

CHITINA NATIVE CORP.

IBLA 82-1161

Decided March 21, 1985

Appeal from decision of the Alaska State Office, Bureau of Land Management, reserving easements in decision to issue conveyance. AA-6653-A and AA-6653-B.

Affirmed in part as modified; reversed in part. Recommended decision of Administrative Law Judge L. K. Luoma adopted as decision of the Board.

1. Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements: Access -- Alaska Native Claims Settlement Act: Easements: Public Easements

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Where the evidence adduced at an evidentiary hearing shows that an easement does not qualify under sec. 17(b), BLM's decision seeking such an easement is properly reversed.

2. Administrative Procedure: Administrative Review -- Alaska Native Claims Settlement Act: Native Land Selections: Village Selections

Where the facts and law are comprehensively set forth in an Administrative Law Judge's decision recommending reversal of easements reserved under authority of sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Chitina Native Corporation (Chitina), a village corporation established pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601-1627, appealed a decision dated January 22, 1982, by the Alaska State Office, Bureau of Land Management (BLM), which determined to reserve certain public easements in conveyances of lands to Chitina, pursuant to the provisions of section 17(b) of the Act (43 U.S.C. § 1616(b)(3)).

By order of the Board dated September 15, 1982, the appeal was referred to the Hearings Division for assignment of an Administrative Law Judge to conduct a hearing on the propriety of and necessity for reservation of disputed easements in the conveyances to Chitina. The Board's order instructed the Judge to prepare a recommended decision and serve it on the parties, allowing each to respond to this Board within 30 days of receipt.

A hearing was held December 6-9, 1982, at Copper Center, Alaska, by Administrative Law Judge L. K. Luoma. On April 25, 1984, Judge Luoma issued a recommended decision holding that BLM's decision to reserve two disputed easements (site easement EIN 22 and trail easement EIN 17) should be rescinded. Judge Luoma also confirmed the terms of a stipulated settlement reached by the parties concerning the balance of the easements under appeal.

[1, 2] Neither BLM nor Chitina filed any response to the Administrative Law Judge's recommended decision. That opinion sets out a full summary of the testimony, relevant evidence, and applicable law, and arrives at a well-reasoned decision. With one exception we adopt the recommended decision as the final decision of the Board. <sup>1/</sup> A copy of the recommended decision is attached hereto.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the attached recommended decision of Administrative Law Judge Luoma is adopted as the final decision of the Board.

Wm. Philip Horton  
Chief Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

Will A. Irwin  
Administrative Judge

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<sup>1/</sup> That exception is the quotation on page 8 of the recommended decision from the order in Appeal of Goldbelt, Inc., ANCAB G 80-1 (Oct. 9, 1981), that a "decision to reserve easements must be affirmed unless the appellant shows by substantial evidence that such decision was arbitrary and capricious." This statement and one based on it in Northway Natives, Inc., 69 IBLA 219 (1982) were overruled in United States Fish and Wildlife Service, 72 IBLA 218, 220-21 (1983). The Board, on behalf of the Secretary, has plenary authority to review de novo all official actions and to decide appeals on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of public policy or public interest in cases involving the exercise of discretion. Id. at 220.

April 25, 1984

CHITINA NATIVE CORPORATION,	:	<u>IBLA 82-1161</u>
Appellant	:	(Formerly ANCAB VLS 82-1)
	:	
v.	:	Village Selection
	:	
BUREAU OF LAND MANAGEMENT,	:	Appeal from Decision of
Appellee	:	the Bureau of Land Management
:	:	Nos. AA-6653-A and AA-6653-B,
	:	dated January 22, 1982, as
	:	modified February 12, 1982

#### RECOMMENDED DECISION

Appearances: Paul W. Koval, Esq., Roberts and Shefelman,  
Anchorage, Alaska, for appellant;  
Robert Babson, Esq., Office of the Regional  
Solicitor, U.S. Department of the Interior,  
Anchorage, Alaska for appellee.

