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ALASKA REGION

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MEMORANDUM

TO: State Director
Alaska State Office
Bureau of Land Management

FROM: Deputy Regional Solicitor
Alaska Region

SUBJECT: Management of ANCSA 17(b) Easements

You have asked for a legal opinion on numerous questions involving management of ANCSA 17(b) easements.[1] Since you request our view on certain statements and articulated assumptions, we will reiterate parts of your request and present our response in the same order and format as your request.

1. EASEMENT LOCATION ADJUSTMENTS

You have presented for our consideration, the following background information and assumptions:

> Easements have been reserved based on both a legal description and a map depiction. The legal description is given as within a section for a site easement or starting and ending within a section for a linear easement. [The basic map depictions are fairly wide linear markings running

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1/ ANCSA 17(b) easements are those easements reserved for public access across lands conveyed to Native corporations pursuant to uncodified section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), Pub.L. 92-203 (85 Stat. 688), codified in part at 43 U.S.C. § 1601 et seq.

from one designated section of land to another for linear easements and a fairly large triangular marking in an identified section of land for site easements]. Some locations are given more specificity, i.e., left/right bank, mouth of stream.

a. When there is agreement between the managing agency and the land owner concerning the on-the-ground location of an easement, it is our assumption that as long as the written site location or start and end points for a linear easement remain within those sections or in the vicinity of the referenced topographical feature, then any variance from the map depiction for the actual on-the-ground location can be handled through a Memorandum of Understanding (MOU) which does not need to be recorded.

b. It is our assumption that if the on-the-ground location changes the legal description to another section, then a recordable document is required. Can this still be a Memorandum of Understanding, or must there be a donation and release of interest? Can the conveyance document be corrected using the authority of Section 316 of FLPMA?

c. If an MOU is not sufficient, it is assumed that the procedures to be used include all the various authorities the agencies possess to make the appropriate action, i.e., ANCSA exchange authority, acceptance of gifts, acquisition, etc.

Our legal analysis of your assumptions is as follows:[2]

2/ What is said in this portion of our opinion reflects the current state of relevant general legal concepts and does not preclude or predict specific ANCSA conformance procedures which may be developed to address these problems and to provide specific remedies. Thus, this opinion should be read in the light of, and be considered modified by, any specific ANCSA conformance procedures which may be implemented at some future date.

a. On-the-ground location by mutual agreement.

When parties agree to the reservation of an easement based on a legal description and map depiction there is some flexibility in adjusting the easement to conform to the on-the-ground location. Such a general easement reservation reserves the right "to a convenient, reasonable, and accessible way within the limits of the grant."[3] "... the location must be reasonable as respects the rights of the grantor as well as the grantee."[4] By the terms of ANCSA, however, the legal description and map depiction must be viewed as giving a degree of certainty.[5] With these principles in mind, it is appropriate to take such things as topography into consideration when fixing the on-the-ground location of the reserved easement. Where, however, there is an existing route or site, that route or site will be taken to be the location of the easement unless a contrary intention appears in the conveyance documents.[6] In the absence of either an existing easement or definite legal location, the parties can agree to the on-the-ground location as long as that location is reasonably compatible with the terms and descriptions contained in the conveyance documents. In addition, slight and immaterial alterations are also possible where the burden on the servient estate[7] is not increased.[8]

3/ 28 CJS Easements, § 80, p. 760. Citations to such general sources as CJS, rather then strict reliance on case citations, are used in this opinion due to the general nature of the issues.

4/ Id.

5/ 43 CFR § 2650.4-7(a)(4) specifically provides that "[a]ll public easements which are reserved shall be specific as to use, location, and size." (Emphasis added).

6/ 28 CJS Easements, § 80b, p. 761.

7/ The servient estate is the land conveyed to the ANCSA corporation which is subject to, or "required to serve," the easement.

8/ Gaither v. Gaither, 332 P.2d 436, 438 (Ca. 1958); and 28 CJS Easements, § 65C, p. 733.

