

ANCSA 17(b) Easement Management Handbook

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ANCSA 17(b) EASEMENT HANDBOOK

Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1616(b) and 43

CFR 2650.4-7 authorizes the reservation of public easements¹ on lands conveyed to Native corporations and individuals. The primary purpose for reserving 17(b) easements to the United States is to reserve public access across or facilitate access across ANCSA conveyed lands to reach publicly owned lands² and major waterways³. The permissible uses on 17(b) easements are very limited and described in 43 CFR 2650.4-7. When justified, the regulations allow for exceptions to the standard uses on a case by case basis. Therefore, the easement user must review the conveyance document which transferred title to the Native Corporation to determine the permissible uses on each 17(b) easement. Use by the public was reserved to the United States on the majority of 17(b) easements. However, public use was not reserved on 17(b) easements reserved for utility purposes or use by a governmental agency.

I. Handbook Objectives.

This manual or handbook is designed to be a working document that addresses 17(b) easement management,⁴ 17(b) easement administration,⁵ and 17(b) easement record keeping.⁶ It establishes policy; gives guidance on what/how to complete on-the-ground related tasks; and directs the documentation of the records. It is subject to change as conditions warrant or new procedures or practices are applied or developed in the field or shared by other agencies. This handbook draws heavily on Regional Solicitor opinions relating to easements (Appendix 1).

¹ The law and the regulations use the term “public easement” to identify easements reserved under Sec. 17(b) of ANCSA. This document uses the term “17(b) easement” instead of public easement. The common usage of “public easement” is any easement reserved for public use and is not limited to “17(b) easements”.

²43 CFR 2650.0-5(r) states that publicly owned lands means all Federal, 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. The regulations, at 43 CFR 2650.4-7(b), provide for public easements for “groups of private holdings sufficient in number to constitute a public use.” Verbal advice from the Regional Solicitor’s Office has further defined that two or more private in holdings, owned by distinct and separate parties, may qualify as public lands for the purpose of reserving a 17(b) easement.

³ 43 CFR 2650.0-5(o) states 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.

⁴ 17(b) easement management is defined as those actions involving coordinating and conducting on-the-ground activities such as locating and marking, trail hardening projects, or field work associated with the relocation or acquisition of an easement. This includes the preparation of MOUs or agreements relating to 17(b) easements.

⁵ 17(b) easement administration is described in the Departmental Manual Part 601 Chapter 4, Administration of ANCSA 17(b) Easements, the 1988 MOU between BLM, NPS and USF&WS, and the 1990 MOU between BLM and the USFS. These three documents define how to determine which easements will be administered by the BLM, USF&WS, NPS and the USFS. It also describes the procedures for transferring administration to another federal or state agency.

⁶ 17(b) easement record keeping are actions which remain BLM’s responsibility even if the 17(b) easement is administered by the USFS, NPS and USF&WS or administration was transferred to another federal or state agency. These actions include 17(b) easement reservation, release of interest and acceptance of an easement donation to the US. It also includes maintaining the public record, such as easement case files and easement maps.

Some of the guidance is specific where warranted and some consists of general guidelines that will allow the field offices to develop specific practices for their own situations and the flexibility to use the guidelines to develop unique solutions to specific problems. As such, this is not intended to be a “cookbook”. It does not replace the existing easement identification, easement acquisition, and easement conformance guidance.

This document addresses known and recurring easement management and administrative issues. The easement program is evolving and new issues will be addressed in the future. We will develop additional policy and guidance when we have identified specific situations that require resolution.

II. Easement Management.

A. General Policy.

Easement administration consists of:

Administrative Functions- typically office work and record keeping

Management Functions- typically on-the-ground activities

BLM is solely responsible for taking actions such as identifying, reserving, and conforming easements to boundary surveys, conforming easements to easement agreements, record keeping, title affirmation, terminating, processing, and accepting donations on all 17(b) easements, even those administered by another entity. However, other federal agencies or their contractors may perform those easement management functions such as hazardous material clearance or certificates of inspection and possession (CIP) necessary to acquire title to an easement.

Easement management, including easement relocation, is discretionary and subject to availability of funds, personnel and management objectives. If undertaken, it should be approved according to the criteria in Section IV and covered in an easement management plan approved by the field manager. The BLM’s priority is to manage those easements which access long term BLM managed lands.

Within established overall priorities and when funding and personnel are available, BLM Field Offices will locate, mark, sign, and survey using GPS technology (GPS survey) easements accessing lands permanently managed by the BLM where appropriate and will develop and implement plans to maintain markers and signs and will monitor activities on these easements. All other on-the-ground activities on BLM-administered easements will be on a case-by-case basis using the criteria in Section IV.

BLM must (even without a final plan in place) take timely action to protect public safety when hazards are known or brought to our attention on easements administered by BLM and will document the official record after notifying the land owner. Field Offices will inform the State Office of the situation and actions taken. The Field Office should immediately inform the administering agency and the landowner when the easement is not administered by BLM.

The Department of Interior Policy is to transfer administration of an easement to another federal or state entity whose lands are accessed by that easement. The BLM may enter into an MOU (see Appendix 2), but cannot force an agency to accept administration. BLM Field Offices will, in writing, acknowledge administration of or transfer administration of 17(b) easements to other federal agencies as soon after initial conveyance as possible. The acknowledgement will include the documentation required by the Departmental Manual and MOUs. However, the easements must be conformed to the easement agreement, if any, before acknowledgment or transfer occurs.