Before: Administrative Law Judge Luoma

By order dated September 15, 1982, the Interior Board of Land Appeals referred this matter to the Hearings Division for hearing and a Recommended Decision on the propriety and necessity for reservation of certain public easements in a conveyance of lands by the Bureau of Land Management (BLM) to the Chitina Native Corporation (Chitina). Pursuant thereto a hearing was held on December 6-9, 1982, at Copper Center, Alaska.

On September 4 and November 7, 1974, Chitina Native Corporation for the Native village of Chitina filed selection applications AA-6653-A and AA-6653-B, under the provisions of Sec. 12 of the Alaska Native Claims Settlement Act of December 18, 1971 (43 U.S.C. 1601, 1611) (ANCSA), for the surface estate of certain lands in the vicinity of Chitina, Alaska. By decision dated January 22, 1982, as modified February 12, 1982, the Alaska State Office of the BLM approved certain of the selected lands for interim conveyance (DIC) to Chitina, reserving to the United States a number of public easements pursuant to Sec. 17(b) of ANCSA (43 U.S.C. 1601, 1616(b)). On February 26, 1982, Chitina filed a notice of appeal from the DIC and in its statement of reasons, filed March 29, 1982, listed thirteen reservations of easements to which it objected alleging they were made in violation of law.

### SETTLEMENT

At the commencement of the second day of hearing the parties announced that an agreement had been reached to dispose of the appeal relative to all but two of the easements. Following is the disposition made:

1. EIN 1c  
Par. 2b., p. 13 of DIC  
Chitina withdrew its appeal (Tr. 217).
2. EIN 1d  
Par. 2c., p. 13 of DIC  
Chitina withdrew its appeal (Tr. 217).
3. EIN 8a  
Par. 2h., p. 14 of DIC  
Chitina withdrew its appeal based upon the agreement that the BLM will limit this float plane landing site easement to 350 feet of continuous lake frontage on First Lake and that the lake frontage will include the southernmost point on the shore line of the lake (Tr. 217-219).
4. EIN 18  
Par. 2j., p. 14 of DIC  
The BLM agreed to remove this trail easement from the DIC upon agreement of Ahtna Corporation to grant a substitute trail easement. This left Chitina with nothing to appeal (Tr. 219-220).

5. EIN 19  
Par. 2k., p. 14 of DIC  
This site easement is directly related to trail easement EIN 18, immediately above. Similar to the agreement on EIN 18 the BLM agreed to remove this site easement from the DIC, leaving Chitina with nothing to appeal (Tr. 220).
6. EIN 28L  
Par. 2m., p. 15 of DIC  
Chitina withdrew its appeal, based upon an understanding with Ahtna Corporation and the BLM (Tr. 221-222).
7. EIN 33E  
Par. 2n., p. 15 of DIC  
Chitina withdrew its appeal based upon the agreement that the BLM will retain a one-acre site easement at this location with river frontage limited to 300 feet, and furthermore that the river frontage of the site shall be adjacent to the northernmost boundary of the Alaska State right-of-way associated with the Chitina-McCarthy road (Tr. 222-225).
8. EIN 33a.E  
Par. 2o., p. 15 of DIC  
Chitina withdrew its appeal on the understanding that this road easement providing access to EIN 33E, above, will be located along an existing road (Tr. 225-226).
9. EIN 37  
Par. 2q., p. 15 of DIC  
The BLM agreed to remove this site easement from the DIC, leaving Chitina with nothing to appeal (Tr. 226).
10. EIN 29L  
P. 1, Feb. 12, 1982 modification of DIC  
Chitina withdrew its appeal based upon a relocation and redescription of this trail easement (Tr. 226-227).
11. EIN 36  
P. 2, Feb. 12, 1982 modification of DIC  
Chitina withdrew its appeal based upon the agreement with the BLM that this site easement will be relocated and limited in size to one-quarter acre, with no more than 100 feet of road frontage. Furthermore, camping will be specifically prohibited (Tr. 227-228).