Coupling this general law with how 17(b) easements are reserved by general legal descriptions and fairly wide markings on a map, we agree that the location of an easement can be conformed to the on-the-ground location as long as its location is within the bounds set by the conveyance documents. For linear easements this requires that beginning and ending points remain in the same sections and that the easement itself stays within the general course depicted on the easement map. By this we mean that if a linear easement is depicted as crossing Native corporation land on the west side of a mountain, the location may be fixed on the most reasonable route on the western side of the mountain but may not be moved one or more sections to an entirely different location. For site easements, the on-the-ground location must also be within the section identified in the conveyance documents and must correlate to the topography depicted on the map (e.g. at a mouth of a stream). In other words, the easement location must be in reasonable proximity to and recognizable as the 17(b) easement described and depicted in the pertinent ANCSA conveyance document. We do not, however, agree that the flexibility to make adjustments is so broad as to include "any variance" agreed to by the managing agency and the landowner.

In the event an agreement is reached on the appropriate on-the-ground location, a MOU is one acceptable mode of memorializing the agreement. In order for such agreements to have independent legal affect, they must be based on adequate legal authority. Such authority for BLM is provided by section 307 of the Federal Land Policy and Management Act (FLPMA).[9] An MOU is not a title document and you correctly state it would not generally need to be recorded.[10] Alternatively, the location of a 17(b) easement can simply be fixed on-the-ground without any need for a written agreement.

b. and c. Changes requiring more than just mutual agreement.

In the event the affected parties are in agreement as to the on-the-ground location but the agreed upon location varies too greatly from the reserved easement, more than a MOU

9/ 43 U.S.C. § 1737.

10/ Note, however, that for certain situations 601 DM 4.3G provides, "[s]uch adjustments shall be reduced to writing and recorded."

is needed. If the linear or site easement moves sections or varies significantly in topography from the easement described in the conveyance documents, then it is a title matter and recordable title instruments are required.[11] In general, this would entail a conveyance (often called a "donation") for the new route from the affected ANCSA corporation and a release of the originally reserved easement by the United States. The procedures discussed in BLM's Title Recovery Handbook, IM No. AK-85-271, are the ones to use in processing conveyances of any type to the United States. While section 316 of FLPMA[12] provides statutory authority for BLM's correction of the original conveyance document, such action cannot be taken without the current landowner's consent and cooperation, and the implementing regulations[13] have made such deed corrections a relatively standard title acquisition procedure. In acquiring new easements any authority otherwise available to the managing federal agency can be used, although it is BLM which must actually issue any release terminating a reserved 17(b) easement.[14] The way we foresee this working is for the managing agency to arrange for the acquisition of a new route by purchase, donation, or exchange with the understanding that BLM will take the appropriate steps to terminate the existing easement.

d. Adjustments of location where there is no mutual agreement.

You have also asked for legal guidance on what to do in the event the managing agency and the landowner cannot agree on an appropriate location of a 17(b) easement. While we assume you are concerned with the easements requiring the type of major adjustments discussed in part b and c above, it should be noted that the federal government has the right to locate a reasonable route of access within the perimeters of the description contained in the conveyance documents even if the landowner withholds its assent. To avoid problems it is of course always preferable to obtain the servient landowner's

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11/ In this regard, it needs to be reiterated that any specific ANCSA patent conformance procedures developed in the future may modify the more general law set out here.

12/ 43 U.S.C. § 1746.

13/ Subpart 1865 of 43 CFR.

14/ See, 601 DM 4.4C; and 43 CFR § 2650.4-7(a)(13).

consent. Consultation with the servient landowner(s) is required in every instance by 601 DM 4.3F. Where a reasonable route cannot be established within the bounds of the original 17(b) reservation and the current landowner will not participate in an exchange or donation, the new easement must be acquired by purchase. The purchase would be for the fair market value of the easement and could be condemned in the event the landowner would not agree to a voluntary sale. However, if the 17(b) easement to be acquired is within the boundaries of a conservation system unit, the provisions of section 1302 of the Alaska National Interest Lands Conservation Act (ANILCA)[15] would also have to be followed.

Acquisition by purchase of a new route is in keeping with the well established principle that once the location of an easement is fixed by description or use, any significant modification of the route constitutes a different easement.[16] This is true no matter how convenient or reasonable the new route might be.[17] Moreover, Congress has expressly recognized this general rule by requiring the acquisition by purchase or exchange of any required easement which was not reserved at the time of conveyance.[18]

Along this line, we perceive no basis for deducting the value of the original 17(b) easement from the fair market value of any future easement acquired by voluntary sale or condemnation. This is because section 903(b) of ANILCA does not provide for such a remedy and, more specifically , because 43 CFR § 2650.4-7(a)(13) sets out a particular course of action in the event a 17(b) easement is no longer needed. In short, reserved easements which are no longer needed must be terminated, and the United States has not either reserved or been given the authority to deduct the value of the no longer needed easement from any future acquisitions.

