July 8, 1975

M-36880

EASEMENT RESERVATIONS IN CONVEYANCES TO ALASKA NATIVE CORPORATIONS UNDER ANCSA

Alaska - Indian and Native Affairs
Alaska Native Claims Settlement Act - Easements

Prior to the conveyance of any land pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601) (ANCSA) the Secretary must make a determination of which public easements are necessary and the Secretary must reserve those easements in the conveyance.

The Secretary has authority to reserve public easements in conveyances under ANCSA (43 U.S.C. 1601) other than those easements identified and recommended by the Joint Federal State Land Use Planning Commission.

The authority of the Secretary to reserve easements in conveyances under ANCSA is not limited to those public easements specifically listed in Section 17(b)(1) of that Act.

The Secretary is not limited to reservation of easements in conveyances under ANCSA which cross the patented lands from one boundary to another. The easements may be for uses within the patented lands.

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

MAY 23 1975

Memorandum

To: The Secretary

From: Solicitor

Subj: Easement Reservations in Conveyances to Alaska Native Corporations Under the Alaska Native Claims Settlement Act, 85 Stat. 688, 43 U.S.C. Section 1601 et seq. (ANCSA)

You have asked for a brief and concise description of the authority of the Secretary to reserve easements under Section 17(b)(3) of ANCSA. Since Section 17(b)(3) is not the sole source of authority for the Secretary to reserve easements, the scope of that authority must be discussed in the context of his total authority. Section 17(b) of ANCSA provides:

> (1) The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.
>
> (2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements

and recommendations from interested organizations and individuals on the need for and proposed location of public easements: Provided, That any valid existing right recognized by this chapter shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

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

The inclusion of this section in the Act by the Conference Committee was the result of long and continuing expressions of need by many diverse interests during the consideration of a Native claim settlement. H.R. 10367, 92d Cong., 1st Sess. (1971), as passed by the House, contained no reference to easement reservations after the efforts to include a land use planning section were defeated. On the other hand, S.35, 92d Cong., 1st Sess. (1971), as it passed the Senate, did contain a land use planning section in which the findings of the Land Use Planning Commission were mandatory and binding on the Secretary. Section 24(d) of that bill provided:

(1) As a part of the Planning Commission's review of land selections by the State, by Native Villages or by corporations pursuant to section 24(a)(9) the Planning Commission shall identify public easements across such lands and at periodic points along the courses of major waterways which are reasonably necessary to guarantee a full right of public use and access for recreation, hunting, transportation, utilities, docks and such other public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall solicit and receive statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: Provided, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

> (3) Prior to granting any patent under this Act the Secretary shall consult with the Planning Commission and shall reserve such public easements as the Planning Commission has identified and recommends. The responsibilities granted to the Planning Commission under this section shall be transferred to the Secretary upon termination of the Planning Commission.

The Senate Committee explained the intent of that section as follows:

> [A] major problem facing the State of Alaska and the Federal Government in connection with the settlement of the land claims issue and the gradual lifting of the administrative and Secretarial Order "land freeze" that has operated in Alaska over the past five years is to develop a rational and coherent land use planning capability which will operate to preserve the environment and protect the public interest in the Federal lands in Alaska without, at the same time, frustrating the reasonable expectations of the Native people and the State to exercise in a rational manner of the rights granted to them by this Act and by the Alaska Statehood Act.
>
> This year, building upon the experience gained from two intensive years of consideration and many hearings on legislation to establish a National Land Use Policy, it is the Committee's view that additional actions should be taken to insure that the land resources base of Alaska is properly planned for and managed.
>
> To achieve this goal the Committee has adopted Section 24. Section 24 provides for the establishment of a Joint Federal-State Land Use Planning Commission; the creation of a North Slope Recreation and Transportation Corridor; and the reservation of appropriate public easements. These provisions are discussed in detail elsewhere in this report. S. Rep. No. 92-405, 92d Cong., 1s Sess., 84-85 (1971).

The Committee then stated, by way of detailed discussion:

> Section 24(d) - This section details the requirement that appropriate public easements shall be reserved under all grants and patents to insure the full rights of public use and access.

> Section 24(d)(1) - This subsection directs that as a part of the Planning Commission's review of land selections by the State, by Native Villages or by corporations pursuant to section 24(a)(9) the Planning Commission shall identify public easements across such lands and at periodic points along the courses of major waterways which are reasonably necessary to guarantee a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.
>
> Section 24(d)(2) - This subsection directs that in identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall solicit and receive statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements. Any valid existing right recognized by this Act shall, however, continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.
>
> Section 24(d)(3) - This subsection directs that prior to granting any patent under this Act the Secretary shall consult with the Planning Commission and shall reserve such public easements as the Planning Commission has identified and recommends. The responsibilities granted to the Planning Commission under this section shall be transferred to the Secretary upon termination of the Planning Commission. Id. at 172.