12. EIN 1

Par. 2a., p. 13 of DIC

At the hearing Chitina's statement of reasons filed with its appeal was amended to include EIN 1 as part of its appeal (Tr. 53). This is a trail easement reserved for use in connection with site easement EIN 37. Since that site easement was removed from the DIC, above, trail easement EIN 1 was also removed, leaving Chitina with nothing to appeal (Tr. 228-229).

As stated above, Chitina withdrew its appeal with respect to some of the easements based upon the agreement of the BLM to make certain modifications in the easements. The parties understand that should the BLM fail to conform to the agreement with respect to any given easement Chitina may renew its appeal as to that easement (Tr. 229).

EASEMENTS REMAINING IN THE APPEAL

With the disposition made by agreement, above, only two easements remain in controversy. They are site easement EIN 22, set out in par. 21, p. 14 of the DIC and trail easement EIN 17, par. 2i., p. 14 of the DIC. EIN 22 is described, partially, in the DIC as a three-acre site easement upland of the high water mark on the right bank of the Copper River at the mouth of O'Brien Creek. The uses allowed, according to the DIC, are: vehicle parking (e.g., aircraft, boats, ATV's, snowmobiles, cars, trucks), temporary camping, and loading or unloading. Temporary camping, loading, or unloading shall be limited to 24 hours. EIN 17 is described, partially, in the DIC as an easement 50 feet in width for an existing road which connects the site easement to an existing state highway right-of-way. The uses allowed, according to the DIC, are: travel by foot, dog sled, animals, snowmobiles, two and three-wheel vehicles, small and large all-terrain vehicles, track vehicles, four-wheel drive vehicles, automobiles, and trucks.

APPLICABLE LAW

Under section 17(b) of ANCSA, 43 U.S.C. § 1616(b), the Secretary of the Interior is authorized and directed to reserve certain public easements across lands selected by Village Corporations and Regional Corporations and at periodic points along the course of major waterways. That section reads, in pertinent part:

(b)(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.

\* \* \*

(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 breadth of this authority was first interpreted in Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977) and later more particularly defined by section 903(a) of the Alaska National Interest Lands Conservation Act of December 2, 1980 (ANILCA), 43 U.S.C. § 1633(a), which reads:

With respect to lands conveyed to Native Corporations or Native Groups the Secretary shall reserve only those easements which are described in section 17(b)(1) of the Alaska Native Claims Settlement Act and shall be guided by the following principles:

(1) all easements should be designed so as to minimize their impact on Native life styles, and on subsistence uses; and

(2) each easement should be specifically located and described and should include only such areas as are necessary for the purpose or purposes for which the easement is reserved.

The implementing Departmental regulations, 43 CFR, Subpart 2650, properly reflect the statutory authority and court interpretation. For ease of reference the relevant regulations follow:

§ 2650.4-7 Public easements.

(a) General requirements. (1) Only public easements which are reasonably necessary to guarantee access to publicly owned lands or major waterways and other public uses which are contained in these regulations \* \* \* shall be reserved.

\* \* \*

(3) The primary standard for determining which public easements are reasonably necessary for access shall be present existing use. However, a public easement may be reserved absent a demonstration of present existing use only \* \* \* if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract area of publicly owned land. When adverse impacts on Native culture, lifestyle, and subsistence needs are likely to occur because of the reservation of a public easement, alternative routes shall be assessed and reserved where reasonably available. The natural environment and other relevant factors shall also be considered.

(4) All public easements which are reserved shall be specific as to use, location, and size. Standard sizes and uses which are delineated in this subsection may be varied only when justified by special circumstances.

\* \* \*

(b) Transportation easements (1) Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native Corporations. \* \* \* If public easements are to be reserved, they shall:

(i) Be reserved across Native lands only if there is no reasonable alternative route of transportation across publicly owned lands.