BLM will coordinate and consult with the Native landowner when planning for, and prior to conducting, any on-the-ground activities on the easement. BLM must obtain permission from the landowner if conducting activities off the easement.

Where possible and appropriate, BLM will use agreements with volunteers and user groups for easement maintenance and other activities. See Appendices 2E & 2F for sample memoranda of understanding (MOUs) with private organizations for maintenance or repair activities.

BLM will not require or issue a permit or other authorization to use a 17(b) easement.

For management purposes, BLM will consider the Gross Vehicle Weight (GVW) to be the maximum vehicle weight as determined by the vehicle's manufacturer. The weight is found on the vehicle placard.

The BLM cannot take action against uses on an easement that do not interfere with or damage the specifically reserved rights of the U.S. Only the underlying land-owner can identify or initiate action on impermissible or unauthorized uses.

Any proposal for seasonal or permanent restriction of permissible uses as an option to mitigate impacts to the easement or public safety will require coordination and consultation with the State Office.

BLM will timely terminate easements that are no longer required. The two federal MOU's state that the administrating agency will complete the pre-decision actions prior to requesting that BLM terminate and release a 17(b) easement which they administer. BLM will, however, have to verify and agree with any proposed termination and the official BLM record must contain sufficient documentation for the action taken.

The Branch or Lands and Realty, Alaska State Office, will coordinate policies with the Field Offices, other easement managers, other public land managing agencies, landowners, and the public.

BLM Field Offices will timely report all planned and accomplished measurable units for Sec. 17(b) easements to the Alaska State Office.

B. Authority.

Since easements are legally defined as "land interests" and are in effect public lands as defined in Federal Land management Policy Act of 1976, the act (FLPMA), as well as ANCSA (see Appendix 4), provide BLM with the authority to administer easements reserved under ANCSA. Easement management is a discretionary function. When that discretion is used, management actions should follow this handbook.

The BLM adopted easement identification regulations on November 27, 1978, that are found at 43 CFR 2650.4-7. These regulations were promulgated to implement section 17(b) of ANCSA. They establish the policy and procedures for the reservation of easements for a minimal, non-duplicative system of access across ANCSA-conveyed lands to publicly owned lands and major waterways, and for the termination of easements.

Sec 903(a) of the Alaska National Interests Lands Conservation Act of 1980, 43 U.S.C. 1633.

Department of Interior, Departmental Manual, Part 601 sets out procedures for the administration of easements reserved pursuant to Sec. 17(b) of ANCSA.

C. Goals.

The goal of the easement program is to reasonably satisfy the general public access requirements as mandated by Section 17(b) of the ANCSA. The more specific goals are to provide for safe and reliable public access to publicly owned lands and major waterways, and to protect Federal interests in reserved easements.

D. Objectives.

Implement and maintain a spatial data management system consisting of a database and digitized easements.⁷ The database contains all information pertinent to the reservation, management and permissible uses of reserved easements, including any on-the-ground data collected. The system will support information dissemination, on-the-ground management needs and management reports.

Provide the general public the information necessary, including easement maps, for legal use of reserved easements, through the BLM's Public Information Center, Field Offices and the BLM's website.

Complete BLM management actions within a coordinated transportation plan that includes 17(b) easements, granted rights-of-way and other easement types.

Acknowledge administration of easements by, or transfer administration of easements to, the ap-

⁷One of the tasks of the 2001 17(b) Easement Review Project was to collect data and digitize Sec. 17(b) easements for inclusion into the BLM Alaska Spatial Data Management System (SDMS). Funding for the project ceased in July of 2004, but the effort is being reassessed as the Easement Data System (EDS) in 2007.

appropriate federal land managing agency such as the National Park Service, the Fish and Wildlife Service and the Forest Service. Develop agreements with other federal agencies, the State of Alaska, and Alaska boroughs or municipal governments for administering easements accessing their lands.

Coordinate and standardize management policies for federal easement managing agencies, focusing on easement locating, marking, signing, and GPS surveying.

Establish and implement priority setting criteria for on-the-ground easement activities.

Establish easement marking, maintenance, and monitoring standards.

Seek agreements with easement users, groups, organizations and other entities to perform specified on-the-ground management activities.

Educate the general user public, the landowners and easement administrating agencies about their rights and responsibilities.

Revise the procedures to realign easements, terminate easements or accept donations of easements.

III. Easement Inventory and Easement Quad Digitization. (The following described state-wide inventory effort is on hold.)

Before an easement management program can be developed and undertaken, BLM needs to know how many easements are reserved, what type, where they are located, administration of lands accessed, allowed uses, etc. This information is being reviewed and collected on a state-wide level.

A spatial data management system (SDMS), Section II D, above, is being used to collect, standardize, manage and distribute information on 17(b) easements. This system uses an Informix Relational Database. The database is flexible and new categories of information can easily be added. As part of this effort, the easements as shown on the easement quads are being digitized.

The database and digitized easement quads will be available to staff on the BLM Intranet and to the public on the BLM's external web site and will become part of the official records. The digitized easement quads will replace the current easement quads.