15/ 16 U.S.C. § 3192.

16/ See, Public Easements Under the Alaska Native Claims Settlement Act, report of the Federal-State Land Use Planning Commission (June 1978), p. 169; and 28 CJS Easements, § 84, p. 763.

17/ Id.

18/ Section 903(b) of ANILCA, 43 U.S.C. § 1633.

2. OWNERSHIP OF ROADS AND TRAILS IN PLACE AT TIME OF CONVEYANCE.

You next report that some landowners are asserting ownership over such permanent improvements as roadbeds and road surfaces under the theory that they acquired all rights, including appurtenances of whatever nature by virtue of the ANCSA conveyance. You ask, "... whether transportation improvements within 17(b) easements are owned by the servient owner or by respective Federal and State owners?"

We find this to be somewhat of a non-issue given general legal principles which prevent the owner of the servient estate from taking any action which interferes with the reserved uses and purposes of the easement.[19] Regardless of the exact level of ownership interests, the United States has a sufficient property interest to insure continued use of the reserved 17(b) easements. If a landowner asserted possession or ownership of a roadbed, road surface, bridge, or any other improvement in a manner which interfered with the continued use of the easement, that interference could be prevented by the United States or an affected party by appropriate judicial action.[20] In the same way, ownership of a road does not in itself shift management responsibilities. If a non-federal entity has a duty to maintain a particular road, that duty continues even if a 17(b) easement for the road is reserved. The United States responsibility in regards to maintaining 17(b) easements is explained in more detail in our opinion of May 11, 1981, attached as Addendum 3 and discussed in section 5 of this memorandum.

As far as actual ownership interests go, we think the answer appears in the very nature of a 17(b) easement itself. As we have repeatedly stated, a 17(b) easement is not a possessory interest; it is a right to use land owned by another. Logically then, any fixtures or permanent improvements not

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19/ Vol. 2, Thompson, Real Property (1961), § 427, pp. 696-699.

20/ Vol. II, American Law of Property, §§ 8.105 and 8.106, pp. 311, 312 (1952); Public Easements Under the Alaska Native Claims Settlement Act, supra (n. 16), pp. 165, 166; and Vol. 3, Powell, Real Property (1979), § 420.

expressly reserved to the government[21] would be part of the bundle of rights conveyed under ANCSA subject to the reserved right to accommodate public access. The rights reserved by a 17(b) easement reservation would normally be the right to use the conveyed land and fixtures possessed by another for specified, limited purposes. This is in keeping with the broader mandate of ANCSA to convey all federal interest except the smallest practical tract used in connection with a federal agency and where that is an easement, only the right to use an easement and not fee ownership should be reserved.[22]

The only precedent we can find directly on point concerns a claim by the United States Forest Service for cost recovery from an ANCSA corporation for a road built on land conveyed to that corporation. The Chief of the Forest Service decided the cost was improperly collected from the ANCSA corporation and ordered reimbursement to the corporation. The decision appears to be based on the following legal advice from the Office of General Counsel, United States Department of Agriculture, in which we fully agree:

> The language of the interim conveyance precludes a claim for reimbursement by the United States. As part of the description of the lands conveyed, the conveyance contains the following language, known as an "habendum:"
>
> > NOW KNOW YE, that there is, therefore, granted by the UNITED STATES OF AMERICA, unto the above named corporation the surface and subsurface estates in the land above-described, TO HAVE AND TO HOLD the said estates with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said corporation, its successors and assigns, forever: . . . Interim Conveyance No. 225, p. 5, (August 17, 1979); (emphasis added).

21/ We understand that in certain instances, such as for some navigational aids, necessary improvements are expressly reserved along with the easement.

22/ Section 3(e) of ANCSA, 43 U.S.C. § 1602(e), and 43 CFR 2655.2(c).

