Natives Win A Round in Court

From Our Anchorage Bureau

It would be nice to think that the easement decision by a U.S. District Court judge earlier this month had brought Alaska Natives a lot closer to gaining title to their land. We suggest you don't hold your breath.

After months of legal maneuvering, and a hearing last month, Judge James von der Heydt ruled In Anchorage that the Secretary of Interior is required to follow easement guidelines created by Congress under the land claims act, and affirmed that the guidelines must be based on public need. He also cut down the Interior Department's proposed 25' continuous shoreline easement and vacated continuous streamside easements reserved by the Secretary.

The rub is that the decision is sure to be appealed, which will result in months more delay before the easement issues are finally resolved. In addition Natives did not win every point.

The federal court ruling came about as a result of a lengthy battle between Natives, the Department of Interior and the Alaska Public Easement Defense Fund over how much access the general public should have across lands selected by Native corporations under the 1971 land claims act. Lawsuits brought by Natives and the Defense Fund against Interior were combined in Anchorage.

A crucial point lost by Natives is what date should be used to determine "present" recreational use of lands to which access should be guaranteed by easements. Natives rely on the date of passage of the act, December 1971. Interior says recreational use initiated up to December 17, 1976 is valid for easement protection. Judge von der Heydt agreed with the government. He wrote: "The public easement section (of the act) itself contains no specific date which should be considered in reserving easements. The intent of the section, however, indicates that the date of enactment is not the appropriate date. This section was intended to preserve the right of public access to lands remaining in the public domain after Native selection. It is entirely possible that such lands may not have been used at all prior to December 18, 1971, and that it would still be appropriate to reserve an easement to them for future use. The date chosen by the Secretary is entirely consistent with the purpose of the section."

Natives protest that delays in land conveyance caused by the Interior Department have given the general public unwarranted opportunity to establish new

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uses adjacent to Native lands that will require access. They further point out that in a meeting last fall, then-Secretary Kleppe agreed by inference that the 1971 date was acceptable. Speaking for the Secretary, Bureau of Land Management State Director Curt McVee later denied that that was the date endorsed by the department.

The judge did rule in the Natives favor on another crucial question, the reservation of "floating" easements for the transportation of fuel and other natural resources. These easements were protested because they were intended for future resource development.

'The court can certainly understand the motivation of the Secretary in this instance. He is being asked to reserve a specific easement at this time for uncertain use. Clearly it would be more convenient to reserve the floating easement but convenience is not the touchstone of his authority. The Secretary has not attempted to reserve other floating easements for future unknown public access for recreation and, indeed, he would be hard put to justify such a reservation. While the energy crisis of which the Secretary speaks may make the nature of the material travelling over the utility transportation easement unique, it does not alter the nature or requirements of the easement itself. Nothing in the Act indicates that this easement should be treated differently than others and the overall intent of the Act strongly cuts against such an easement. Hence, this floating easement and order 2987 (creating the easement criteria for the floaters) cannot stand," von der Heydt wrote.