureaus, the bureau with the larger conservation system unit shall administer the access easement. If the easement connects a conservation system unit with other public lands then the bureau managing the conservation system unit shall administer the easement. Any segment of an easement crossing lands within the exterior boundary of a conservation system unit shall be administered by the bureau managing the conservation system unit in consultation with any other bureau or agency managing the remainder of the easement outside of the conservation system unit. Each bureau is authorized to negotiate with other Federal agencies, the State of Alaska, an Alaska borough or municipal government to transfer the administration of a specific easement, if authorized by law.

4.3 Administration Procedures.

A. The Alaska State Director, Bureau of Land Management, shall notify the appropriate bureau or Federal agency when an easement accessing a conservation system unit or Federal property has been reserved in a conveyance document to a Native corporation. Where that easement is external to the boundary of a conservation system unit, that easement shall be made part of that unit by authority in Section 103(b) of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3103). The notice shall include the easement identification number, Federal unit accessed, the servient landowner's name and mailing address, the size, length and acreage of the easement, authorized uses and a map depicting the easement.

B. Each Alaska Regional Director or State Director shall maintain necessary maps or other appropriate reference materials which display the location of, and authorized uses for each easement under its administration. This information shall be available in the bureau's office which has direct administration of the lands which are accessed by the easement. The Alaska State Office, Bureau of Land Management, shall also maintain records of all easements. Each bureau is responsible for making necessary supplemental use information available to the Bureau of Land Management.

C. Each bureau has the right to remove and use vegetal materials and common varieties of soil, sand, gravel, and stone within the easement, at no cost, to the extent necessary for the development or management of the particular easement, except as limited by specific negotiated agreements with the servient owner(s). Vegetal materials and common varieties of soil, sand, gravel, and stone not necessary for the development or management of the particular easement remain the property of the servient

owner. However, nothing in this manual gives or shall be considered to give an easement user the right to appropriate vegetal or mineral materials.

D. Any use authorization granted for an activity on publicly owned land may include the necessary authorization for the appropriate use of the accessing public easements. The authorization shall not allow uses which are not provided for in the easement reservation. If authorization is required to construct and use a reserved easement, the administering bureau may grant such authority.

E. When funds are available, the bureau may contract with private entities, including, but not limited to, Native corporations to perform functions which may be needed as part of the administration of the easement, including, but not limited to, the installation of signs, construction and maintenance of trails and sites and litter control.

F. Prior to on-the-ground activities such as location, marking or developing an easement by an administering bureau, the servient owner(s) should be consulted.

G. The physical location of an easement may be adjusted to rectify a usability problem, or to accommodate the servient owner's development of the lands and shall be made only after the bureau and the servient owner agree to the adjustment. Such adjustments shall be reduced to writing and recorded.

H. An easement is a property interest which may be exchanged. An easement may be exchanged if an acceptable alternate easement or benefit is offered by the servient landowner(s).

4.4 Transfer of Administration. Administration of an easement may be transferred to the State of Alaska, an Alaska Borough or municipal government if the Secretary determines that it is in the best interest of the United States or public and is otherwise authorized by law.

A. Each bureau may, under appropriate authority, negotiate the transfer of its administration of any easement to any appropriate unit of Federal or State government. Upon successful transfer, the bureau transferring administration shall notify the BLM State Director of the action and provide BLM with a signed copy of the agreement. The transferring bureau shall continue to maintain a record of the easement and make the information available to the public.

B. Prior to transferring administration of an easement to the State of Alaska, a borough or municipal government, the bureau shall make the transfer document available to the servient owner(s) for inspection and comment for a period of not less than 30 days prior to execution of the transfer. All comments submitted by the servient owner(s) should be considered prior to the final transfer.

C. When a bureau determines that an easement is no longer necessary for the purpose for which it is reserved, the Regional Director of that bureau shall request that the BLM State Director either assume administration of the easement or initiate proceedings to relinquish the easement to the servient land owner. The request shall be supported with documentation that:

1. An alternate easement has been offered by the landowner; or

2. Termination is required by law.

Chapter 4 - Administration of ANCSA 17(b) Easements
September 11, 1984 #2586

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Alaska

Section 17(b) easement general information

17(b) easements[1] are rights reserved to the United States. They take the form of 60-foot wide roads, 25- and 50-foot trails, and one-acre sites for short-term uses. These rights are reserved[2] when the BLM conveys land to a Native corporation under the Alaska Native Claims Settlement Act (ANCSA). There are no 17(b) easements across public lands.

What is the purpose of 17(b) easements?

Most 17(b) easements are reserved to allow the public to cross private property to reach public lands[3] and major waterways. Using 17(b) easements does not allow the public to use the private lands these easements cross. It is very similar to the street in front of many homes. The public has the right to travel on the street, but they do not have the right to dump litter on private property or trespass on private lawns.

Notes:

[1] 17(b) easements may also be reserved to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in number to constitute public use and government facilities. See 43 Code of Federal Regulation (CFR) 2650.4-7 for a complete listing of the types of public easements.

[2] The authorities for reserving 17(b) easements are the Alaska Native Claims Settlement Act, 43 U.S.C. 1616(b) and 43 Code of Federal Regulation (CFR) 2650.4-7.