The mandatory nature of the language concerning the determinations of the Land Use Planning Commission was vigorously opposed by the House members of the Conference Committee and by the Executive Branch. Thus, the entire function of the Land Use Planning Commission became advisory to the Secretary[1] in the bill prepared by the Conference Committee, while the

---

1. The Conference Report states: "The Planning Commission has no regulatory or enforcement functions, but has important advisory responsibilities." S. Conf. Rep. No. 92-581, 92d Cong., 1st Sess. 36 (1971) (emphasis added).

Secretary's authority was broadened to look beyond the Planning Commission and to make individual determinations on questions concerning easements. Section 17(b) of the Alaska Native Claims Settlement Act as finally enacted can be outlined as follows: The Planning Commission is directed to identify public easements for a number of public uses and access functions which it deems to be important. In the process of doing so the Planning Commission is to consult with appropriate State and Federal agencies and interested organizations and individuals. The Secretary of the Interior is then instructed prior to granting of any patent under the Act to village and regional corporations to consult with the State and with the Planning Commission and then mandated to reserve such public easements as he determines are necessary. It is important the Secretary must reserve those public easements which "he determines are necessary." Thus, the Secretary must first make his own determination, in consultation with the State and the Planning Commission, as well as others, as to which public easements are necessary and should be reserved under the Act. The Act's language "the Secretary...shall reserve" (Section 17(b)(3)) mandates the reservation of those easements.

It is noted that in the original Senate version the Planning Commission dictated which easements were to be reserved, but in the final version of the Act the Secretary of the Interior makes this determination and he is to make that determination after consultation with the State as well as the Planning Commission. Furthermore, Section 17(b)(2) requires "that any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access." Therefore, in construing the meaning of "public easement," the Secretary must construe his functions under Section 17(b) in such a manner as not to reduce the right of access of anyone holding any valid existing right at the time of conveyance. Thus, the Secretary's discretionary authority to reserve public easements beyond those identified and recommended by the Planning Commission derives from the Secretary's independent mandate to consult with the State as well as the Planning Commission and to ensure that "valid existing rights" of access are preserved.

It has been argued that the purposes for which easements may be reserved and the circumstances in which they may be reserved listed in Section 17(b)(1) are limitations upon the authority of the Secretary in Section 17(b)(3). This construction of the statute will not hold up under close

examination because: (1) the Act requires the Secretary to look beyond the Planning Commission for consultation before making his determinations; (2) the Secretary is directed not to reduce the right of access of any valid existing right; (3) the language of Section 17(b)(1) is ejusdem generis in nature and is not that ordinarily used when the doctrine of expressio unius est exclusio alterius is intended to apply. The first two reasons have been examined in some detail already in this opinion. With respect to (3) above, Section 17(b)(1) ends with the phrase "and such other public uses as the Planning Commission determines to be important." (emphasis added.) This phrase makes it clear that the use or access functions listed previously in that subsection are not exclusive. The reemphasis of the term "public use" in that phrase would also indicate a relation back to such "public use" needs as arise in the fulfillment of international treaty obligations.

Relevant parts of the Conference Report also indicate that the nature and purposes of easements to be reserved were to be determined chiefly in light of the duty of the Planning Commission and the Secretary to protect the "larger public interest":

> Appropriate public access and recreational site easements will be reserved on lands granted to Native Corporations to insure that the larger public interest is protected. S. Conf. Rep., Supra, at note 1. at 36. (emphasis added.)

An explanation of the term "public use" as used in Section 17(b)(1) is appropriate. A "public use" has been defined as that which, (1) enables "the United States or a State.... to carry on its governmental functions, and to preserve the safety, health, and comfort of the public...(2) to serve the public with some necessity or convenience of life....(3) in certain...cases...to enable individuals to carry on business... if their success will indirectly enhance the public welfare." Delfield v. City of Tulsa, 131 P. 2d 754, 757-9, 191 Okl. 541 (1942). The weight of authority is to the effect that "public use" encompasses the concept of public advantage. Thus, the United States Supreme Court has said, "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment." Rindge Co. v. Los Angeles Co., Cal., 262 U.S. 700, 707 (1922). Public uses, then, obviously involve more than simply access-related functions.

