December 10, 1980

MEMORANDUM

To: Special Assistant to Chief Counsel, RCC-3

From: Chief Counsel, The Alaska Railroad, RAR-3

Subject: Interior intentions toward Railroad gravel reserves and Railroad rights-of-way as evidenced by motion before Alaska Native Claims Appeal Board

You will find enclosed a "Motion for Remand and Dismissal" drafted by counsel for the Bureau of Land Management (BLM).

As you can see, the BLM is taking the position that PLO 2672 should be conveyed to Eklutna because the area has not "been disturbed for the purpose of removing gravel by the appellant."

Also, you can see that Interior is taking the position that the State Director of Interior may grant either a fee or an easement right-of-way for the Railroad, even though easements for railroads have not been defined under Section 17(b).

The Office of Chief Counsel of The Alaska Railroad urges that FRA and DOT take the position that railroad easements need be defined with FRA's and ARR's input before BLM can make any decision that any Alaska Railroad right-of-way is held only in easement. Obviously, if the easement as defined is not a "Railroad Easement" The Alaska Railroad has certainly lost almost all control of its right-of-way.

Our office also urges that FRA and DOT take the enclosed "Motion for Remand and Dismissal" to the staffs of Senator Stevens and Senator Murkowski and the Commerce and Energy Committees to show them that Interior intends to take away the Railroad's gravel reserves and to force on the Railroad an easement which, under the latest proposed regulation, would force the Railroad to pay for perturbations of vegetation, presumably including weeds, or for the use of any gravel.

If there is anything else your office thinks we should send to the people in the political arena, please let us know.

David M. Roderick

Enclosure

WJWong:rc

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

RECEIVED NOV 25 1980 for The Alaska Railroad

NOV 20

The Alaska Railroad
NOV 25 1980
OFFICE OF
GENERAL MANAGER

The Honorable Cecil D. Andrus
Secretary of the Interior
Washington, D.C. 20240

Dear Cece:

The Department of Transportation (DOT) petitions for reconsideration of the Final Rule published by the Department of the Interior on October 22, 1980, to implement Section 3(e) of the Alaska Native Claims Settlement Act (ANCSA). This petition is submitted under authority of the Administrative Procedure Act (5 USC 553(e)) and Department of the Interior regulation (43 CFR 14.6) which grant a right to petition the Secretary of Interior for the repeal or amendment of any rulemaking of your Department.

The basis for this petition is that the Final Rule would adversely affect the Alaska Railroad, an agency of DOT, by allowing Native selection of significant portions of the land holdings needed for the Railroad to continue operating as an economically viable rail carrier. Such a result is inconsistent with the statutory language and intent of Section 3(e) of ANCSA, which was designed to remove from Native selection those federal lands necessary to preserve ongoing federal activities in Alaska. In addition, parts of the Final Rule raise new issues that were not discussed in the proposed rulemaking. DOT also seeks reconsideration because we do not believe the Department of the Interior gave adequate consideration during the rulemaking proceeding to the concerns and recommendations that were expressed by DOT in November 1979 (copy enclosed).

Section 3(e) of ANCSA exempts from the definition of public lands available for Native selection "the smallest practicable tract...enclosing land actually used in connection with the administration of any Federal installation,..." (43 USC 1602(e)).

Because the Alaska Railroad is structured as a business enterprise, its land holdings are part of its economic base. They are used in the same way that a private rail carrier uses its lands to support operations, provide revenue, and supply materials for maintenance. Unlike other federal agencies, the Railroad does not receive an appropriation to pay its normal operating costs. Instead, like other railroads, it depends on

its earnings, including revenues and savings generated from its land holdings, to sustain itself. For this reason, those lands that are used to operate the Railroad, provide rental income, and supply maintenance resources are actually used and, therefore, should be ineligible for Native selection under section 3(e) of ANCSA.

However, the Final Rule would make vital Railroad lands eligible for Native claims by including in the definition of public lands available for Native selection Railroad right-of-way lands, leased lands and gravel reserves. Nearly 9,000 acres of Railroad land that are near Native village areas will be directly affected by the Final Rule. This includes gravel reserves, rental lands and about 30 percent of the Railroad's right-of-way. The rest of the Railroad's land holdings -- 29,000 acres -- may also be affected because Native Region Corporations have filed claims for virtually all these other lands, and we expect strong attempts will be made to extend the standards established by the Final Rule to those other claims.