Training on how to use the system and how to update information will be provided when the system is deployed.

IV. Easement Management Criteria for BLM-Managed Easements.

Field Offices must take timely action to protect public safety when hazards are known or brought

to BLM attention on easements administered by BLM⁸ and document the official record. Field Offices will inform the State Office of the situation and actions taken. The Field Office will immediately inform the administering agency and the landowner when the easement is not administered by BLM. See Sections X and XI. BLM will also keep the landowners informed as provided elsewhere in this handbook.

As previously stated, BLM will locate, mark, sign, and GPS survey access related easements managed by BLM where appropriate. We will develop a statewide program to complete this for the three field offices. Cooperation by the landowner will be a key factor in prioritizing the areas that will be located, marked, signed, and GPS surveyed.

Generally, we will conduct management activities on cases other than those described above on a case-by-case basis according to the following criteria:

- Easements accessing lands that are permanently managed by BLM;
- Easements receiving high use;
- Action is required as part of an activity or implementation plan;
- Landowner supports the activity;
- Action will mitigate environmental damage to the easement or BLM managed lands;
- Action will meet other policy objectives.

However, there may be instances where we complete minimal activities on easements accessing other publicly owned lands such as lands or waters owned by the State of Alaska or its political subdivisions.

All proposed management activities must be part of a plan. See Chapter V.

Administrative activities such as transferring administration, terminating easements, title affirmation, identifying, reserving, conforming easements to boundary surveys, conforming easements to easement agreements, and record keeping on all 17(b) easements will be completed as required or when requested by AK960 to support the land transfer program.⁹ These activities are not considered management activities requiring inclusion in a plan.

⁸BLM-administered easements are those easements that access BLM-managed lands or that access non-federal lands located within BLM managed lands when the administration has not already been transferred. This definition also includes easements accessing other federal agency lands, sites, installations or facilities that are not within Conservation System Units (CSUs) and where the other federal agency has not assumed administration.

⁹Information Bulletin AK 2004-013 realigned certain activities to support the Accelerated Land Transfer Acceleration Act of 2003.

V. Planning and Relationship to Other Plans.

A. Plan Development.

The Field Offices will develop easement management plans before easement management activities occur. Easement management plans should be approved by the Field Manager. Easement management activities that require additional FO funding or obligate BLM to multi-year funding will be approved through the State budget process. Easement management activities which prevent or delay planned activities will be coordinated with any affected office.

Only BLM-administered easements will be included in BLM easement plans. BLM will coordinate and consult with the Native corporation landowners early in developing easement management plans. Approved plans will form the basis for easement management budgets.

The plan should have a goal of providing safe, reliable access to publicly owned lands and major waterways. See 43 CFR 2650.4-7(b)(1). The scope of the plan is important. A plan can be whatever is required for the situation, circumstances or management objectives. The plan could cover a specific area such as a village, a village corporation, a regional corporation, a segment of a trail or a specific site and any associated trails. An overall plan should be developed for each field office addressing general priorities, how maintenance will be done, how easements will be marked, who will perform the identified tasks (for example, in-house vs. contract and/or lands vs. recreation) and any other appropriate items.

The priority of easements to be considered in the plan is dependent on many factors. Because of the large number of reserved easements in the state, it is necessary to prioritize easements so the BLM can meet its goals and objectives in an efficient and effective manner.

Prioritization will allow field offices to obtain dollars by giving defensible and legitimate facts as to the size of the program. Utilization of the criteria in a consistent manner will allow for reasonable comparisons and equitable distribution of funds. Refer to Section IV for the criteria used in ranking easement priorities.

When preparing easement management plans the following guidelines, at a minimum, are to be used:

All easement management plans should conform to the BLM 1600 planning series manuals and handbooks, and all other applicable laws, regulations, and guidance.

Plans being prepared should be coordinated with existing planning documents in a manner permitting common use of relevant data.

All plans should have a statement of work to be completed, the specifics or discrete actions of the project, the timing and duration, the proposed product, completion date and the estimated costs. Later, if on-the-ground solutions or other proposed solutions are

needed, such as an acquisition, the time frames and products should be documented in an amendment to the plan.

All plans should have an estimated cost of the work to be performed. Estimated work costs can then be incorporated in the budget process for approval.

In addition, the following subjects should be addressed where appropriate:

Construction and/or development and maintenance schedules - Include on-the-ground location and signing activities, development of facilities, construction of trails, mitigation of adverse impacts, etc.

Uses - Include a description of the permitted and prohibited uses.

Use administration - Include monitoring use, maintenance requirements and schedules, compliance work, enforcement, etc.

Post Use - Include plans for abandonment, reclamation, and/or termination.

Acquisition - Identify those sections of trail or road easements that are discontinuous, such as portions of a trail or road that cross private lands where no public easement of any kind has been reserved. These sections can be planned for acquisition, prioritized and then acquired using appropriate acquisition authority as funding permits.

Where possible and appropriate, plan common centerlines for 17(b) easements and potential RS2477 routes to minimize the impact on the landowner.

Transfer of administration - The plan should identify easements for transfer of administration to other federal agencies if administration was not transferred after initial conveyance. However, the easements must be conformed to the easement agreements, if any, and to the regulations before transferring administration (See IM AK 89-335).