\* \* \*

(2) Transportation easements shall be limited to roads and sites which are related to access. The use of these easements shall be controlled by applicable Federal, State, or municipal corporation laws or regulations. The uses stated herein will be specified in the interim conveyance and patent documents as permitted uses of the easement.

\* \* \*

(3) Site Easements. Site easements which are related to transportation may be reserved for aircraft landing or vehicle parking (e.g., aircraft, boats, ATV's, cars, trucks), temporary camping, loading or unloading at a trail head, along an access route or waterway, or within a reasonable distance of a transportation route or waterway where there is a demonstrated need to provide for transportation to publicly owned lands or major waterways. Temporary camping, loading, or unloading shall be limited to 24 hours. Site easements shall not be reserved for recreational use such as fishing, unlimited camping, or other purposes not associated with use of the public easement for transportation. \* \* \* Before site easements are reserved on transportation routes or on major waterways, a reasonable effort shall be made to locate parking, camping, beaching, or aircraft landing sites on publicly owned lands; particularly, publicly owned lands in or around communities, or bordering the waterways. If a site easement is to be reserved it shall:

(i) Be subject to the provisions of paragraphs (b)(1) (ii), (iii), (vi), (xii), (xiii), and (xiv) of this section.

\* \* \*

(iv) Be reserved only at periodic points on major waterways. Uses shall be limited to those activities which are related to travel on the waterway or to travel between the waterway and publicly owned lands. Also, periodic site easements shall be those necessary to allow a reasonable pattern of travel on the waterway;

\* \* \*

§ 2650.0-5 Definitions.

\* \* \*

(o) "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. Significant use means more than casual, sporadic or

incidental use by watercraft, including floatplanes, but does not include use of the waterbody in its frozen state by snowmobiles, dogsleds or skiplanes. Designation of a river or stream as a major waterway may be limited to a specific segment of the particular water body.

(p) "Present existing use" means use by either the general public which includes both Natives and non-Natives alike or by a Federal, State, or municipal corporation entity on or before December 18, 1976, or the date of selection, whichever is later. Past use which has long been abandoned shall not be considered present existing use.

\* \* \*

(r) "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.

In addition to these regulations we are bound by certain procedural rulings made by the then Alaska Native Claims Appeal Board 1/ in the case of Appeal of Goldbelt, Inc., ANCAB G 80-1 (October 9, 1981). They are:

1. When an appellant appeals a BLM easement determination made pursuant to ANCSA and its enabling regulations, the burden of proof is upon the party challenging the determination to show that the determination is erroneous.
2. A decision to reserve easements must be affirmed unless the appellant shows by substantial evidence that such decision was arbitrary and capricious. Any agency action inconsistent with the statutory and regulatory easement criteria would be arbitrary and capricious.

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1/ ANCAB was terminated and its functions transferred to the Interior Board of Land Appeals by Secretarial Order No. 3078, dated April 29, 1982.

3. In light of the clear and unambiguous definition of "present existing use" in 43 CFR 2650.0-5(P), any activities which took place after December 18, 1976, are not to be considered in determining present existing use under 43 CFR 2650.4-7(a)(3).

See also, Northway Natives, Inc., 69 IBLA 219 (December 17, 1982).

#### EVIDENCE PRESENTED

In light of the settlement reached as to most of the easement reservations as set forth above, the following recitation of testimony and evidence produced will be limited mainly to that which relates to easements EIN 17 and EIN 22.

At the hearing BLM Exhibits 1 through 14 and Chitina Exhibits A through M were received in evidence. In addition the parties agreed that certain court documents involved in a United States District Court case styled Alaska Conservation Society, et al. v. William T. Coleman, et al., No. A-33-73, not then available to counsel, should be received in evidence by submission with post-hearing briefs (Tr. 474-476). Counsel for Chitina submitted with its brief a document entitled Stipulation and Order for Dismissal with an attached Agreement of Compromise and Settlement. This is received in evidence as Exhibit N. Counsel for the BLM submitted a document entitled Third Amended Complaint for Injunction and for Declaratory Relief. This is received in evidence as Exhibit 15.