DOT believes the Final Rule represents a misunderstanding of the legislative history of ANCSA and will result in an incorrect application of the act to the Alaska Railroad. At the time ANCSA was enacted, it was the understanding of DOT that the definition of "public lands" excluded from selection most of the Railroad's land holdings because the Railroad actually uses its lands to operate, to generate traffic, to produce revenue and to provide materials for maintenance. It was on the basis of this understanding that DOT did not object when the enrolled bill that became ANCSA was signed into law in 1971. In commenting on the enrolled bill, the DOT General Counsel indicated that DOT had no objection to the bill for the very reason that the property rights of the Railroad would not be disturbed.

The legislative history of ANCSA is completely devoid of any evidence that Congress intended the land holdings needed to support the Railroad to be available for Native selection. In fact, the opposite conclusion can be drawn from a statement by Congressman Nick Begich (D. Alaska) when he explained to the House of Representatives the meaning of the Conference Committee Report which was later adopted:

> "The Act protects all presently existing property rights for all citizens... Presently existing Federal services ...are continued intact."
> 117 Cong. Rec. 46789 (Dec. 14, 1971)

Statements by other members of Congress who were active in shaping the legislation have supported the view that Congress did not intend to allow such Railroad lands to be selected. In a letter to the Chief Counsel of the Railroad, former Congressman Lloyd Meeds reiterated this view:

> "As a member of the House which passed the bill and the Conference Committee which worked out the differences between the House and Senate versions, it is clearly my recollection that there was no intention to deprive the Alaska Railroad of any of its land either actual or potential."
> (Letter dated February 5, 1979, copy enclosed)

Congressman Morris Udall also stated that ANCSA was not intended to allow Native claims to weaken the economic viability of the Railroad. During House consideration of amendments to ANCSA in May 1979, he said:

> "...the Secretary of the Interior should recognize the unique status of the Alaska Railroad as a commercial enterprise performing a typically nongovernmental function. The Railroad is structured like a business and does not receive an appropriation for operating expenses. It competes with other forms of transportation and its rates are regulated by the Interstate Commerce Commission. The Secretary should not allow any conveyance of Railroad lands that would prevent its continued operations or otherwise increase the cost to the Government to operate the Railroad."
> (125 Cong. Rec. H 3299 (1979))

Another member of Congress at the time ANCSA was enacted, Senator Howard Cannon, shares the view that Native selection of these Railroad lands is contrary to the intent of Congress. In a letter to Chairman Henry Jackson, Senator Cannon expressed his concern about pending approvals of Native selections of Railroad land:

> "These lands are being approved on the grounds that the property is not being 'actually used' by the Railroad but used by others or held for future use. Such a result is clearly inconsistent with the Railroad's specific grant of power to hold lands for future use and to lease lands given to it in the Alaska Railroad Enabling Act. It is also inconsistent with the Railroad's mandate to operate as a business enterprise and will result in both curtailment of service to the people of Alaska and the need for Federal operating subsidies -- a result certainly not

contemplated by the Congress upon passage of the Alaska Native Claims Act."
(Senator Cannon letter to Senator Jackson, October 11, 1979, copy enclosed)

We believe that the Final Rule is contrary to the plain meaning and purpose of section 3(e) of ANCSA as well as the Congressional intent that the act not impede existing federal activities in Alaska. It represents an exceedingly narrow view of what constitutes actual use of land by a federal agency and would prevent the Railroad from fulfilling its statutory obligation to operate as a commercial enterprise. Once implemented, the Final Rule would force the Railroad to curtail services and change its character from a self-sustaining business enterprise to a subsidized activity. This would destroy the normal business incentives to operate efficiently and would require progressively greater government subsidies in the future. Furthermore, there is no reason why the Railroad should be so adversely affected by Native selection. The Railroad's relatively small land holdings are not needed to satisfy Native entitlements under ANCSA; and the act can reasonably, and more correctly, be interpreted to exclude from Native claims land that is used by the Railroad in the same way that other railroads use land.

Because the Final Rule does not become effective until November 21, 1980, it should be changed at this time before the detailed actual use determination process begins.

