Federal-State
Land Use Planning Commission
For Alaska

October 23, 1978

Mr. Curtis McVee
State Director
Bureau of Land Management
555 Cordova Street
Anchorage, Alaska 99501

Re: AA 6661C: Alaska Railroad Withdrawals - Eklutna

Dear Curt:

This correspondence is written as a followup to the Co-Chairmen's letter of August 9, 1978, to provide you with a statement of the legal conclusions upon which the recommendations contained in their letter were premised.

Since the Bureau receives legal advice from the Solicitor's office, we do not think that it would be particularly useful at this juncture for us to provide an exhaustive legal analysis of the basis for the conclusions contained herein. However, if it would be helpful for us to do so, we would be glad to provide additional written documentation or to meet with members of your staff or the Solicitor's office.

Our legal premises are as follows:

1. Lands withdrawn for the use of the Alaska Railroad are not "lands withdrawn or reserved for national defense purposes." Moreover, while the Railroad is directed in its enabling statute to facilitate certain military functions, the Railroad is not a national defense agency. Therefore, lands withdrawn for Railroad use are not exempt from the statutory withdrawals effected by Section 11(a)(1) of the Settlement Act. Since the exemption provided in Section 11(a)(1) does not apply, Railroad lands may be selected by the village corporation for Eklutna. The Secretary of the Interior must then make a determination that lands so selected satisfy the definition of "public lands" provided in Section 3(e) of the Settlement Act.

2. Section 17(b) of the Settlement Act cannot be used to protect the withdrawals in question, except as specifically provided in regulations now being promulgated by the Department of the Interior. These regulations, which are the outgrowth of the decision of the U.S. District Court for Alaska in Calista v. Andrus, do not provide for the reservation of easements for gravel extraction or dynamite storage, and generally do not permit the reservation of easements

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based on possible future use. However, if necessary, easements could be reserved for railroad tracks, sidings, the future construction of such facilities (subject to a five-year limitation), and safety zones.

3. Section 17(c) of the Settlement Act, which authorizes the Secretary of the Interior to withdraw a corridor for utility and transportation purposes across public lands, was never used by the Secretary, nor did Congress so intend, to withdraw the lands in question for the use of the Alaska Railroad.

4. Where the village corporation for Eklutna has made an otherwise valid selection, the Alaska Railroad may not retain such lands if the case for retention is premised on future use rather than actual use as of December 18, 1971. Section 3(e) of the Settlement Act defines "public lands" available for Native selection to include "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation ..." (Emphasis added) In his policy directives of March 3, 1978, the Secretary of the Interior incorporated this statutory definition into administrative policy.

   In our opinion, Section 975(c) of the Alaska Railroad Enabling Act (43 USC 975) is not authority for the retention by the Railroad of lands which do not satisfy the actual use criterion contained in Section 3(e). The status of lands which are either totally or partially exempt from Native selection is dealt with explicitly in various provisions of the Settlement Act. (See, for example, Sections 11(a)(1) and 12.) Lands held by the Alaska Railroad are not mentioned in this enumeration. To the extent that a conflict between the Enabling Act and the Settlement Act is deemed to exist, Section 26 of the latter legislation resolves such conflict in favor of ANCSA. Thus, in our opinion, the key issue here is factual and not legal; that is, the inquiry should focus on how much acreage was actually utilized.

5. If other statutory criteria are met, lands utilized by the Alaska Railroad for gravel extraction can qualify as a Federal installation under Section 3(e) of the Settlement Act. Section 975(c) of the Alaska Railroad Enabling Act specifically vests the President with authority to reserve lands "as are or may be useful for furnishing materials..." for construction and operation. Our research indicates that such materials are a necessary concomitant of Railroad operations. Moreover, Federal statutes and case law give a broad meaning to the term, "Federal installation."

6. Actual use of a gravel excavation site is not that use represented by the exterior boundaries of the land disturbed on December 18, 1971. At the same time, use of a small portion of a withdrawal for gravel extraction does not necessarily justify retention in Federal ownership of the entire tract. With respect to the former conclusion,

it is not reasonable to assume that Congress intended the immediate cessation of ongoing governmental activities--a likely result under the first alternative. Yet, if use of a small portion of a Federal withdrawal, without more, could justify the retention of all the lands so reserved, the objectives of Section 3(e) would be thwarted.

In our opinion, the Secretary, as the decision maker under Section 3(e), should establish a reasonable standard which considers the pattern of use existing on and before December 18, 1971, and other relevant factors. We believe that the standard suggested by the Co-Chairmen in their correspondence of August 9, 1978, constitutes a reasonable method for determining the actual use of lands claimed for gravel extraction. There well may be other standards which also address the considerations enumerated in this section. Whatever test is ultimately adopted, it should be applied uniformly to situations where the actual use of a gravel pit is at issue. If this is done, and assuming the validity of the first two conclusions stated in this section, we think that the courts will give a fair degree of deference to the Secretary's determinations respecting the actual use of gravel extraction sites.