For the purpose of giving general background information, Mr. Terry R. Hassett, BLM's chief of the Branch of Easement Identification, Anchorage, Alaska, was the first witness to testify. He described generally the land status in the selection area and the location and description of the various easements reserved, all as depicted on a large U.S.G.S. map, in evidence as Exhibit 1. Mr. Hassett's testimony relating specifically to EIN 17 and EIN 22 was given after completion of Chitina's presentation.

The first witness to testify for Chitina was Ms. Mildred Buck, chairperson of the Board of the Chitina Native Corporation and its employee as land coordinator. She was born July 13, 1929, and raised in the village of Chitina and lived there continuously for 29 years. Since that time she

has resided in Anchorage but each summer would come back to Chitina where she still owns a home. She described the geographic relationship between the non-Native town of Chitina and the Native village of Chitina, the latter being owned by Chitina Native Corporation (Ex. A). To distinguish between the two communities they will be referred to herein as the town of Chitina and the village of Chitina, respectively. The town is located at the southern terminus of the Edgerton Highway, near the west bank of the Copper River. The village abuts the southern limits of the town (Exs. 1 and A). Extending southerly from the Edgerton Highway and running adjacent to the village is a narrow secondary road called the O'Brien Creek trail which connects with EIN 17 and EIN 22 at a point approximately five miles south of the village where O'Brien Creek enters the Copper River. This road lies over an abandoned railroad and is passable by ordinary motor vehicles, including trucks, campers and motor homes.

Ms. Buck said that in the 1940's, 50's and 60's the area of the two easements at O'Brien Creek was used by the Native people for subsistence fishing, trapping and woodcutting. They used fish wheels for catching fish. During this period she recalls no non-Native use of the area (Tr. 78-80). She said that non-Native use of the area began in 1974, about the time that the Chitina Native Corporation made its land selection. This non-Native use increased considerably in 1978 when the State of Alaska started permitting the use of dip nets for fishing 2/ in the O'Brien Creek area and closed the area to fish wheels, according to Ms. Buck. This brought about a heavy increase in vehicular traffic passing by the village of Chitina and on down the O'Brien Creek trail to EIN 22. This increased traffic created problems for the village, such as vandalizing of graves, building of fires, and general disturbance of the village (Tr. 81-87). However, she qualified her testimony to the extent that the vandalizing of graves took place at the old village of Taral, located across the Copper River from O'Brien Creek (Tr. 90, 118).

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2/ Dip net fishing involves the use of a flexible mesh basket attached to the end of a long pole. The fisherman, usually standing on the bank or near the shoreline rather than being in a boat, extends the basket into the stream anticipating that a salmon moving upstream will swim into the basket (Exs. B, C).

Ms. Buck testified that there is no need for a Copper River boat launching facility at EIN 22 because an adequate facility already exists off the Chitina-McCarthy road near the town of Chitina. This site is shown on Exhibit 1 as EIN 33, approved for reservation by the agreement set forth above. She said that O'Brien Creek has been used very little for boat launching and that EIN 33 is much better suited for that purpose because of better road access and ease of launching (Tr. 104-105).

The next witness called by Chitina was Charles H. Brannen who does carpentry and other work in and around Chitina. He has lived in the Chitina area for three years. He said he is familiar with the traffic that goes to O'Brien Creek because he lived on the road leading there for two years. He said he has never seen a boat launched at O'Brien Creek and that the primary launching site is by the Copper River Bridge, which is EIN 33 (Tr. 169-170).

Another witness testifying for Chitina was Martin Finnesand, president of the Chitina Native Corporation. He was born in Chitina in 1938 and lived there continuously until 1959. From 1959 to 1963 he lived and worked in Copper Center, not far distant from Chitina, and since has lived in Anchorage, Valdez, and again at Copper Center. Presently he is in Chitina at least once a week (Tr. 181-182). He said the primary boat launching site to the Copper River is at EIN 33, only one and one-half miles from Chitina. Boats are also launched at the Chitina airport, some five miles north of Chitina. He said he has seen only one boat launching at O'Brien Creek which is five miles south of Chitina. That was about one year ago (Tr. 188-190). He also said there is a State of Alaska campground or wayside located across the Chitina-McCarthy Highway from site easement 33. This is used by the public for camping (Tr. 195).