[3] Publicly owned land means all Federal, State, or municipal and borough lands or interests and submerged lands as defined by the Submerged Lands Act. This definition of public lands also includes lands selected by, but not conveyed to, a Native corporation.

EASEMENT MARKER

How are 17(b) easements identified and reserved?

The identification process begins when a Native corporation prioritizes selected lands for conveyance. The BLM reviews the lands for public easement needs and requests comments from the Native corporations, the State of Alaska, and interested parties. The information is analyzed using the 17(b) easement criteria and the results are documented. The BLM includes the approved 17(b) easements in an appealable decision and the lands are later conveyed to the Native corporation with the easements reserved to the United States.

General Legal Authorities & Agreements

- Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971, 43 U.S.C. 1616 (1b) (authority for reserving public easements)
- Federal Land Management Policy Act of 1976 (FLPMA)
- Section 903 (a) and (b) of the Alaska National Interest Lands Conservation Act (ANILCA) of December 2. 1980, (adds guiding principles when reserving easements and authorizes the acquisition of easements)
- Code of Federal Regulations 43 CFR 2650.4-7 and 2650.0-5 (public easements)
- Code of Federal Regulations 43 CFR 4.410 (who can appeal)
- Departmental Manual 601 DM 4 (Department of the Interior guidance on administration of Section 17(b) easements)
- Memorandum of Understanding (MOU) among the BLM, NPS, and FWS dated

How can I tell the difference between private land and public land, and how do I know where 17(b) easements are found?

Prior to heading out to public lands, visit your nearest BLM public room to determine who owns the land you intend to cross to reach your destination. Master title plats show land ownership, but they don't show 17(b) easements. Lands that have been conveyed to a Native corporation are privately owned by that corporation, but public lands that have been selected by the corporation and not yet conveyed are still public lands and may be used by the public.

The 17(b) easement allows the public to cross conveyed lands, but the route reserved in the conveyance document and the uses allowed on that easement must be followed. The public room will assist you with looking up the title documents, which will show you the easements reserved. The documents conveying the land to the Native corporation will identify the 17(b) easements, which are shown on easement maps, but the easement maps do not depict land ownership.

Can 17(b) easements be terminated?

Yes, but only the BLM can terminate a 17(b) easement, using the following process. When the BLM or the easement manager determines that an easement is no longer necessary, the BLM must provide public notice that the easement is proposed for termination and request comments from the public. After reviewing the comments and determining the easement is no longer required, the BLM issues an appealable decision terminating the easement. The BLM terminates the public easement when the decision is final by issuing a release of interest.

Next Page>>

12/12/88 (governs which agency will administer, the process for administering, and the termination of Section 17(b) easements)

- MOU between the BLM and the USFS dated 9/4/90 (governs which agency will administer, the process for administering, and the termination of Section 17(b) easements)

View various 17(b) easement maps from the Spatial Data Management System (SDMS)map interface by selecting "Easements" and then ANCSA region's easements under the Layers menu. Or visit the SMDS Home page for more 17(b) map information.

§ 317. Appropriation for highway purposes of lands or interests in lands owned by the United States

(a) If the Secretary determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State transportation department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State transportation department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title.

(Pub. L. 85–767, Aug. 27, 1958, 72 Stat. 916; Pub.L. 105–178, Title I, § 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 193.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1958 Acts. Senate Report No. 1928, see 1958 U.S. Code Cong. and Adm. News, p. 3942.

1998 Acts. House Conference Report No. 105–550 and Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 64.

Amendments

1998 Amendments. Subsecs. (b), (c). Pub.L. 105–178, § 1212(a)(2)(A)(i), substituted "State transportation department" for "State highway department".

proved as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps or plats will not dispense with the filing of maps or plats after the survey of the lands and within the time limited in the act granting the right-of-way. If these maps or plats are in all respects regular when filed, they will receive approval. In filing such maps or plats the initial and terminal points will be fixed as indicated in §§ 243.12 and 243.13.

§ 243.16 Connections with public survey corners.

Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. The map or plat should show these distances and the station numbers at the points of intersection. When field notes are submitted, they should also contained these distances and station numbers.

§ 243.17 Statement and certificate required.

The engineer's statement and president's certificate must be written on the map, and must both designate by termini and length, in miles and decimals, the line of route for which right-of-way application is made. (See Forms 3 and 4.)[2] Station grounds must be described by initial point and area in acres (see Forms 7 and 8),[2] and when they are on surveyed land the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein.

§ 243.18 Spurs or branch lines.

Where right-of-way is desired for spurs or short branch lines which will not greatly enlarge the size of the map, they may be shown on the same map with the main line, and should be separately described in the forms by termini and length. For longer branch lines separate maps should be filed.

§ 243.19 Notations on maps and records.

(a) When maps are filed, the manager will note on each the name of the land office and the date of filing, over his written signature. Notations will also be made on the records of the land office, as to each unpatented tract affected, that application for right-of-way is pending, giving date of filing and name of applicant. The manager will certify on each map, over his written signature, that unpatented land is affected by the proposed right-of-way. The maps and field notes will be approved by the manager in duplicate. Any valid right existing at the date of the filing of the right-of-way application will not be affected by the filing or approval thereof. If no unpatented land is involved in the application the manager will reject it, allowing the usual right of appeal.