Accordingly, I urge you to withdraw the Final Rule and issue an amended rule that will not adversely affect the Alaska Railroad. Changing the Rule as suggested in DOT's earlier comments would allow the Railroad to continue meeting its statutory responsibilities and be consistent with the legislative intent of Section 3(e) of ANCSA.

Sincerely,

ORIGINAL SIGNED BY

Neil Goldschmidt

Enclosures

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 22 1980

Honorable Neil Goldschmidt
Secretary of Transportation
Washington, D.C. 20590

Dear Neil:

We have received your November 20, 1980, petition for reconsideration of the final rulemaking published by the Department of the Interior on October 22, 1980, implementing section 3(e) of the Alaska Native Claims Settlement Act (ANCSA).

The rulemaking was first published as proposed rulemaking in the Federal Register (44 F.R. 54254 on September 18, 1979). During the many months between the publication of the proposed rulemaking and the publication of the final rulemaking, careful and thorough consideration was given to all comments received. Extensive and frequent discussions took place throughout the entire rulemaking process between the Department of Transportation and the Department of the Interior on all the information contained in your petition for reconsideration. The provisions of section 3(e) apply to all Federal agencies except national park and national defense lands and, accordingly, the regulations were written to reflect this. The fact remains that there are no exceptions in the language of section 3(e) of the ANCSA which specifically exempt Alaska Railroad land.

Although the preamble to the final rulemaking outlined our reasoning on the issues to which you referred in your letter, let me further clarify the matter of the railroad right-of-way. First, the railroad right-of-way will be protected as a section 17(b) easement on Native conveyances. The ANCSA does not provide us with the authority to specifically reserve a right-of-way under the railroad enabling act of March 12, 1914, but the reservation under the section 17(b) easement provision will protect the railroad's interest. Second, the conveyance of lands to the Native corporations with a reservation of an easement for the railroad is consistent with standard practices in all other types of conveyance (i.e., State and private lands).

I urge you to give the regulations time to be implemented to determine if indeed there will be specific impacts on railroad lands. Our preliminary review of the section 3(e) lands in question indicates only a modest impact

on railroad lands. Finally, no new issues have been raised, or factual information provided, that lead me to believe the railroad is exempt from this law.

As a result of the review of the final rulemaking and the information presented and analyzed, I find it necessary to deny the petition for reconsideration.

Sincerely,

SECRETARY

OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

GENERAL COUNSEL

NOV 19 [illegible]

Mr. Frank Gregg
Director, Bureau of Land
Management
1800 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Gregg:

The Department of Transportation (DOT) has serious concerns about the proposed regulations published by the Department of Interior on September 18, 1979, at 44 Fed. Reg. 54254 to implement section 3(e) of the Alaska Native Claims Settlement Act (43 USC 1602(e)). Section 3(e) exempts from the definition of public lands available for Native selection land actually used in connection with the administration of any Federal installation.

Section 3(e) is a statutory basis for exempting from Native selection various DOT properties in Alaska, particularly the land holdings needed to operate the Alaska Railroad, an agency of DOT. However, the proposed regulations adopt a narrow view of what constitutes actual use by a federal agency. The proposed regulations could severely damage the Alaska Railroad as an economically viable railroad by allowing Native selection of significant parts of the Railroad's right-of-way, gravel reserves and leased lands. These losses would prevent DOT from fulfilling its statutory responsibilities under the Alaska Railroad Act (43 U.S.C. 975 et. seq.). This result would be contrary to the Congressional view that the Secretary of Interior "should not allow any conveyance of Railroad lands that would prevent its continued operations or otherwise increase the cost to the Government to operate the Railroad." (125 Cong. Rec. H3299 (1979) Remarks of Rep. Udall)

Since the Native Claims Act was enacted in 1971, various DOT lands in Alaska have been conveyed to Native Corporations, including parts of the Alaska Railroad, without the benefit of regulations. Uniform standards are needed to determine which federal lands are actually used and, therefore, not available for selection. However, the proposed regulations should be substantially revised to reflect accurately the intent of Section 3(e) and to recognize the unusual use of land held by the Alaska Railroad.

DOT's comments are organized in three parts. The first part deals with general issues that appear throughout the regulations. The second part is a discussion of the four categories of land presented in the regulations as examples of actually used land, and the third part considers several specific provisions in the regulations.