Mr. Finnesand stated that the State of Alaska banned the use of fish wheels in the O'Brien Creek area in 1978 and at the same time changed the dipnetting regulations to permit dipnetting there. This caused an increase in vehicular traffic going to O'Brien Creek for dip net fishing (Tr. 200-201).

Mr. Terry Hassett, who briefly testified previously, was recalled as a witness for the BLM. He related generally the process of notice and meetings that took place prior to issuance of the BLM State Director's decision which became the DIC (Tr. 240-259). He stated that the purpose of site easement 22 was to provide for parking, overnight camping, use as a trail head for walking downstream, dipnetting for fish in the Copper River, and for launching of boats into the Copper River, one of the State's navigable streams. He said the site was intensively used for these purposes by

not only local people but also by people from as far away as Fairbanks and Anchorage (Tr. 260-268; Ex. 5). He said dip net fishing is not done from the site easement itself but is done by people walking up and down the shoreline of the river on State-owned lands. Boats are not used for this fishing. He conceded that he doesn't specifically know of boat launching at site 22 and that most boat launching is done at the Chitina bridge at site 33 which is adequate to serve the public in the general area (Tr. 269, 320, 379-380). Concerning use of site easement 22 as a trail head Mr. Hassett said people park their cars there and walk south of O'Brien Creek along the existing Alaska State railroad right-of-way which runs along the Copper River all the way to Cordova on the coast. The approaches to the bridge crossing O'Brien Creek have washed out closing the bridge to vehicular crossing (Tr. 328-334).

Mr. Hassett described trail easement 17 as a means to connect site easement 22 to the existing state railroad right-of-way. This connection is only about 300 yards long (Tr. 271, 301; Ex. 8). He said if site easement 22 should fail then trail easement 17 would fail with it (Tr. 382).

The next witness called by the BLM was Mr. Kenneth Roberson, a fishery research biologist for the Alaska Department of Fish and Game, in charge of the Upper Copper River subsistence fishery. His testimony about the fishery and its use by the public follows. The fishery on the southern end begins at Haley Creek, some eight air miles south of Chitina (Ex. 1) and extends up the Copper River for over 100 miles. It is the largest single subsistence fishery in Alaska with respect to public participation (Tr. 390). The definition of subsistence fishing is that the fish is for personal use only, not for trade, sale or barter. Both fish wheels and dipnetting gear are used to capture the salmon. Virtually the entire dip net fishery is concentrated between the Chitina-McCarthy Bridge and Haley Creek and about one-half of that occurs below O'Brien Creek (Tr. 393). Fish wheeling was allowed in the entire area until 1980 at which time fish wheels were restricted to the area above the Chitina-McCarthy Bridge and dipnetting was restricted to below the bridge. The state began its permitting system for dipnetting and fish wheeling in 1960 and there has never been any restriction from that time on for dipnetting in the O'Brien Creek area.

The drastic increase of public use of the O'Brien Creek area for dip net fishing occurred in 1969, brought on by the upgrading of the 35 mile long Edgerton Highway which connects Chitina to the mainline Richardson Highway (Tr. 393-395). The magnitude and progression of the fishery is graphically shown by Exhibit 9, prepared by Mr. Roberson. The dip net catch of salmon in 1960 was 1,179, increasing to