The use of the terms "recreation sites" and "camp sites" throughout the Conference Report clearly indicates that Congress contemplated that the Secretary would have the authority to reserve site easements for public uses on lands conveyed to village and regional corporations.2/

In various oral and written comments to the Department, much emphasis is placed on the term "across" in the phrase in Section 17(b)(1), "identify public easements across lands selected." The term "across" has been construed by the courts over the years to have a very broad meaning that is not limited to a line from one boundary to another boundary of a piece of property. It has been variously held to mean, "Over" Commonwealth v. Warwick, 40 A. 93, 185 Pa. 623, (1898); Illinois Central R. Co. v. City of Chicago, 30 N.E. 1044, 141 Ill. 586 (1892); State v. Newport St. Ry. Co., 18A. 161, 16 R.I. 533 (1889); Brown v. Meady, 25 American Decision 288, 10 Me. 391 (1833); "Along" Mt. Vernon Telephone Co. v. Franklin Farmers Tel. Co. 92 A. 934 Maine (1915); Brooklyn Heights R.R. Co. v. Steers et al. 106 N.E. 919, 213 N.Y. 76 (1914); "On" "The reservation of the right to maintain a drain 'across' the land conveyed is not nullified because the drain, in fact, ended in a cesspool 'on' the land conveyed." Jones v. Adams et al. 38 N.E. 437, 162 Mass. 224 (1894); "Upon" (same citations as "along"); "Through" and "Within" Quanah, A. & P. Ry. Co. v. Cooper 236 S.W. 811 (Tex. 1922). In view of the two

---

2. "Appropriate public access and recreational site easements will be reserved on lands granted to Native Corporations to insure that the larger public interest is protected." Id. Conf. Rept at 36

"Section 17 of the conference report is based upon section 24 of the Senate amendment.

* * * *

2. Subsection 17(b) of the Conference Report is substantially the same as section 24(d) of the Senate amendment. This subsection provides for the advance reservation of easements and camping and recreation sites necessary for public access across* lands granted to Village and Regional Corporations." Id., at 44.

*We have some difficulty in conceptualizing a recreation site on Native lands necessary for access across Native lands.

conclusions that Section 17(b)(1) is not a limitation on the Secretary and that "across" has a very broad meaning, it is concluded that the term "across", standing alone, does not prescribe the place or manner in which a public easement may be reserved.

It has been argued that the "across" language followed by the language "and at periodic points along the course of major waterways" further delimits the Secretary's authority to proscribe him from reserving linear easements along the course of any major waterway. At least three responses can be made to that argument. First, linear easements along the course of a major waterway might be necessary, in the opinion of the Secretary, to fulfill some public easement function such as the guaranteeing of international treaty obligations or some access functions such as rights-of-way for transportation or utilities. Second, such linear easements will, in appropriate circumstances, qualify as being "across" selected lands. Finally, after consultation with the State of Alaska, the Secretary may determine that such a linear easement is reasonably necessary. As a result of these possible situations and in view of obvious Congressional intent to preserve valid existing rights and to protect the larger public interest, such a narrow and constricted interpretation as that proposed in various oral and written comments submitted to the Department cannot be placed upon the statute.

Each statute already in force and applicable to Alaska, authorizing the reservation of easements, has not been examined in light of Section 26 of the ANCSA. Each of these statutes must be examined with care to determine whether they should be used in conjunction with Section 17(b), in lieu of Section 17(b), or must be construed as repealed. However, in examining these alternatives it must be remembered that there is a strong presumption against implied repeal. Federal Trade Commission v. APW Paper Co. 328 U.S. 193 (1946); U.S. Alkali Export Assn. v. U.S. 325 U.S. 196 (1945); State of Georgia v. Pennsylvania R.R. Co. 324 U.S. 439 (1945).

There are four limitations upon the Secretary in carrying out his obligations under Section 17(b). The first is contained in Section 17(b)(2) which prohibits the reduction of the right of access for anyone holding a valid existing right under present law. The second limitation appears in Section 17(b)(3) and requires that he first determine public easements are necessary before any reservation is made. Third, the easement reserved must be a public easement or an easement to fulfill the obligation of Section 17(b)(2).

Fourth, the easement should be a public use or an access-related easement. This fourth conclusion is not clearly spelled out in Section 17(b)(2) or (3) but is strongly suggested by the general scope of Section 17(b)(1).

Despite these limitations on the authority of the Secretary, he is vested with broad authority by Section 17(b)(3) and with certain obligations. In the exercise of his authority he must be reasonable and not arbitrary or capricious in his determinations of what easements are necessary or not necessary. A determination that an easement is necessary or not necessary should be recorded and accompanied by a written record in support thereof in case the determination is challenged. (Citizens to Preserve Overton Park v. Volpe 401 U.S. 402 (1971); Camp v. Pitts 411 U.S. 138 (1973)). The exercise of the Secretary's authority is, in part, a policy function of his office and the exercise of that authority is not totally dictated by this statute but also by general principles of law.

DEPUTY Solicitor