Part I. General Issues

Agency Operated as a Commercial Enterprise:

DOT's primary concern is the failure of the regulations to recognize that the Alaska Railroad, even though it is a Federal installation, is required to be operated as a commercial enterprise. The Railroad actually uses its land holdings in different ways than typical government agencies. The regulations should define as actually used those land holdings that are the business assets of a federal agency, such as the Alaska Railroad, that is operated on a self-sustaining basis. This is a legitimate distinction under the Native Claims Act. The purpose of section 3(e) was to keep federal activities intact. For the Railroad, that means continuing to hold land necessary to operate as a viable economic entity. There are several bases on which the Railroad could be distinguished from other federal agencies. The Railroad Enabling Act assigns to the Railroad the normal duties of a common carrier and provides authority for the Railroad to use the proceeds from the sale or lease of its lands to pay operating expenses. Agencies that are operated as a commercial enterprise need land holdings similar to comparable private businesses. To determine the actual use of land by the Alaska Railroad the analogy should be a typical private railroad, not a typical government agency. Unlike a typical government agency, the Railroad does not customarily receive an appropriation for operating expenses. It has operated for the past 40 years without an operating subsidy.

The Railroad's lands form an important part of its revenue base and are essential to its economic viability. Loss of significant lands would change the character of the Railroad from a self-sustaining transportation system to a subsidized activity. This could destroy the normal business incentives to operate efficiently and could require progressively greater government subsidies in the future. Moreover, the Railroad would be less attractive to a private buyer or the State of Alaska because it could no longer operate on a break-even basis.

Date of Actual Use

A second general concern is language throughout the regulation that would allow the pool of public lands available for Native

selection to be expanded during the selection period. We can find no authority in the Native Claims Act for expanding the selection pool after December 18, 1971, the date of enactment of the Native Claims Act. Section 11(a)(1) designates public lands for Native selection as of that date. If lands were actually used by a federal agency on that date, they are not public lands that were placed in the selection pool. The only concern of the Secretary of Interior should be to determine actual use on December 18, 1971, not what an agency does with its lands after that date. There are several examples where expanding the public land pool during the selection period would injure the Alaska Railroad. Any gravel pit that was actually used on December 18, 1971, and became exhausted after that date would become public land eligible for selection under the proposed regulations even though it may have value to the Railroad for industrial development or other Railroad uses. Leased land that had a break in its lease or a changed use during the selection period could also become public land available for selection even though it was generating traffic and/or revenue for the Railroad in 1971, and still does.

A provision should be added to limit the section 3(e) determination to the actual use on December 18, 1971, and the following provisions should be deleted from the proposed regulations because they allow a determination based on actual use after that date: section 2655.1(c), section 2655.2(e) and the last clause in section 2655.2(c).

Land Held for Future Needs

The proposed regulations request comments on whether the term "actually used" should include land held for future needs. DOT believes that in the unique case of the Alaska Railroad land actually used by the Railroad under section 3(e) includes land held for future needs. In enacting section 3(e) Congress intended to ensure that sufficient lands would be retained to continue Federal programs in the future. A member of the Conference Committee that reported the Native Claims Act explained to the House of Representatives that "Presently existing Federal services...are continued intact." (Cong. Rec. 46789 (Dec. 14, 1971) Remarks of Rep. Begich) In our view, Congress did not intend agencies to discontinue their current activities once the land resources necessary to support those activities are exhausted. The Alaska Railroad would be unable to implement its mission in the future if the land resources that are held to continue that mission are transferred to Native Corporations. In order to operate in the future, the Railroad could find itself in the position of requesting appropriations to buy back the same land resources that had been conveyed to Native Corporations. The obligation to operate the Alaska Railroad will continue beyond the life of its active gravel pits. Additional gravel reserves and other support lands have been reserved for continued self-sustaining operations in the future.

At a minimum, the regulations should define as actually used those lands that were held by an agency on December 18, 1971, to continue existing activities in the future. For an agency like the Alaska Railroad, that operates on a self-sustaining basis, those lands that formed part of the revenue base of the agency on December 18, 1971, should be considered as actually used whether they were in active use in 1971 or held for future needs.