B. Relationship to Other Plans.

Easement management plans should be consistent with other existing management plans such as RMPs, MFPs, recreation management plans, river management plans, and transportation plans. The Field Office should resolve conflicts with other plans. Easement management planning provides additional justification for funding of the program.

C. Plan Completion.

Once priorities have been established and the plan is completed and approved, field activity planning can begin.

VI. Pre On-The-Ground Activities Summary.

These activities include reviewing and researching the records for pertinent information; developing a working field file folder containing valuable data or information obtained in the review and research phase or obtained in the field for updating the official records; and the required contacting and coordinating with the landowner.

Because of the specific procedures of these requirements, they are addressed in a separate document rather than in the handbook (See Appendix 5).

VII. On-The-Ground Actions.

On-the-ground actions include locating, marking, signing easements and performing a GPS survey; construction; maintenance and repair (including actions addressing safety hazards); and monitoring/compliance; and termination. However, the decision to locate, mark, etc., is discretionary and may depend on the availability of funding and personnel.

Within established overall priorities, and when funding and personnel are available, BLM Field Offices will locate, mark, sign, and GPS survey most BLM managed 17(b) easements. Generally, BLM will not locate, mark and sign utility easements or cornering easements (easements where only the corners of 2 sections intersect). Additionally, BLM will not usually mark and sign easements accessing other federal agency's facilities such as those of the Federal Aviation Administration or U.S. Coast Guard, or that access other publicly owned lands such as the State of Alaska's. Use the same criteria for ranking easement locating and marking, etc., as is used for management ranking in Section IV.

Except for action on safety hazards, on-the-ground actions should be taken only on easements that are continuous.¹⁰ If an easement is not continuous because of an inholding, an easement should be obtained across the inholding or rerouted before on-the-ground actions are taken. Easements cannot be acquired across inholdings until the inholding has been conveyed.

BLM facilitates access to publicly owned land, BLM does not provide for recreational use of an easement or long term use and occupancy. For example, we will not normally place garbage cans, picnic tables or outhouses on easements. Possible exceptions to this might be high use areas after considering the increased maintenance, repair costs and monitoring. However, the landowner may place or allow such facilities on the easement if they do not unreasonably interfere with the easement's reserved uses.

When appropriate, labor for on-the-ground actions may be sought from or offered by the landowner, especially for inter-village easements and high use easements. This subject may be addressed when the contact or notification required in Section VI is made.

¹⁰17(b) easements are considered continuous when crossing non-ANCSA conveyed land as long as a right-of-way or other type of legal access exists.

Field Offices could seek agreements with user groups and landowners to mark, sign, maintain and monitor easements. Agreements should be monitored to ensure compliance with the terms and conditions. See Appendices 2E and 2F for sample memoranda of understanding with private organizations for maintenance or repair activities.

A. Locating and Marking Easements.

Before locating, marking, signing, and GPS surveying the easement, any previously identified problems should be worked out or the easement(s) should not be marked and GPS surveyed. When locating and marking an easement on the ground, every effort should be made to avoid excessive stream crossings or slope to minimize impact to the landowner. Generally, cease work if a problem arises in the field that cannot be resolved with the landowner. See Appendix 5 for procedures to follow. However, if the circumstances warrant, Field Offices may mark and GPS survey an easement's reserved location even if the landowner objects or is unresponsive to agency contact and coordination.

Generally, site easements should be marked at each corner with appropriate markers. Site easements may be any shape that suits the topography or other factors. The size of the site marked should be approximately the same size as that reserved. One corner marker or the entrance to the site should be signed to post the permissible uses. Determine the appropriate markers to place the signs on for the situation. Trees, stakes, carsonite posts, or wooden tripods are all appropriate markers for sign placement, depending on the terrain and environment. Other marker types may be considered on a case-by-case basis. See Appendix 5 for the current policy adopted by the BLM, FWS, NPS and USFS for signing easements and the types of signs to be used.

Linear easements such as roads and trails, as a minimum should be marked and signed at the beginning, the end, and at any crossroads with the permissible uses signs. Place additional signs as necessary to prevent deviation from the easement. The spacing of signs or markers along linear easements should be as dictated by the terrain and vegetation. Generally, a reasonable interval on open tundra would be about 10 per mile for well-defined trails. Poorly defined trails may require line of sight. In some instances, trails may be more appropriately signed on the centerline, and larger trails and roads may need signing on at least one or both sides. Some trails and roads may have several routes that have developed over the passage of time. In these instances, the easement's legal location must be determined before marking and signing can occur.

Easement location data will be gathered and recorded using GPS equipment and maintained in the approved database and case file. As a general rule, the corner of each site will be recorded. The beginning points, end points and intersections of linear easements should be recorded with GPS. Any curves or turning points should also be recorded if the GPS equipment does not have linear recording capability. The centerline of linear easements will be GPS surveyed even though the side of the easement was marked and signed. Equipment and survey standards will be developed.

ADD GPS STANDARDS (Reserved)

The easement location as marked on the ground should be in accordance with the legal description and map location contained in the conveyance document. The GPS survey will reveal any discrepancies between the two. Differences in the reserved location and the existing on-the-ground location should be resolved by title affirmation, donation/release or another appropriate method.