§ 243.20 Evidence of construction.

When the railroad is constructed, a statement of the engineer and certificate of the president (Forms 5 and 6)[2] must be filed in the land office, in duplicate. No new map will be required, except in case of deviations from the right-of-way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and the amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the manager.

PART 244—RIGHTS-OF-WAY OTHER THAN FOR RAILROAD PURPOSES AND FOR LOGGING ROADS ON THE OREGON AND CALIFORNIA AND COOS BAY REVESTED LANDS

CROSS REFERENCES: For easements for public works, see Part 9 of this title. For rights-of-way, Alaska, see Part 74 of this chapter. For logging roads rights-of-way, revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands in Oregon, see Part 115 of this chapter. For rights-of-way for railroad and station grounds, see Part 248 of this chapter. For rights-of-way over Indian lands, see Indians, 25 CFR, Part 161.

Subpart A—General Regulations Applicable to All Rights-of-Way Provided for in This Part

DEFINITIONS

Sec.

structures as canals, ditches, pipelines, and transmission lines and 1,000 feet to the inch for rights-of-way for reservoirs, except where a larger scale is required to represent properly the details of the proposed developments, in which case the scales should be 1,000 feet to the inch and 500 feet to the inch, respectively. For electric transmission lines having a nominal voltage of less than 33 kv. map scales may at option of the applicant be 5,280 feet to the inch.

(2) Courses and distances of the center line of the right-of-way or traverse line of the reservoir should be given; the courses referred to the true meridian either by deflection from a line of known bearing or by independent observation, and the distances in feet and decimals thereof. Station numbers with plus distances at deflection points on the traverse line should be shown.

(3) The initial and terminal points of the survey should be accurately connected by course and distance to the nearest corner of the public-land surveys, unless that corner is more than 6 miles distant, in which case the connection will be made to some prominent natural object or permanent monument, which can be readily recognized and recovered. The station number and plus distance to the point of intersection with a line of the public-land surveys should be ascertained and noted, together with the course and distance along the section line to the nearest existing corner, at a sufficient number of points throughout the township to permit accurate platting of the relative position of the right-of-way to the public-land survey.

(4) If the right-of-way is across or within reservation lands which are not covered by the public-land surveys, the map shall be made in terms of the boundary survey of the reservation to the extent it would be required above to be made in terms of the public-land surveys.

(5) All subdivisions of the public-land surveys within the limits of the survey should be shown in their entirety, based upon the official subsisting plats, with the subdivisions, section, township, and range clearly marked.

(6) The width of the canal, ditch, or lateral at high-water line should be given and the width of all other rights-of-way shall be given. If the width is not uniform, the location and amount of the change in width must be definitely shown. In the case of a pipeline, the diameter of the line should be given. For reservoirs, the capacity in acre-feet, the area within the high-water line, the source of the water supply, and the location and height of the dam must be shown. The total distance of the right-of-way on the Federal lands shall be stated. In the case of a reservoir or other site, the total acreage shall be stated.

(7) Each copy of the map should bear upon its face a statement of the engineer who made the survey and the certificate of the applicant. The statement and certificate referred to are embodied in Forms 1 and 2, which are made a part hereof and which should be modified so as to be appropriate to the act invoked and the nature of the project.[4]

(8) Whenever it is found that a public-land survey monument or reservation boundary monument will be destroyed or rendered inaccessible by reason of the proposed development, at least two permanent marked witness monuments should be established at suitable points, preferably on the surveyed lines. A brief description of the witness monuments and the connecting courses and distances to the original corners should be shown.

(b) *Evidence of water right.* If the project involves the storage, diversion, or conveyance of water, the applicant must file a statement of the proper State official, or other evidence, showing that he has a right to the use of the water. Where the State official requires an applicant to obtain a right-of-way as a prerequisite to the issuance of evidence of a water right, if all else be regular, a right-of-way may be granted conditioned only upon the applicant's filing the required evidence of water right from the State official within a specified reasonable time. The conditional right-of-way will terminate at the expiration of the time allowed.

General Provisions[5]

§ 244.7 Nature of interest granted; settlement on right-of-way; rights of ingress and egress.

(a) No interest granted by the regulations in this part shall give the holder

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[4] See appendix for form to be placed on maps.

[5] In addition to the material contained under this heading, the subpart relating to the particular type of right-of-way involved should be consulted. See Subparts B through L of this part.

thereof any estate of any kind in fee in the lands. The interest granted shall consist of an easement, license, or permit in accordance with the terms of the applicable statute; no interest shall be greater than a permit revocable at the discretion of the authorized officer unless the applicable statute provides otherwise. Unless a specific statute or regulation provides otherwise, no interest granted shall give the grantee any right whatever to take from the public lands or reservations any material, earth, or stone for construction or other purpose, but stone and earth necessarily removed from the right-of-way in the construction of a project may be used elsewhere along the same right-of-way in the construction of the same project.