7. While it may be a close question, we do not think that the Alaska Railroad can justify its retention of lands in Federal ownership solely on the basis that such lands are encompassed within a lease issued by the Railroad. Section 14(g) of the Settlement Act specifically protects valid existing rights, including leases, contracts, and permits issued by the Federal government. In the usual situation, it would be difficult to argue that a lessee's use of lands would constitute "lands actually used in connection with the administration of any Federal installation...". However, in the instant case, the situation is complicated by the fact that the leasing of adjacent lands is an aspect of Railroad operations, and is in fact a means by which the Railroad derives revenue for its operations. In other words, unlike most Federal instrumentalities, the Railroad does not receive its operating funds in the form of annual appropriations from Congress. Instead, the Railroad utilizes authorization provided in the Alaska Railroad Enabling Act to derive revenues through leasing, the transport of persons and commodities, etc. Therefore, it is arguable that lands leased on December 18, 1971 were actually used in connection with a Federal installation.

While perceiving it as a close question, we have rejected this argument, because we do not think that the Settlement Act makes such distinctions. Under the Act, Section 14(g) deals with the treatment of Federal land which is encumbered by a lease or other temporary interest. Depending upon lease terms, etc., most of this land, if otherwise available, was amenable to Native selection. Section 3(e), on the other hand, treats lands which are withdrawn or reserved for Federal use. While this neat dichotomy may blur in the situations where a leaseholder is performing certain functions directly for a Federal agency (for example, processing waste material produced on a Federal installation), we do not think that such is

the case here. In the instant situation, the Railroad, with one possible exception, leases lands to derive revenue. In making lands available for Native selection, the Settlement Act does not give any special status to this entrepreneurial function other than to protect the leaseholder's valid existing rights. Moreover, it is worth noting that with the exception of the rentals which the Railroad derives from leasehold interests, Eklutna or any other private owner which owns lands adjacent to the Railroad right-of-way may well have the same interest as does the Railroad in attracting revenue producing enterprises which are dependent upon rail transportation.

Whether or not our position is upheld with respect to the issue just discussed, we believe that lands held for future leasing may not be retained in Federal ownership under Section 3(e). This is so because such lands would not constitute "lands actually used..." (See previous discussion) In our opinion, the Railroad's use of lands as part of its rate base for determining tariffs is not an "actual use" cognizable under Section 3(e). Actual use must be something more than a mere bookkeeping transaction; that is, there must be some on-the-ground use.

Further regarding the relationship between Sections 3(e) and 14(g), the Railroad has previously indicated its willingness to relinquish the gravel pit currently being utilized by Rogers & Babler, so long as the operations there are not impaired. Since the Rogers & Babler operation is premised upon a contract which, if valid, would be cognizable under Section 14(g), we see no reason to utilize Section 3(e) to retain mined-out lands which we have found to be of no other use to the Railroad. (Even if the Railroad's position concerning the Rogers & Babbler pit changes--and we have some indication that this might occur--our findings respecting actual use will remain the same.)

Regarding the lease of the Eagle River withdrawal for the storage of explosives, use of Section 14(g) to protect existing leases appears to be an adequate remedy. (Utilizing any one of several approaches, there may also be a need to create a temporary buffer for safety purposes around leased areas.) In this regard, we have not found any recent use of the site by the Railroad for storage purposes, nor have our investigations indicated that the lessees of the lands involved are storing explosives particularly for Railroad purposes. Rather, we have found that the lessees involved sell stored explosives on the open market, and the Railroad is sometimes a purchaser of such materiel. In our opinion, this pattern of use is not such as would justify a determination that the lands in question are actually used by a Federal agency.

This correspondence has focused on the interrelationship between the Alaska Railroad Enabling Act and the Settlement Act and between various provisions of the latter legislation. In stating the premises contained herein, we are not unmindful of the importance of the Alaska Railroad to

the State's economy or the realities of Railroad operations under the Enabling Act. However, we believe that it must be assumed that Congress considered these matters, and therefore we have confined our comments to the legal and factual context within which Eklutna's selection of Railroad lands, in our opinion, should be considered.

I hope that the foregoing analysis proves useful. If we can be of any further assistance in the Bureau's adjudication of the topfiled Railroad withdrawals discussed in the Co-Chairmen's correspondence, please let us know.

Sincerely,

John W. Katz
Counsel

JWK/dw

cc: David Roderick
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