B. Relocating Easements.

Relocating an easement is considered to be part of the easement management function and involves on-the-ground activities which may be inherently federal responsibilities. Processing a donation and release to relocate an easement is a discretionary action dependent upon funding and other management priorities. The BLM is not legally required to process a donation and release to re-align a 17(b) easement for an existing trail. While only the BLM can accept a donation for a 17(b) easement, any federal or state agency can acquire through donation or purchase another type of easement or ROW directly from the land owner.

Easements may be relocated when:

1. On-the-ground examination is completed, and it is determined the easement cannot be located (limiting physical barriers, topography, etc.) as described in the conveyance document; and
2. The proposed new location will serve essentially the same area of public lands; and
3. The landowner agrees, in writing, to the relocation. Use the forthcoming title affirmation procedures for a minor realignment or the donation/release procedures for a new easement. If the landowner does not agree, decide whether to develop the reserved easement. Another option is to purchase an easement.

The BLM policy is to manage only those easements accessing long term BLM managed lands. However, since only the BLM can accept a donation for a 17(b) easement, we are obligated to take into account the desire of the land owner or other administering agency with lands accessed by the easement. In considering a request to relocate 17(b) easements accessing lands other than long term BLM managed lands, the BLM should apply the criteria in Section IV and in addition should consider:

Who will ultimately be responsible for administering the easement?

Who will be responsible for the cost to locate and mark the easement or other actions necessary to accept title, for example CIP, hazardous material clearance, title insurance etc.?

Do both the entity whose lands are accessed by the easement and the landowner agree to the proposed realignment?

Is the land owner willing to sell or donate an easement or ROW directly to the entity whose land is being accessed?

Other alternative rights of access of access (RS2477, Omnibus).

When the State of Alaska desires that an easement be relocated, the preferred method is for the State to acquire the easement directly from the land owner. While BLM cannot require the State to assume administration of an easement, BLM can condition the relocation of an easement on the State agreeing to take administration. BLM also cannot require the State to pay for relocating an easement, but BLM can condition the relocation on the State's willingness to pay all or part of the costs involved. See Solicitor's Review dated May 17, 2007, located in Appendix 1. I.

C. Constructing, Maintaining and Repairing Easements.

Trail and road easement construction and maintenance should follow guidance found in the BLM 9100 Manual series to the extent practical.

Approved construction, maintenance and repair projects must consider and protect endangered plants and animals and historic, cultural and other values. These concerns should be addressed and mitigated through the NEPA or NHPA Sec. 106 processes discussed in Chapter VIII.

The BLM will not generally maintain or repair items such as bridges or other improvements that it does not own. In some cases bridge maintenance may be appropriate even though the corporation owns the bridges. See Solicitor's Opinion dated 2-4-87, pp.7-9, located in Appendix 1. E. (Note: Under the terms and conditions of the 1982 Chugach Natives, Inc. (CNI), agreement, the U. S. retains ownership of bridges and other appurtenances for easements reserved pursuant to chapter 13 of the agreement.) The U. S. owns any improvements made by the U. S. after the land is conveyed.

We may use materials such as sand, gravel and rock, and vegetal materials within the easement boundaries to construct and maintain the easement. The use of sand and gravel is limited to cut-and-fill operations in the same project and can be moved no more than 500 feet¹¹ within the easement. These materials, when not needed for the development or management of the easement, remain the property of the corporation. An easement user has no right to appropriate vegetal or mineral materials. See Departmental Manual 601 DM 4.3C located in Appendix 4.

Maintenance and repair responsibilities can not include rehabilitation of trespass damage on Native lands off the easement, since BLM is not authorized to spend its management funds on private property.

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. See Solicitor's Opinion dated 2-4-87, p. 7, located in Appendix 1. E.

¹¹ Koniag v. Koncor, 39 F. 3d 991 (9th Cir. 1994).

We will utilize volunteers, staff, and agreements with others to the extent possible for on-the-ground activities. If none of these options are feasible, contracting may be necessary.

D. Monitoring and Compliance.

It is important to monitor easements to:

1. Assure safe and continued access to publicly owned lands and major waterways;
2. Establish baseline conditions and trends;
3. Determine maintenance needs, and mark and sign replacement;
4. Determine use and patterns of use;
5. Determine whether the easement should be terminated under 43 CFR 2650.4-7(a)(13).

The BLM Field Offices are encouraged to work with the landowner, when practical, to jointly monitor and document the use of the easements. This cooperation will enable the landowner, the public, and the BLM to better understand the roles, responsibilities and rights associated with public easements. Joint monitoring will help to establish the baseline condition of the easements, to consistently manage the easements, and to potentially reduce use conflicts both on and off the easements.

Easements can also be monitored in other ways. For trail or site easements that are expected to see substantial use, a kiosk with a use register could be used for voluntary documentation of actual use. Even the use of aerial photos could provide needed data. One of the best ways, although expensive, would be by an on-the-ground periodic review. Aerial over flights of winter-use only trails in springtime can be a way to assess use. Aerial observation should be done according to the approved plan and in conjunction with other field activities to reduce costs. Field Offices should actively seek, obtain and document easement use information from the public, the landowner and, if applicable, the land managing agency.

Use information should be recorded, analyzed, copied into the easement case file and utilized in any easement retention or termination consideration. A public use form that the public can use to document an easement's use is anticipated to be available on the BLM's external web site.