(b) All persons entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations in this part, take the land subject to such right-of-way and without deduction of the area included in the right-of-way.

(c) In order to facilitate the use of a right-of-way granted or applied for under the regulations of this part, the authorized officer may grant to the holder of or applicant for such right-of-way an additional right-of-way for ingress and egress to the primary right-of-way, including the right to construct, operate, and maintain such facilities as may be necessary for ingress and egress. The holder or applicant may obtain such additional right-of-way only over lands for which the authorized officer has authority to grant a right-of-way of the type represented by the primary right-of-way held or requested by the applicant. He must comply with the same provisions of the regulations applicable to his primary right-of-way with respect to the form of and place of filing his application for an additional right-of-way, the filing of maps and other information, and the payment of rental charges for the use of the additional right-of-way. He must also present satisfactory evidence that the additional right-of-way is reasonably necessary for the use, operation, or maintenance of the primary right-of-way.

[19 F.R. 9099, Dec. 23, 1954, as amended, Circ. 2012, 24 F.R. 901, Feb. 6, 1959]

§ 244.8 Commencement of construction work in advance of approval of right-of-way; trespass.

(a) Permission to commence construction work over and through lands under the jurisdiction of the Department of the Interior or of its agencies and to use and occupy such lands in advance of the approval of a right-of-way may be granted by the manager upon a satisfactory showing of the necessity for such action and upon a determination, after the request for permission has been cleared by all interested agencies of the Department, that such action is compatible with the public interest. Requests for such advance authority need not meet the formal requirements of §§ 244.3 to 244.5 and may be filed with the agency having supervision of the land involved, in which case a duplicate request must be filed in the office specified in § 244.3.

(b) Any grant of advance permission is solely for the convenience of the applicant and is not a commitment by the Department that a right-of-way will be approved. The Department's authority in acting on a right-of-way application is not restricted in any way by the grant of advance permission or any requirements laid down in such grant of permission and the Department may impose additional or different requirements, within the scope of the applicable statute and lawful regulations thereunder, as conditions precedent to the approval of the right-of-way. A grant of advance permission is revocable at will, and the grantee assumes all the risk of operating under such permission.

(c) Any occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass.

[19 F.R. 9099, Dec. 23, 1954, as amended, Circ. 2004, 23 F.R. 4699, June 26, 1958]

§ 244.9 Terms and conditions.

An applicant, by accepting a right-of-way, agrees and consents to comply with and be bound by the following terms and conditions, excepting those which the Secretary may waive in a particular case:

(a) To comply with State and Federal laws applicable to the project for which

the right-of-way is approved, and to the lands which are included in the right-of-way, and lawful existing regulations thereunder.

(b) To clear and keep clear the lands within the right-of-way to the extent and in the manner directed by the superintendent in charge; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project in such manner as to decrease the fire hazard and also in accordance with such instructions as the superintendent in charge may specify.

(c) To take such soil and resource conservation and protection measures, including weed control, on the land covered by the right-of-way as the superintendent in charge of such lands may request.

(d) To do everything reasonably within his power, both independently and on request of any duly authorized representative of the United States, to prevent and suppress fires on or near the lands to be occupied under the right-of-way, including making available such construction and maintenance forces as may be reasonably obtainable for the suppression of such fires.

(e) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way.

(f) To pay the United States the full value for all damages to the lands or other property of the United States caused by him or by his employees, contractors, or employees of the contractors, and to indemnify the United States against any liability for damages to life, person, or property arising from the occupancy or use of the lands under the right-of-way, except that where a right-of-way is granted hereunder to a State or other governmental agency which has no legal power to assume such a liability with respect to damages caused by it to lands or property, such agency in lieu thereof agrees to repair all such damages.

(g) To notify promptly the superintendent in charge of the amount of merchantable timber, if any, which will be cut, removed, or destroyed in the construction and maintenance of the project, and to pay the United States through such superintendent in advance of construction such sum of money as such superintendent may determine to be the full stumpage value of the timber to be so cut, removed, or destroyed.

(h) To comply with such other specified conditions, within the scope of the applicable statuto and lawful regulations thereunder, with respect to the occupancy and use of the lands as may be found by the agency having supervision of the lands to be necessary as a condition to the approval of the right-of-way in order to render its use compatible with the public interest.

(i) That upon revocation or termination of the right-of-way, unless the requirement is waived in writing, he shall, so far as it is reasonably possible to do so, restore the land to its original condition to the entire satisfaction of the superintendent in charge.

(j) That he shall at all times keep the manager informed of his address, and, in case of corporations, of the address of its principal place of business and of the names and addresses of its principal officers.

(k) That in the construction, operation, and maintenance of the project, he shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin and shall require an identical provision to be included in all subcontracts.

(l) That the allowance of the right-of-way shall be subject to the express condition that the exercise thereof will not unduly interfere with the management, administration, or disposal by the United States of the lands affected thereby, and that he agrees and consents to the occupancy and use by the United States, its grantees, permittees, or lessees of any part of the right-of-way not actually occupied or required by the project, or the full and safe utilization thereof, for necessary operations incident to such management, administration, or disposal.