Part II. Categories of Land Exempt from Selection

The proposed regulations list four categories of land that will be considered as actually used by an agency. A discussion of each category follows:

Category 1 - "Lands necessarily used for prudent and reasonable action in support of a federal agency program on December 18, 1971"

In contrast to other sections of the regulations, this provision correctly recognizes that a determination of actual use is based on an agency's use of land on December 18, 1971. As discussed above, DOT believes this is consistent with the Native Claims Act and should be followed throughout the regulations.

DOT also suppports the "prudent and reasonable" standard adopted under this category, but we believe other provisions are inconsistent with this standard. In particular, the first paragraph of section 2655.0-5 refers to the "least amount" of land as exempt from selection. The amount of land necessary for prudent and reasonable actions by an agency would generally be greater than the least amount of land that could possibly be used by that agency. DOT recommends that the "least amount" standard be eliminated where it appears and the "prudent and reasonable" standard substituted throughout the regulations. This change would be compatible with section 3(e) which uses the word "practicable" to describe land used by an agency.

Although DOT generally agrees with this category, we believe it would be substantially improved by the addition of language that specifically recognizes the statutory mission of an agency as a valid and necessary basis on which to judge actual use of its lands. Actual use should include land that was held on December 18, 1971, that was needed for prudent and reasonable actions by the agency to support its statutory mission and land that was held on that date for future actions that will be necessary for the agency to continue to fulfill its statutory mission.

Category 2 - "Lands necessary to provide a reasonable buffer zone with respect to adjacent properties"

This provision would require the Railroad to justify the width of its right-of-way at each location of the railbelt where a Native claim is filed. It would allow Interior officials to make what is essentially a transportation judgment as to the proper width of the right-of-way. DOT can see no reason why it is necessary to subject the Railroad's right-of-way lands to this detailed section 3(e) determination. The right-of-way is 200 feet wide which is not unusual for an operating railroad. There is language in the Railroad Enabling Act that reserves a right-of-way of this width and an 1898 statute (30 Stat. 409) establishing rights-of-way for private railroads in Alaska, some of which are now part of the Alaska Railroad, specified a 200-foot right-of-way. Private railroads in the western United States have rights-of-way that vary from 100 feet to 400 feet wide, but 200 feet is considered desirable from an engineering and safety point of view, particularly for the rugged terrain and severe climate conditions in Alaska.

This category should be revised to include the existing Railroad right-of-way as an example of land that is actually used as a buffer zone. There is both a statutory and practical basis for recognizing the existing right-of-way as an example under this category.

Unless this revision is made, the regulations could result in protracted administrative proceedings over claims for right-of-way lands, and the Railroad could end up with a right-of-way of varying widths along the railbelt. This result could cause serious operational and safety difficulties for the Railroad and prove to be dangerous to any private development within the existing right-of-way.

Category 3 - "Lands used by a non-governmental entity or private person for a use that has a direct and necessary connection to the mission of the Federal agency"

Interior does not include in this category any Railroad leased lands that are used solely to generate income nor any leased land that had a gap in its lease or a changed use during the selection period. As indicated above, DOT questions the statutory authority for determining actual use on the basis of a change in lease status after December 18, 1971. A more serious problem with this category is that it constitutes a prejudgment by Interior that the Alaska Railroad's leasing of land to obtain revenue is not an actual use. The Railroad has specific statutory authority to lease its lands. Generating

revenue directly supports its statutory mission. By pre-judging Railraod leased lands, Interior would deny the Railroad the opportunity to show that revenue-generating lands have a direct and necessary relationship to the mission of the Railroad and are therefore actually used under the language of this category.

Therefore, this category should be revised to reflect the uniqueness of the Railroad by recognizing that leased lands are an important source of rail traffic and lease revenue. Lands that are between leases or were being prepared for leasing during the selection period form part of the revenue base of the Railroad. As in any business, land holdings are developed and leased when it is most advantageous to do so. All leased lands -- actual and potential -- whether they generate rail traffic or revenue, or both, are assets of the commercial railroad enterprise and are actually used in that sense.

Category 4 - "Lands used on December 18, 1971, and continued in use as a source of gravel or other materials used by the Federal installation but not where the gravel or other material is sold to produce revenue"

Under this category, Interior would consider gravel reserves as actually used only to the degree they are needed by the agency in the immediate future. This provision would not allow an agency to retain gravel reserves for long-term needs. It could signficantly reduce the present gravel reserves of the Alaska Railroad, leaving the Railroad with inadequate resources for long-term maintenance needs and emergencies, which are quite common given the extreme tides and severe weather conditions along the railbelt.