> The purpose of an habendum in a deed is to define the extent of the ownership in the property conveyed. In the conveyance to Sealaska, all appurtenances are granted. An appurtenance includes permanent improvements to the land and in this case would include the road.
>
> The interim conveyance did reserve certain property rights to the United States. In this case, a public easement was reserved in accordance with BLM regulations at 43 CFR 2650.4-7. However, the reservation of an easement is not the same as reserving the actual road. The easement merely reserves a nonpossessory right of passage over lands.[23]

By way of reiteration, while we have concluded that the ownership of the roadbed and surface is with the owner of the servient estate, the ownership aspect does not alter or impede the right to use a 17(b) easement for the purpose(s) it was reserved.

3. TRANSFER OF ADMINISTRATION OF FEDERAL INTERESTS IN RESERVED EASEMENTS.

As regards the administration of 17(b) easements you state and ask:

> Departmental Manual 601 DM 4.2 states that 17(b) easements should be administered by the Interior bureau whose land is accessed by the easement. The Regional Solicitor's Office has previously stated that 17(b) easements are not possessory interests, but that they are an interest in the land (January 24, 1986 Memo from Regional Solicitor to Deputy State Director, Operations, BLM [Addendum 2]).

23/ Unpublished Memorandum dated January 6, 1982 to Chief, Forest Service, from Assistant General Counsel, Natural Resources Division, U.S. Department of Agriculture on the subject of Big Salt Road, Tongass National Forest.

a. Can we assume that "administration" and "interest in the land" are one and the same? Does the administering agency hold all of the retained U.S. interests in the land, or are U.S. Interests retained by BLM, with just the administration of the U.S. interest transferred to the administering agency?

b. The January 24, 1986, Memo referenced above also stated that FLPMA contains provisions for managing 17(b) easements. Is Title V of FLPMA BLM's authority for managing 17(b) easements? If BLM transfers administration of easements to another federal agency, will those agencies manage the easements under the authority of FLPMA, or under the authority of regulations peculiar to those agencies? Easements administered by state, municipal or borough governments will, we presume, be managed under State law.

An interest in land and the administration of a 17(b) easement are not one and the same thing. Under section 17(b) of ANCSA public access easements are reserved to the United States. Such easements, as you have been previously advised, are interests in land. Accordingly, 17(b) easements are an "interest in land owned by the United States" as defined by section 103(e) of FLPMA,[24] and BLM can apply its FLPMA authority in managing 17(b) easements. This includes all applicable provisions of FLPMA, like section 307 which authorizes cooperative agreements, and not just the Title V right-of-way provisions. Keep in mind, however, that only limited interests have been reserved in 17(b) easements, and management can neither increase the burden on the servient estate nor interfere with the guarantee of reasonable public access.

Since the interest in land is held by the United States, it is only the administration of a 17(b) easement, and not the ownership of it, which transfers between managing agencies. Accordingly, the management directives and authorizations contained in FLPMA stay with the BLM and do not pass to another agency along with the administrative role. Rather, each managing agency, be it a federal, state, or local entity, would use its normal management authorities with the caveat

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24/ 43 U.S.C. § 1702(e).

expressed above that the burden on the servient estate cannot be increased and the public access rights cannot be unreasonably restricted. The question as far as Interior agencies are concerned is expressly answered by 601 DM 4.2 wherein it is provided that where an "easement accesses or is part of the access to a conservation system unit, that easement shall become part of that unit and be administered accordingly."[25] While management of transferred easements can, consequently, vary somewhat, BLM would continue to handle ownership aspects of 17(b) easements and documents changing, realigning, or releasing the location of a 17(b) easement would need to be processed through the BLM.[26]

4. TERMINATION OF EASEMENTS.

In addition, you ask whether termination of a 17(b) easement requires issuance of an appealable decision. The regulations concerning termination set forth certain standards for determining if termination is proper and require proper notice and an opportunity to be heard.[27] The regulations do not, however, expressly articulate a requirement for issuance of an appealable decision as part of the termination process.

25/ We do not read this to mean that a federal agency can restrict the identified uses of a 17(b) easement on Native corporation land absent sufficient reasons to do so such as an absence of funds to repair a bridge or serious erosion by certain types of vehicles threatening to make the route unuseable as a public access route. Where certain modes of transportation may be unacceptable at the point where the easement goes off Native lands and enters a conservation system unit, the trail can be posted to prohibit those uses at the terminus of the 17(b) easement at the boundary of the servient estate. The level of retained federal interest in the land is simply not enough by itself, however, to achieve a closure of the 17(b) easement to certain uses absent sufficient evidence establishing interference with use of the easement itself. See, Addendums 1 and 2 for a more detailed discussion of these problems; and also see, 36 CFR §§ 1.2(a)(3) and (b).