(m) That the right-of-way herein granted shall be subject to the express covenant that it will be modified, adapted, or discontinued if found by the Secretary to be necessary, without liability or expense to the United States, so as not to conflict with the use and occupancy of the land for any authorized works which may be hereafter constructed thereon under the authority of the United States.

§ 244.10 Proposed or existing national forest.

Whenever a right-of-way is sought through or in national forest lands, or any area withdrawn for inclusion within a national forest, the applicant must enter into such stipulations and execute such bond as the Forest Service may require for the protection of such existing or proposed national forest.

§ 244.11 National parks and monuments.

(a) The act of March 3, 1921 (41 Stat. 1353; 16 U.S.C. 797), provides that no right-of-way for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as then constituted of any national park or monument, shall be approved without specific authority of Congress.

(b) Whenever a right-of-way is desired through any national park or monument for purposes other than those excepted by the act of March 3, 1921, or not otherwise expressly prohibited by law, the applicant must show to the satisfaction of the Director, National Park Service, that the location and use of the right-of-way for the purposes contemplated will not interfere with the uses and purposes for which the park or monument was originally dedicated, and will not result in damage or injury to the natural conditions of property or scenery existing therein. The applicant must also file such stipulations and bond as may be required by the Director, National Park Service. Ordinarily, such a right-of-way may be allowed only on a showing of absolute necessity.

§ 244.12 Oregon and California Railroad and Coos Bay Wagon Road grant lands.

All applications for rights-of-way for the construction and operation of any project over Oregon and California Railroad lands, title to which was revested in the United States by the act of June 9, 1916 (39 Stat. 218), and reconveyed Coos Bay Wagon Road lands, act of February 26, 1919 (40 Stat. 1179), must also be accompanied by a statement showing the amount of merchantable timber, if any, to be cut, removed, or destroyed in the construction of the project works, and agreeing to deposit with the Bureau, in advance of construction, such sum of money as may be determined to be the full stumpage value of the timber to be so cut, removed, or destroyed, and an affirmative showing that favorable action on the application will not adversely affect or impair watershed protection, streamflow regulation, and other conservation features enumerated in the act of August 28, 1937 (50 Stat. 874).[5]

§ 244.13 Alaska.

All general right-of-way laws, and the regulations thereunder contained in this part, are applicable to Alaska.[7]

§ 244.14 Approval of right-of-way.

(a) Where an application is complete and in conformity with the law and regulations and all required reports have been obtained and it is determined that the approval of the right-of-way will not be contrary to the public interest, including that of the Government, the manager will approve the right-of-way.[8]

(b) An application which does not conform with the law or regulations under which filed or the approval of which would be inconsistent with the public or Government interest, will be rejected.

§ 244.15 Use of right-of-way.

(a) *Proof of construction.* A period of 5 years from the date of the approval of the right-of-way is usually allowed for construction unless a different period is provided by statute. Upon completion of construction, proof thereof should be submitted to the manager, consisting of a statement and certificate furnished by the holder of the right-of-way. The statement and certificate are embodied in Forms 5 and 6, which should be modified so as to be appropriate to the act and to the nature of the project.[9] If, in construction, a substantial deviation from the location shown on the original map is planned or made, the party in interest must file a duly executed relinquishment of the unused portion of the right-of-way accompanied by a map of

[5] The general right-of-way statutes were extended to these lands by sec. 2 of the act of June 9, 1916 (39 Stat. 218), and sec. 3 of the act of February 26, 1919 (40 Stat. 1179).

[7] See sec. 3 of the act of August 24, 1912 (37 Stat. 512; 48 U. S. C. 23), and 30 Op. Atty. Gen. 387 (1915).

[8] Where the land over which the right-of-way is sought is withdrawn or reserved for the use of another Federal agency, the manager is required to clear the application with such agency.

[9] See appendix for forms.

amended location of the right-of-way for the project as actually constructed. The map of amended location must be prepared in accordance with § 244.6 (a) and must be filed before or as soon as possible after the deviation is made. The relinquishment may be prepared so as to become effective upon approval of the amended location. Any deviation made prior to such approval will be at the risk of the applicant.

(b) *Nonconstruction, abandonment, or nonuse.* Unless otherwise provided by law, rights-of-way are subject to cancellation by the authorized officer for failure to construct within the period allowed and for abandonment or nonuse.

§ 244.16 Revocation for violation of regulations or terms or conditions.

All rights-of-way approved pursuant to this part, except those granted for pipe lines pursuant to section 28 of the act of February 25, 1920, as amended August 21, 1935 (49 Stat. 678; 30 U.S.C. 185), shall be subject to cancellation for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way. No right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation.

§ 244.17 Change in jurisdiction over or disposal of lands.

(a) A change of jurisdiction over the lands from one Federal agency to another will not cancel a right-of-way involving such lands. It will, however, change the administrative jurisdiction over the right-of-way.

(b) The final disposal by the United States of any tract traversed by a right-of-way shall not be construed to be a revocation of the right-of-way in whole or part, but such final disposition shall be deemed and taken to be subject to such right-of-way until it is specifically canceled.