DOT believes this provision is based on an unreasonably narrow interpretation of Section 3(e). The purpose of a gravel reserve is to provide material for future needs. It is impossible to know when or where gravel will be needed, and a prudent railroad attempts to have adequate resources at various locations along the rail line. A more reasonable construction of section 3(e) would be to treat land held on December 18, 1971, as gravel reserves as land actually used for a gravel reserve.

Part III. Specific Provisions

Lands Subject to Actual Use Determination

The first paragraph of section 2655.1(a) states that 3(e) actual use determinations apply to federal lands that have been withdrawn for selection under sections 11(a) and 16(a).

DOT believes this section is based on an incorrect interpretation of the Native Claims Act. Sections 11(a) and 16(a) withdrew public lands for Native selection. The term "public lands" is defined by section 3(e) to exclude lands actually used by a federal agency. Therefore, lands actually used by an agency could never be withdrawn for selection.

Section 2655.1(a) has reversed this statutory scheme by allowing withdrawal and selection of actually used land that was intended by section 3(e) of the Act to be excluded from the withdrawal and selection process altogether. This provision reflects the questionable procedure Interior has been following in the past of allowing Native selection of agency land to take place before an actual use determination has been made.

To be consistent with the Act, section 2655.1 of the regulations should be revised to state that federal agency land is not withdrawn for selection until it has been determined to be public land under section 3(e). Unless this change is made, all federal agency land in Village selection areas will be classified as withdrawn for selection until the 3(e) determination process is completed. Federal agencies will be unable to properly manage their land holdings in these areas because the Native Claims Act directs the Secretary of Interior to manage any federal lands that have been withdrawn for selection. Moreover, any proceeds derived from withdrawn lands are to be paid into an escrow account established by section 2(a) of P.L. 95-204. This would create an impossible situation for the Alaska Railroad, which is required to use the proceeds from its land holdings to cover operating expenses.

Easements

DOT questions the authority of the Secretary of Interior to determine that an agency may retain only an easement instead of full fee title to land that it actually uses.There is no authority under section 3(e) for the Secretary to determine that the agency actually uses a lesser interest in land than its present rights to that land. The only authority for the Secretary to designate easements is section 17(b) of the Act. Section 17(b) applies to public lands that have been selected by Village Corporations. Land actually used by an agency is not public land and therefore could not be validly selected. Subsection 2655.2(c)(2) of the proposed regulations improperly applies the section 17(b) easement authority to the section 3(e) actual use determination process. Under Subsection 2655.2(c)(2) the Secretary could convey title to land even after it had been determined to be actually used, leaving the agency with only an easement across the land. This is contrary to the clear meaning of section 3(e) that exempts from selection land that is actually used by an agency. The

language in subsection 2655.2(c)(2) allowing the Secretary to designate an easement should be deleted, and new language should be added to ensure that the United States will retain full fee title to any land that is actually used by an agency.

Regional Corporation Selections Subject to Section 3(e) Determination

As presently written, section 2655.1(b) of the regulations is vague as to the relationship between the 3(e) determination process and the selection pool authorized by P.L. 94-204 for the Cook Inlet Region Corporation. New language should be added to clarify this relationship.

The following language is consistent with the Department of Interior's policy on this issue and should be inserted at the end of subsection 2655.1(b):

"In establishing eligibility of land for inclusion in the selection pool under Part I.C(2) of the document entitled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" (authorized by Section 12, P.L. 94-204) only those lands withdrawn by section 11(a)(1) and not validly selected by a Village Corporation are subject to a determination under section 3(e)(1) of the Act or this subpart."

We understand the Department of Interior's desire to complete the process of land selection under the Native Claims Act. We share your concern for prompt settlement of Alaska Native Claims for Federal lands. However, we also have a statutory responsibility to operate the Alaska Railroad and would appreciate your consideration of our comments as you revise these regulations.

Attached is a copy of the proposed regulations with DOT's comments noted as specific changes.