After easement inspection or monitoring, prepare compliance reports with recommended courses of action. Develop an implementation schedule and file with the easement management plan in the easement file. Document and report when action items are completed.

E. Termination and Reclamation.

The regulation at 43 CFR 2650.4-7(a)(13) states when and how 17(b) easements can be termi-

nated. In general, an easement may not be terminated to eliminate trespass or environmental impacts to the land owner. While the easement manager or others may request that an easement be terminated, BLM makes the final decision after reviewing the evidence. The rationale and evidence must support the decision.

Once a decision to terminate an easement is made, several steps are needed before issuing the formal decision to terminate and issuing the release of interest. Termination will require compliance with that portion of the plan addressing on-the ground reclamation and rehabilitation of any BLM improvements. Even if a plan was not prepared, the following actions should be taken:

1. Review the easement type, the compliance and monitoring records or any other documents or reports, and determine whether it exists on the ground. Reclamation needs to be addressed on a case by case basis. If appropriate, perform a field inspection of the easement to determine its condition before deciding the level of reclamation.
2. Coordinate with the landowner, easement manager or using federal agency, and if necessary or appropriate, jointly inspect the easement to obtain ideas regarding removal of any structures and signs, and type and time of reclamation. The BLM may not be responsible for revegetating or regrading existing trails.
3. The termination process is not complete until successful reclamation occurs as determined by the plan or by mutual agreement.

E. Donations.

Only the BLM may accept a donation for a 17(b) easement. However, other federal or state agencies may acquire a similar easement or ROW by donation or purchase directly from the landowner. When the BLM accepts a donation for a 17(b) easement, it is an acquisition of an interest in public lands, and the BLM must follow all requirements and procedures pursuant to the BLM Acquisition Manual Handbook H-2101-1, the Pre-Acquisition Environmental Assessments Manual Handbook H-2101-04, and Department of Justice Standards. Some of these actions are inherently federal in nature and close coordination with the Solicitor's Office is required before allowing other entities to perform these functions for the BLM. A Certificate of Inspection and Possession (CIP) must be performed by the federal agency involved in the acquisition.

VIII. Compliance with NEPA and NHPA.

The purpose of this section is to address how to apply NEPA and NHPA. BLM will also comply with all other laws, regulations, and policies applying to federally managed interests.

A. National Environmental Policy Act Compliance and Documentation.

BLM will comply with NEPA requirements. The proper perspective for BLM is not whether to develop an easement, but from the aspect of mitigating impacts. Since BLM is not the landowner, BLM needs to be especially careful to reduce any potential detrimental impacts the pro-

ject may have. Environmental assessments will be prepared on those easements that are yet to be constructed or are existing easements proposed for reconstruction or new construction.

On those trail or road easements that have already been constructed or are already in existence, and where BLM is only marking or signing, etc., we will not prepare an EA. The installation of routine signs, markers, culverts, ditches, waterbars, gates, etc. on/or adjacent to existing roads is categorically excluded from NEPA. This information is in Appendix 5: 5.4G(2) of Departmental Manual 516 DM 6 entitled Transportation Signs. BLM will consider other, already existing easements as also being categorically excluded for purposes of marking and signing, etc.

B. National Historic Preservation Act, Sec. 106, Compliance.

Compliance with Section 106 of the National Historic Preservation Act (NHPA) is required for 17(b) easements prior to commencing surface disturbing activities on the easement. This requirement should be initiated as early as practical in the planning phase of the easement project by contacting a Field Office archaeologist for the appropriate compliance work needed under the NHPA. Compliance will be on a case-by-case basis and will involve assessment of the potential cultural resources involved and the level of management proposed for the specific easement. All proposed BLM actions must be reviewed for Section 106 compliance by a Field Office archaeologist. Some actions on easements existing on the ground and on easements yet to be developed may not require an on-the-ground exam or inventory. For example, marking and signing of existing or constructed easements, including winter-use only trails and emergency signing for hazardous conditions, may not require an on-the-ground exam.

Where the Section 106 compliance report prepared by the archaeologist determines there is no need for an on-the-ground exam, document the easement case file with the report. Sometimes an on-the-ground exam and report has already been completed for other reasons. The archaeologist can review the report for Section 106 compliance and make a quick determination whether further action is needed.

If cultural evidence is found or suspected during the on-the-ground marking or construction of a 17(b) easement, these activities must be halted to allow for additional evaluation by the archaeologist. This evidence or suspected evidence may necessitate an on-the-ground exam by the archaeologist.

The following ground disturbing activities will generally require an on-the-ground cultural exam or inventory before construction begins:

1. Easements where construction of a site, trail, road or other actual construction occurs, or new maintenance or reconstruction occurs.
2. New uses where Section 106 compliance has not previously been accomplished.

It should be apparent that Section 106 compliance does not end once a determination of any type is made. It is like NEPA in that new data or discovery can trigger the need for further analysis or

reevaluation.

IX. Rights, Responsibilities and Liabilities.

A. Rights and Responsibilities.

Rights of the Easement User - The user has a right to use the easement only for the purposes for which it was reserved. These purposes are identified in 43 CFR 2650.4-7 for the various easement types and in the relevant conveyance documents. The method of use must be one of the permissible uses reserved to the U. S. in the conveyance documents.