§ 244.18 Transfer of right-of-way.

(a) Any proposed transfer, by assignment, lease, operating agreement or otherwise, of a right-of-way acquired under any of the acts, except the act of March 3, 1891 (26 Stat. 1101; 43 U.S.C. 946–949), must be filed in triplicate in accordance with § 244.3 for approval; must be accompanied by the same showing of qualifications of the assignee as is required of applicants; and must be supported by a stipulation that the assignee agrees to comply with and be bound by the terms and conditions of the right-of-way. No assignment will be recognized unless and until approved.

(b) All filings of transfers, by assignment, lease, operating agreement, or otherwise, made pursuant to this section, except by States or agencies or instrumentalities thereof, must be accompanied by an application service fee of $10 which will not be returnable.

[19 F.R. 9099, Dec. 23, 1954, as amended, Circ. 2001, 23 F.R. 3887, May 20, 1958]

§ 244.19 Disposal of property on termination of right-of-way.

Upon the termination of a right-of-way by expiration or by prior cancellation, in the absence of any agreement to the contrary, if all moneys due the Government thereunder have been paid, the holder of the right-of-way will be allowed six months or such additional time as may be granted in which to remove from the right-of-way all property or improvements of any kind, other than a road and usable improvements to a road, placed thereon by him; but if not removed within the time allowed, all such property and improvements shall become the property of the United States.

§ 244.20 Appeals.

An appeal pursuant to Appeals and Contests (Part 221 of this chapter) may be taken from any decision of the manager to the Director, and from the Director to the Secretary.

Rental Charges

§ 244.21 Payment required; exceptions; default; revision of charges.

(a) Except as provided in paragraphs (b) and (c) of this section, the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer. Periodic payments or a lump-sum payment, both payable in advance, will be required at the discretion of such officer: (1) When periodic payments are required, the applicant will be required to make the first payment before the permit, right-of-way, or easement will be issued; (2) upon the voluntary relinquishment of such an instrument before the expiration of its term, any payment made for any unexpired portion of the term will be returned to the payer upon a proper

GFS(MISC) 41(1987), 97 IBLA 229, 1987 WL 110597 (I.B.L.A.)

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals

**1 STATE OF ALASKA

IBLA 85-898, 85-899

Decided May 11, 1987

INDEX CODE:
43 CFR 2650.4-3

*229 Appeal from decisions of the Fairbanks District Office, Bureau of Land Management, waiving administration of rights-of-way on lands conveyed to Native corporations. F-33008 and F-19177.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the underlying land has been conveyed to a Native corporation, 43 CFR 2650.4-3 requires that BLM waive administration of a right-of-way pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982), absent a finding that retention would be in the interest of the United States.

APPEARANCES: E. John Athens, Jr., Esq., Assistant Attorney General, State of Alaska, Fairbanks, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed from two decisions of the Fairbanks District Office, Bureau of Land Management (BLM), dated July 25 and 29, 1985. These decisions waived BLM administration of rights-of-way F-19177 (IBLA 85-899) and F-33008 (IBLA 85-898), respectively, but recognized the reservation of the rights of the State as grantee pursuant to section 14(g) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(g) (1982). The two waiver decisions issued after BLM had conveyed the underlying land to Native corporations.

On July 31, 1964, BLM granted materials site right-of-way F-33008 to the State of Alaska. On November 17, 1972, highway right-of-way F-19177 was granted by BLM to the State of Alaska. Both grants were made pursuant *230 to the Federal Aid Highway Act, as amended, 23 U.S.C. § 317 (1982). Neither right-of-way grant document specified an expiration date for the grant. On October 23, 1981, and September 22, 1983, BLM issued interim conveyances to AHTNA, Inc., and Simasuak Native Corporation, respectively. The conveyances were spe-

cifically subject to rights-of-way F-33008 and F-19177. In July 1985, BLM issued the decisions under appeal.

In both waiver decisions, BLM specified that, as grantee in the right-of-way grants, the State of Alaska 'is entitled to all the rights, privileges and benefits granted by the terms of the grant, during the term of the grant, until it expires, is relinquished, or is modified by the mutual consent of' the Native corporations and the State. The Native corporations were 'entitled to any and all interests previously held by the United States as grantor, in any such right-of-way covering the land conveyed.' All rental and other fees would be paid to the Native corpora- tions.

On appeal Alaska contends that the BLM waiver of administration would deny it, as grantee, the complete enjoyment of these rights-of-way, including the right of administrative appeal and the potential for Federal Highway Administration grants and aid. The State raises the possibility of termination of rights-of-way, and claims BLM failed to gain prior administrative waiver from the Federal Highway Administration. The State adds that proposed changes in the applicable regulation would clarify the rules to which these sites are subject, and BLM should have postponed its decisions until the regulatory changes issued. The State also contends that 43 CFR 2650.4-3, relied upon by BLM, so far exceeds the Department's statutory authority that the regulation itself should be declared invalid.