Sincerely,

/s/

Mark Aron
Deputy General Counsel

Enclosure

DEPARTMENT OF TRANSPORTATION COMMENTS ON
PROPOSED REGULATIONS TO IMPLEMENT SECTION 3(e) OF
THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Under the authority of the Alaska Native Claims Settlement Act of 1971, as amended, (43 U.S.C. 1601 et seq.), it is proposed to add a new Subpart 2655 to Part 2650, Group 2600, Subchapter B, Chapter II, Title 43 of the Code of Federal Regulations as set forth below:

Subpart 2655—Federal Installations

§ 2655.0–3 Authority.

Section 3(e)(1) of the act provides that the Secretary shall determine the smallest practicable tract enclosing land actually used in connection with the administration of ~~certain~~ Federal installations in Alaska.

Substitute: "any"

§ 2655.0–5 Definitions.

As used in this subpart, the term "the smallest practicable tract enclosing land actually used in connection with the administration of any Federal installation" means the ~~least~~ amount of ~~public~~ lands, improved or unimproved, actually used by a Federal agency on December 18, 1971, and needed by the agency to continue to carry out its mission as established by statute.

delete

delete - (inconsistent with definition of "public lands" in section 3(e))

(a) Lands actually used by a Federal agency include, but are not limited to:

(1) Lands necessarily used for prudent and reasonable action in support of a Federal agency program on December 18, 1971; or

(2) Lands necessary to provide a reasonable buffer zone with respect to adjacent properties; or

(3) Lands used by a non-governmental entity or private person for a use that has a direct and necessary connection to the mission of the Federal agency; or

(4) Lands used on December 18, 1971, and continued in use as a source of gravel or other materials used by the Federal installation directly in connection with its operation, but not where the gravel or other material is sold to produce revenue. The extent of a gravel pit that may be reserved under this criterion shall be determined based on an evaluation of such factors as the agency's previous history of use of the site, the extent of the area disturbed, and the projected prudent and reasonable needs of the agency for the material at that location in the immediate future. The actual use of areas from which material is extracted includes a reasonable extension, as determined by the Director, of present use into areas where the material is available, but does not include past use of areas from which the material has been exhausted.

(b) Lands shall not be considered actually used where they are used solely by the agency to derive revenue from them through a lease, permit, or other means. Where the lease or other means has some direct, necessary and substantial relationship to the mission of the agency, the fact that it incidentally provides revenue shall not make the lands to which the lease applies public lands available for Native selection.

§ 2655.1 Lands subject to determination.

Applicability of determinations: (a) Lands withdrawn by section 11(a)(1) or 16(a) of the act and subsequently selected by a village or regional corporation under section 12 or 16 are subject to a determination made under this subpart.

(b) Lands in the National Park Systems, lands withdrawn or reserved for national defense purposes, and those former Indian Reserves elected under section 19 of the act are not subject to a determination under section 3(e)(1) of the act or this subpart. Lands withdrawn under section 11(a)(3) or 14(h) do not include lands withdrawn or otherwise appropriated by a Federal agency and, therefore are not subject to a determination under section 3(e)(1) of the act or this subpart.

(c) Lands shall be subject to conveyance under section 3(e) of the act

Substitute:
"(1) Lands held by a Federal agency on December 18, 1971, for prudent and reasonable actions in support of its program and needed to fulfill its statutory mission."

Add: "The existing Alaska Railroad right-of-way is an example of actually used land under this criterion;"

Delete

Substitute:
"This includes reserves of gravel, rock & other materials that are prudent and reasonable for the future needs of the agency."

Add:
"(5) Lands held on December 18, 1971, by a Federal agency that is operated as a commercial enterprise that are prudent and reasonable for continued self-sustaining operation."

Add:
"unless the agency is authorized to spend the revenue for operating expenses."

Substitute:
"Federal agency lands located within areas withdrawn by section 11(a)(1) or 16(a) and"

Add:
"Federal agency land is not available for selection until it has been determined to be public land under section 3(e) of the act and this subpart."

Add: "In establishing eligibility of land for inclusion in the selection pool under Part I.C(2) of the document entitled "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" (authorized by Section 12, P.L. 94-204) only those lands withdrawn by section 11(a)(1) and not validly selected by a Village Corporation are subject to a determination under section 3(e)(1) of the Act or this subpart."

and this subpart only if it can be determined that they were public lands during the selection periods as follows:

(1) The period for selections under sections 12(a) and 16(b) of the act was December 18, 1971, through December 18, 1974.