Since the purpose of an easement is to provide public access to Federal, 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, where the boundary of an easement is directly adjacent to or intersects those lands, including submerge lands belonging to the State of Alaska, that would constitute legal access provided it is possible to step directly from the easement onto those lands.

Rights of the Easement Holder - The U. S. is the easement holder and has a non-possessory property right to use, maintain and manage the easement only for the purposes for which it was reserved. This use must be consistent with the reserved, permissible uses. The easement holder also has the right to prevent interference with the permissible uses of the easement. As the owner of the public easement, the U. S., as well as its agents or contractors, has the right to mark, construct, maintain and manage the easement. However, no individual, group or entity has the right to perform these activities under the authority of a 17(b) easement without prior written approval of the easement manager. Any agreements with third parties or the landowner to place improvements on the ground should be specific as to where title and responsibility for the improvements rest. In most instances the BLM would not object to any improvements that do not interfere with the uses of the easement or increase the burden on the landowner, but would not want to acquire title to the improvements. When BLM is the easement manager, it will monitor such activities for compliance with the terms and conditions of the approval.

Rights of the Landowner - The owner of land subject to an easement has all rights and benefits of ownership consistent with the enjoyment of the easement and is generally under no obligation other than to abstain from acts inconsistent with the easement. Further, the owner of the land is not liable for injuries caused by the condition or non-maintenance of an easement. See Solicitor's Opinion dated 5-11-81, located in Appendix 1. B.

Minimum Legal Responsibilities - The easement holder's minimum legal responsibility, as well as the easement user's and landowner's, is simply to act reasonably. This obviously requires a case-by-case analysis and application. The easement holder and landowner do not have to endure unreasonable burdens to maintain their property. Consequently, liability arises only where an individual or landowner has acted unreasonably (negligently) in view of known circumstances or those circumstances that should have been known.

B. Liability.

For a thorough discussion of the United States' liability on 17(b) easements see Solicitor's Opinion dated 5-11-81, located in Appendix 1. B. A brief summary follows:

1. Since the United States is the owner of the 17(b) easements, potential liability exists under the Federal Tort Claims Act. An exception to liability exists for discretionary functions or duties.
2. The decision on whether or not to maintain any particular easement is a discretionary function and depends on the availability of funding and personnel. Accordingly, the decision to not maintain any given easement would not give rise to liability and the United States would not be liable for injuries or losses caused solely by a lack of maintenance (except for known hazards as discussed below). If, however, the decision is made to maintain a 17(b) easement, then there is a duty to exercise reasonable care in maintaining the easement. This reasonable duty, as it regards maintained roads, has been found to include (1) inspections at reasonable intervals, and (2) reasonable steps to diminish danger within a reasonable time after discovery. In general, the level of liability increases with increased management activity.
3. In general, the BLM is not liable for risks common or inherent to travel in Alaska such as snow drifts, fallen trees etc. However, as owner of the easement, the United States has some potential liability even if it does not exercise its discretion to maintain the easement. The United States must take reasonable steps to protect the public users of 17(b) easements from known hazards that are not generally anticipated. This responsibility also includes conditions the United States should have known about. This does not require the inspection of every 17(b) easement but it certainly includes what is known by federal employees, is public knowledge or has been communicated to the government by outside sources.

X. Hazards and Hazardous Materials.

The goal of easement management is to provide public access to publicly owned lands and major waterways. We also want to design safety into easement management, and it should be included and emphasized in the easement management planning stage and before on-the-ground activities occur. The United States must take reasonable steps to protect the public users of 17(b) easements from known hazards, hazardous materials or other health hazards on the easement. See Regional Solicitor's Opinion dated 5-11-81, located in Appendix 1. B.

Field Offices will take immediate action to determine the facts and take appropriate action to remedy the hazard or, when justified, temporarily close the easement when it is known or becomes known that conditions exist that are or may be a safety or health hazard, especially those that are life threatening. For easements managed by BLM, the Field Offices will coordinate and consult with the SO and inform the landowner. Field Offices will immediately inform the easement manager and landowner when the easement is not managed by BLM.

XI. Easement Closures or restriction of Uses.

Generally, BLM will not close an easement to public use except for emergency closures. Easements may be temporarily closed or the uses temporarily restricted to reduce environmental degradation on the easement, or for public safety using existing authorities. The Field Offices will coordinate and consult with the State Office on proposed actions.

While the easement manager should be sensitive to impacts on the landowner, environmental damage to land adjacent to the easement caused by users going around obstacles or mud bogs does not provide BLM with a sufficient legal basis to close an easement or restrict its usage. Further, easements cannot be closed or the uses restricted merely to reflect management harmony with the federal management of adjacent areas. For example, uses that are prohibited on adjoining federal land are insufficient cause for decreasing or eliminating permissible uses on the easement without other significant impacts.

As a matter of general policy, BLM will not permanently restrict or eliminate some of the uses of an easement. An example of a permanent restriction would be changing a trail from year-round use to winter use only.

Except for an emergency closure where the record will be documented with the facts and a reasoned analysis after the closure, the record will be documented with the facts and a reasoned analysis including discussion of alternative considered prior to taking formal action to restrict reserved uses and when or under what circumstances will the closure be lifted.