**2 BLM responded that the Board should affirm BLM as it did in State of Alaska, 86 IBLA 268 (1985).[FN1]

[1] As this Board stated in State of Alaska, 86 IBLA at 271, the statute and the regulation provide express authority for BLM to waive its administration of rights-of-way in lands conveyed to Native corporations. The effect of such a waiver is to transfer the administrative function to the Native corporation to which the land had been conveyed. Section 14(g) of ANSCA, 43 U.S.C. § 1613(g) (1982), states:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to *231 any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration.

The implementing regulation, 43 CFR 2650.4-3, elaborates:

> Leases, contracts, permits, rights-of-way, or easements granted prior to the issuance of any conveyance under this authority shall continue to be administered by the State of Alaska or by the United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease, contract, permit, right-of-way, or easement, unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. [Emphasis added.]

Section 14(g) of ANCSA does not require waiver of administration, but grants discretionary authority to do so.

By promulgating 43 CFR 2650.4-3, the Secretary exercised his discretionary authority under section 14(g) of ANCSA. Generally, when a conveyance includes all the land underlying a right-of-way, the Secretary has concluded it to be in the interest of the United States to waive administration. This Board has found this policy determination to be well supported. State of Alaska, 86 IBLA at 274. The exception arises only when the Secretary makes a contrary finding. It is not necessary to make a finding that the interest of the United States does not require continuation of the administration by the United States whenever a waiver of administration occurs. This finding is necessary only if some interest of the United States requires it to retain administration. 43 CFR 2650.4-3. A finding that no exceptional circumstances exist is implicit in every waiver. The rights-of-way at issue were entirely included in conveyances to Native corporations. There have been no contrary findings. Absent a finding by the Secretary that retention of administration was in 'the interest of the United States' (not the State), BLM was obliged by the regulation to waive.

**3 Appellant suggests 43 CFR 2650.4-3 is ultra vires and should not be followed. Both the Board and BLM are bound to follow a duly promulgated regulation of the Department. McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955); AHTNA, Inc., 87 IBLA 283, 291 (1985),[FN6] and cases cited. We find the regulation to be consonant with the statute, as the regulation *232 43 CFR 2650.4-3 is itself an exercise of the discretionary authority the statute granted to the Secretary. See generally State of Alaska, supra.

The State claims it will lose 'complete enjoyment' of the rights-of-way, particularly the procedural safeguards of its administrative appeal rights under 43 CFR Part 4. However, no right to Departmental adjudication was granted in the right-of-way grants or in the interim conveyances. Notwithstanding the loss of administrative appeal and hearing rights, the State will continue to have recourse to the courts in order to safeguard those rights which were reserved. See, e.g., Tetlin Native Corp. v. State of Alaska, No. 4 FA-84-2536 Civil (Alaska Aug. 12, 1985). Waiver of administration would not diminish the State's ability to take action.[FN1] However, it would shift the forum for resolution of the propriety of action taken in the administration of the right-of-way from Federal to State court and bypass the intermediate step of administrative adjudication by the Department. Appellant has not shown that its interests would be given less due process protection as a result of waiver of this Department's administrative authority. See Tetlin Native Corp. v. State of Alaska, supra at 4. As we said in State of Alaska, 86 IBLA at 272, the State

> still enjoys the same right to use the same land in the same manner under the same terms and conditions as before. The fact that the State may prefer one administrator over another, or one administrator to several, does not bear on its rights to 'complete enjoyment of its interest in the land.' 'Enjoyment' in this context does not mandate a right to happiness, contentment, or freedom from apprehension. Rather, it refers to the exercise of a right; the possession and fruition of a right, privilege, or use.

Any party having authority to administer the grant must comport with the terms and conditions of the right-of-way grant. The conveyances were expressly made subject to the rights-of-way, and under section 14(g) of ANSCA, the Native corporations assume the role of the grantor with all attendant rights under the right-of-way, including the right to cancel,[FN2] to approve sublessees, to receive rent, and to inspect. Those rights and obligations belong to the grantor, who retains the ultimate authority to take appropriate action under the right-of-way grant. See 23 U.S.C. § 317 (1982). Absent a clear indication of statutory intent, we will not interpret section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), to limit the grantor's interests. The waiver of administration does not affect those rights of the grantor guaranteed by section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982), and the grantee remains subject to them.

**4 Appellant also contends that a waiver of BLM administration would limit its access to potential grants and

aid from the Federal Highway Administration. *233 Appellant claims BLM should have consulted the Federal Highway Administration to determine whether a United States interest would be adversely affected by waiver. The Federal Highway Administration was not the agency responsible for administration of the right-of-way prior to the waiver, and BLM has not sought to impair the statutory authority of the Federal Highway Administration.

There is no evidence that the applicable regulation was not duly promulgated and both the State and the Federal Highway Administration are chargeable with constructive notice of the regulation. Neither the State nor the Federal Highway Administration was required to receive additional notice that BLM intended to implement the regulation.[FN3] In light of the mandatory tenor of the regulation, only BLM's refusal to waive with no basis for retention of administrative responsibilities would constitute arbitrary and capricious conduct. State of Alaska, 86 IBLA at 272-73.