26/ See, section 1 b and c, and footnote 14, supra.

27/ 43 CFR § 2650.4-7(a)(13).

While the termination regulations are silent on the point, departmental practice is to treat such decisions as appealable. The decision to reserve the easement was incorporated in an appealable decision and the decision to terminate the easement should be given the same treatment and status. BLM's current 17(b) easement conformance procedures follow this view by providing for inclusion of easements to be terminated in an appealable easement conformance decision. The draft proposed 17(b) regulations which the BLM Director circulated for comment in late 1980 also viewed a termination decision as appealable. In addition, making the termination decision appealable is the only way to give procedural protection to individuals potentially affected by such a decision.[28] Moreover, by a memorandum of February 9, 1982, this office approved a set of easement relinquishment documents, including a termination decision, which we assume has been used in all similar cases since that time.[29]

5. RELATED MATTERS

Since this response covers such a wide spectrum of 17(b) easement management issues, it would be opportune to include a summary of past legal opinions dealing with related 17(b) easement management issues.

By a memorandum of March 17, 1980 (Addendum 1), we provided advice regarding trespass enforcement authority on ANCSA reserved easements. In that opinion it was explained that an easement is the right to use the land of another for a specific purpose and is not a possessory interest in the sense of being able to exclude others. Accordingly, the federal land

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28/ 43 CFR 4.410 provides that parties who are in some instances adversely affected or in other instances have affected property interests, have a right to appeal.

29/ This is distinguishable from termination of such easements as continuous shoreline easements, the standard ditches and canals easement, etc. Those easements were found to be improper as a matter of law and cannot be reserved in an ANCSA conveyance. Alaska Public Easement Defense Fund v. Andrus, 435 F.Supp. 664 (D. Alas. 1977). Accordingly, they can be released without issuance of an appealable decision.

manager can only take enforcement activity to prevent interference to the reserved uses and purposes of a 17(b) easement. The managing federal agency does not have adequate legal authority to prevent non-interfering use of a 17(b) easement or to bring a trespass action against an individual who strays off an easement onto the servient estate.

In a related opinion of January 24, 1986 (Addendum 2), the possible use of citation authority on 17(b) easements was discussed. While the basic problem with use of citations to help manage 17(b) easements is the lack of specific BLM regulations, the underlying general problem is that the United States has only retained limited rights in 17(b) easements. It does not have a sufficient interest to close the trail to a particular activity unless the activity is interfering with the easement because the landowner is free to allow or ignore such non-interfering uses as it sees fit.[30]

In a more comprehensive opinion of May 11, 1981 (Addendum 3), broader issues of potential liability and transfer of administration were discussed. Potential liability exists under the Federal Tort Claims Act[31] to the same extent a private party is liable under State law. In Alaska, this means the managing agency is held to a standard of "a reasonable person maintaining his property in a reasonable safe condition in view of all the circumstances."[32] An exception exists for discretionary functions which we think allows for leeway in deciding whether to maintain, improve or close a given easement. Putting the two concepts together, however, where the easement manager knows of a dangerous condition it cannot properly exercise its discretion to ignore the problem. None of these principles preclude closure of a 17(b) easement where lack of manpower or funds prevent the amount of care required to keep the easement in a reasonably safe condition. As far as transfer of easement management is concerned, we opined that

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30/ Vol.2, Thompson, Real Property, supra (n. 19), ("The holder of the fee has the complete control over and use of the land up to the point where such control and use interferes with the use of the easement.").

31/ 28 U.S.C. §§ 1346(b) and 2671-2680.

32/ Webb v. City & Borough of Sitka, 561 P.2d 731, 733 (Alas. 1977).

the administrative duties but not the easement itself could be transferred to any entity willing to assume that obligation. Administration of an easement cannot be transferred to a non-consenting party and cannot be done in such a way that the burden on the servient estate is increased or public access is unreasonably restricted.

Reference to the addenda should be made for a more complete understanding of these related issues.

Dennis J. Hopewell

Attachments: Addendum 1 - Opinion of March 17, 1980
Addendum 2 - Opinion of January 24, 1986
Addendum 3 - Opinion of May 11, 1981