A. Temporary Closure Procedures.

Follow the procedures found at 43 CFR 8364 - Closures and Restrictions. Field Offices will coordinate and consult with the landowner and the State Office on proposed actions, and prepare the closure order and Federal Register Notice. Appendix 6 contains copies of a closure order used for posting on the easement and in public places in the vicinity, a Federal Register Notice temporarily closing the 17(b) easement, and a BLM news release.

B. Permanent closure procedures.

The termination and release procedures must be followed for permanent restriction or elimination of uses. Field Offices will coordinate and consult with the State Office on proposed actions.

XII. Trespass/Enforcement Activities and Use/Misuse of Easements.

Permissible uses of a specific easement are those reserved to the U.S. as listed in the appropriate conveyance document and regulations. The BLM cannot take action against uses on the easement that do not interfere with or damage the specifically reserved rights of the U. S. Only the underlying landowner can identify or take action on the impermissible or unauthorized uses. Uses such as littering, tree cutting, and other destructive actions exceed the permissible uses of

the reservation, but do not provide a basis for federal action unless the public use of the easement is affected. Such uses may constitute a trespass against the landowner. Further, when there is a suspected trespass to the adjoining land, the federal land manager cannot bring a trespass case and it is up to the landowner to take action. The BLM will not investigate or become involved in situations where the easement is not being obstructed or damaged. BLM employees should refrain from identifying specific individuals to the land owner or making any allegation of wrong doing by members of the public. See Solicitor's Opinion dated 3-17-80, located in Appendix 1. A. However, it is appropriate to ensure the easement is properly marked and to inform users about permissible uses.

BLM will take action when the permissible, reserved uses are interfered with or when BLM must go to extra labor and expense in keeping the easement in repair. See Solicitor's Opinion dated 6-1-84, located in Appendix 1. C. It may be possible to collect monetary damages when BLM must go to extra labor and expense in repairing damage to the easement.

Due to the inherent limitations of the U.S. reserved interests in 17(b) easements, the only remedy for threatened or prospective injuries to an easement by the land owner (e. g., development of the land) is a civil injunction. See Solicitor's Opinion dated 1-24-86, located in Appendix 1. D.

In unique circumstances, a third party who holds no interest or title in the land and cannot claim a good faith defense, may be issued a citation pursuant to 43 CFR 9239.2-1 for blocking or otherwise preventing the public from using an easement to access public lands. However, discretion must be applied due to the higher standard that must be met (beyond reasonable doubt) than that required to take civil action. Any criminal action by law enforcement should be undertaken in close coordination with the Regional Solicitor's Office. See Solicitor's Handbook Review dated May 17, 2007, located in Appendix 1. I.

It should be noted that the landowner may properly allow other use or activity on a 17(b) easement to the extent it does not interfere with the reserved interest of the U S. This means that the corporation could allow 2WD or 4WD vehicles to utilize a twenty-five foot wide trail easement or the corporation could place or authorize picnic tables, garbage cans or outhouses on an easement as long as the use or activity does not interfere with the purpose for which the easement was reserved.

XIII. Commercial Use and Additional Use.

Commercial operators may use a public easement for a permissible, reserved use without charge.

Refer requests for uses other than permissible uses to the landowner. The U.S. does not have the authority to allow new or additional uses on a reserved easement, but the landowner can do so as long as the new or additional use does not unreasonably interfere with the purposes and use of the reserved public easement. For management purposes, BLM Field Offices will ask to be kept informed by the landowner but will not object to the landowner's authorization of new or additional uses unless the uses unreasonably interfere with use of the public easement.

XIV. Facilities Inventory Maintenance Management System (FIMMS) and Recreation

Management Information System (RMIS). (Reserved)

XV. Americans with Disabilities Act (ADA). (Reserved)**XVI. Chugach Natives Inc., Easements reserved Pursuant to the 1982 CNI Agreement.**
(Reserved)**XVII. Record Keeping.**

Maintenance of the easement quad maps will include the digitized easement quads and data bases once EDS is fully implemented. Easements reserved to the United States and proposed for termination will not be removed from the easement map prior to the signing of the Release of Interest. Conversely, easements being acquired will not be noted to the easement quad until the title is accepted and the final title opinion is approved by the Regional Solicitors' office.

The location of 17(b) easements shown on the easement quad at the time of conveyance will be changed only after legal authority such as a MOU, donation, etc. is documented.

XVIII. Public Information and Education.

An active public information and education program will provide information to the user public, the landowner, public land managing agencies and BLM staff. It will help people understand the rights and responsibilities regarding easement use and potentially reduce management problems. As BLM employees, we are all responsible for informing and educating the public about 17(b) easements. However, the primary responsibility rests with the Field Offices as they are the most familiar with the resource and have daily presence and interface with the user public. The BLM Alaska State Office, Branch of Lands and Realty, is available to provide training on any aspect of 17(b) easements and will tailor presentations for users, landowners, easement managing agency, staff or any other group desiring information about the program. The Branch can also assist in the preparation of informational brochures. Eventually, general information about the easement program will be available on the BLM's website.

The availability of on-line use of the database and digitized easements will allow the users to get essential up-to-date permissible use and location information.

A video produced by the Anchorage Field Office discussing the use of easements is available. Others may be developed as needed.