Review of the record and the parties' arguments does not reveal a Federal interest which requires continued administration of these two rights-of-way by the United States. We decline to overturn the BLM decision to waive administration of these rights-of-way. As said in State of Alaska, supra:

> Where the land is no longer owned by the United States and the United States has no residual interest or benefit deriving from the third-party leases, rights-of-way, permits, et cetera, which encumber those lands, it is difficult to justify continuing the Federal administration of those interests at taxpayers' expense, particularly where the new landowner (the corporation) is capable of assuming that function on its own behalf. Except in unusual circumstances, there is little or no reason for the United States to continue to maintain records, perform compliance inspections in the field, engage in correspondence with the interested parties, handle billings, collections, accounts and disbursements, and conduct adjudication. The fact is that these matters are no longer the proper responsibility of the Federal government, and that fact is not altered because the State finds the change inconvenient or otherwise undesirable.

86 IBLA at 274.

*234 Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Fairbanks District Office are affirmed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris

Administrative Judge

Gail M. Frazier

Administrative Judge

FNa) GFS(MISC) 50 (1985)

FNb) GFS(MISC) 65 (1985)

FN1 In addition, the State is now able to choose to resort to condemnation.

FN2 See Tetlin Native Corp. v. State of Alaska, supra at 3.

FN3 The file does not indicate that the Federal Highway Administration had actual notice of the waivers. It would seem appropriate for the Secretary to inform concerned agencies when making such determinations. See State of Alaska Department of Highways, 20 IBLA 261, 270, 82 I.D. 242, 245 (1975).[FNc] The case records contain evidence of past consultation, in the form of letters to BLM from the Federal Highway Administration and its predecessor, the Department of Commerce, Bureau of Public Roads.

FNc) GFS(MISC) 66 (1975)

End of Footnote(s). GFS(MISC) 41(1987), 97 IBLA 229, 1987 WL 110597 (I.B.L.A.)
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Navigability – Selected Cases and Authorities

Legal Standard for Navigability

State of Alaska v. United States, 662 F. Supp. 455, 457 (1987), *aff'd sub nom., State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (present day use for commercial recreational rafting with loads of at least 1,000 pounds, with no evidence that physical characteristics of the river were different at statehood, amounted to "conclusive evidence" that the river was susceptible to use as a highway of commerce at statehood, regardless of whether it was actually used for commerce before statehood.

State Ownership of Submerged Lands

Shively v. Bowlby, 152 U.S. 1, 11-13 (1894) (State's claim to submerged lands is based on the Equal Footing Doctrine, under which submerged lands are held in trust by the United States to be transferred to the territories upon their admission to the Union as states); *Coyle v. Smith*, 221 U.S. 559, 573 (1911); *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *see also United States v. Louisiana*, 363 U.S. 1, 16 (1960) (a new state's ownership of lands underlying navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission").

The Equal Footing Doctrine was codified in the Submerged Lands Act of 1953, 43 U.S.C. 1301 (2000).

Alaska – Rights with Respect to Submerged Lands

Alaska Constitution, Art. VIII

- Section 3 (fish, wildlife and waters reserved to common use);
- Section 6 (submerged lands are within the public domain);
- Section 14 (free access to navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen or the US or resident of the State)

AS 38.05.126 (people of the state have a constitutional right to free access to and use of navigable or public water of the state).

AS 38.05.128 (subject to federal or state permitting and valid existing rights, obstruction of or interference with free passage or use of any navigable water is a class B misdemeanor).

IBLA Cases

State of Alaska (Afognak Native Corporation), 150 IBLA 112 (1999). State appealed BLM decisions to terminate 17(b) easements across ANC lands, arguing the easements were necessary for access to navigable waters and the submerged lands underlying them. BLM moved to dismiss for lack of standing. IBLA ruled (1) assertion of ownership of submerged

lands can satisfy the requirements for standing to appeal a 17(b) decision by BLM, but (2) the State had failed to appeal express non-navigability findings contained in two of the three Interim Conveyances at issue. Therefore, the State was barred by administrative finality from contesting easement decisions within two of the IC's.

State of Alaska (Ahtna, Inc.), 167 IBLA 250 (2005). IBLA set aside BLM decision approving conveyance to Ahtna, where BLM failed to adequately consider whether islands in Copper River had emerged from the bed after Statehood, in which case they would be State-owned. BLM decision had charged Ahtna's entitlement for land State believed to be State-owned submerged lands. Ahtna changed its position and supported the State's argument to the IBLA.

State of Alaska, Louis and Marion Collier (Port Graham Corporation), 168 IBLA 334 (2006). State appealed BLM decision to terminate 17(b) easements to three lakes. BLM argued (1) that the lakes were non-navigable, (2) that they were not "major waterways" under the ANCSA regulations, and (3) the easements provided access for recreational purposes. IBLA held that (1) BLM is required to reserve easements to "major waterways" or "isolated tracts of public land" as defined by the regulations; (2) BLM had never made express non-navigability determinations for the lakes, so it could not be determined that they did not constitute "isolated public lands" under the ANCSA regulations; and (3) reservation of easements across ANCSA land to allow recreational activities is expressly contemplated by ANCSA and the regulations, provided that the recreation occurs on public land rather than ANCSA patented land.