(2) The period for selections under sections 12(b) and (c) of the act was December 18, 1971, through December 18, 1975.

(3) The period for selections for Cook Inlet Region, Inc., has been extended under Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area; section 12 of the Act of January 2, 1976, as amended by section 3 of the Act of October 4, 1976, as further amended by section 3(a) of the Act of November 15, 1977 (43 U.S.C. 1611), as further amended by the Act of August 14, 1979, until July 15, 1980.

Substitute: "on December 18, 1971."

§ 2655.2 Determination procedures.

The Director, Bureau of Land Management, shall make the determination as to the smallest practicable tract. Where sufficient information has not already been provided, the Director shall issue written notice to the holding agency requesting information to be used in making the determination.

Add:
"enclosing land actually used in connection with the administration of any Federal installation."

(a) The information to be provided by the holding agency shall include the following:

(1) The function and scope of the installation;

(2) A plottable legal description of the lands actually used;

(3) A list of structures or other alterations to the character of the lands and their function and date of construction;

(4) A description of the use and function of any unaltered lands; and,

(5) A list of any rights, interests or permitted uses the agency has granted to others, including other Federal agencies.

(b) If available, site plans, drawings and annotated aerial photographs delineating the boundaries of the installation and locations of the areas acutally used as of December 18, 1971, shall be included.

(c) A narrative explanation stating when Federal use of each area began; what use was being made of the lands as of December 18, 1971; whether any action has taken place between December 18, 1971, and the end of the appropriate selection period that would reduce the area needed, and the date this action occurred.

Delete

(1) The burden of proof of actual use in on the Federal agency claiming it.

(2) Where adequate showing of acutal use has been made, the determination

shall be in favor of the agency retaining full fee title to the lands. However, an easement may be reserved in lieu of full fee title where the Director determines that an easement affords sufficient protection, that an easement is customary for the particular use and that it would further the objectives of the act. Since lands conveyed subject to an easement shall be charged against the Native corporations' entitlements, the Native corporations shall be consulted for their views.

Delete

(d) The written notice shall provide that the information requested be furnished within 90 days from the receipt of the notice. A determination of the smallest practicable tracts shall be made based on the information available in the case file. Lacking adequate information to the contrary, all lands selected shall be transferred to the selecting Native corporation.

(e) If any portion of the lands which was used on December 18, 1971, is determined by the Director to be no longer in actual use by the original agency or any other agency which is continuing the same function at the end of the appropriate selection period, that portion shall be public lands available for transfer to the selecting Native corporation.

Delete

(f) Upon adequate and justifiable showing by the holding agency, the State Director, Bureau of Land Management, Alaska, may grant time extensions up to 90 days to provide the information requested in this subpart. Such requests shall be received by the State Director within 90 days of receipt of the notice by the holding agency and such request shall provide a complete and satisfactory explanation as to the need for an extension.

(g) The Director shall also request comments relating to the identification of lands in the installation from the selecting Native corporation.

(h) The results of the determination shall be incorporated into a Decision to Issue Conveyance to the Native corporation making the selection and a conveyance document shall be issued.

§ 2655.3 Adverse decisions.

(a) Any decision adverse to the holding agency or Native corporation shall become final unless appealed to the Alaska Native Claims Appeal Board in accordance with 43 CFR Part 4, subpart J. If a decision is appealed, the Secretary of the Interior may take personal jurisdiction over the matter in accordance with 43 CFR Part 4.5. In the case of appeals from affected Federal agencies, the Secretary may take jurisdiction only upon written request from the appropriate cabinet level

official. The requesting official and any affected Native corporation shall be notified in writing of the Secretary's decision regarding the request for Secretarial jurisdiction and the reasons therefor. In the event the Secretary takes jurisdiction, his substantive decision and the reasons for it shall be communicated in writing to the requesting agency and any other parties to the appeal.

(b) When an appeal to a decision to issue conveyance is made by a holding agency and the basis of that appeal is that the Bureau of Land Management neglected to make a determination pursuant to section 3(e)(1) of the Act for property which was the subject of that decision to issue conveyance, then the matter shall be remanded by the Alaska Native Claims Appeal Board to the Bureau of Land Management for a determination pusuant to section 3(e)(1) of the Act.

September 12, 1978.

Guy R. Martin,

Assistant Secretary of the Interior.

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