8,040 in 1968, jumping drastically to 18,054 in 1969, and continuing at more or less constant levels until 1981 when it reached 28,872 and in 1982, 46,303. Likewise, the number of permits issued rose dramatically from 32 in 1960 to 5,496 in 1982. These figures cover the entire Upper Copper River fishery but about one-half result from dipnetting occurring in the O'Brien Creek area (Tr. 396). In determining the number of people using the fishery it is appropriate to multiply the number of permits issued by three people because permits are issued to families and they average out to three persons per permit (Tr. 397). As to the number of vehicles involved the number of permits issued should be multiplied by 80 to 90 percent, indicating that each vehicle accommodates more people than the people involved in a given permit (Tr. 398). Contrary to previous testimony that the fishery was almost exclusively a Native fishery up to the mid-1970's, Mr. Roberson said that from 1969 on the vast majority of participants in the dip net fishery were non-Natives and that about 20 percent of the participants in the fish wheel fishery were Natives (Tr. 399).

The season for the fishery each year is June 1 through September 30, with about 85 to 90 percent of participation being concentrated in a six-week period during June and the first one-half of July (Tr. 399). Most of dipnetting occurs downstream from EIN 22 at O'Brien Creek (Tr. 400).

Site 22 itself is used primarily for parking vehicles which include recreational vehicles, campers, sedans and all modes of transportation. As an example Mr. Roberson said that a photograph taken by him in 1974 (Ex. 10) shows 16 various types of vehicles and a trailer parked within site 22, which represents about the average numbers that he has seen there, though at times the numbers could be as high as 70 at or near the site (Tr. 413-417). O'Brien Creek running through the site is used by the fishermen to clean salmon (Tr. 405). The use of boats has always been very limited throughout the entire fishery but some boat launchings occur at both site 22 and site 33 at the Chitina-McCarthy Bridge (Tr. 401). He has in the course of his duties launched boats at site 22 to service their fishery camps downstream with food and supplies. He has also been members of the general public launch boats at site 22, but not in large numbers (Tr. 412-413).

Mr. Roberson identified the red line shown on Exhibit 1, running south from Chitina along the Copper River, as the Copper River Northwestern Railroad right-of-way which goes all the way to Cordova. The right-of-way is used by the general public as access to O'Brien Creek and to other points to the south for purposes of dip net fishing, sport fishing at Haley Creek, bear and sheep hunting, and

hiking. It is also used by the U.S.G.S. for maintaining a gaging station located one and a quarter miles below O'Brien Creek. There is a bridge crossing O'Brien Creek which from 1969 to the mid-1970's was intermittently usable by vehicles for travel to the gaging station. Since then the bridge has been inoperable and the various users have had to park their vehicles in and around the area of site easement 22. Mr. Roberson expressed the opinion that if EIN 22 is not reserved as proposed there would be no reasonable alternative site for parking of vehicles by the various users (Tr. 405-411, 421-423). He felt that site 33 would not be a reasonable alternative for parking of vehicles because of the need for people to walk an additional four or five miles (Tr. 502).

Regarding grave sites Mr. Roberson is aware of some five or six areas enclosed by cyclone fences located between the railroad right-of-way and the Copper River approximately one-half mile south of O'Brien Creek. He knows of no other grave sites in the area of site easement 22 (Tr. 497-498).

Another witness called by the BLM was Mr. Lawrence Kajdan, recreation planner for the BLM in the Glenallen District. He testified that he had driven a vehicle over the O'Brien Creek bridge in 1973 and probably in 1974. He identified a photograph taken in July, 1976 (Ex. G) which shows over 40 vehicles parked in the EIN 22 area, some of them across the bridge on the south side of O'Brien Creek. He does not know when after that time that the bridge became impassable (Tr. 512-516).

Mr. Francis Brittain testified that he moved to the Chitina area in 1960 and lives there at the present time. From 1965 to 1973 he lived in Valdez but visited Chitina during that period. He dip net fished at O'Brien Creek from 1961 to 1965 and again in 1973 and 1974. He said from 1960 on he has observed other non-Natives dip net fishing in the area. It was not an exclusive Native fishery. He said with the improvement of the Edgerton Highway he noticed a tremendous increase in use by the general public of the O'Brien Creek fishery (Tr. 517-525).

Three additional witnesses, Mr. William H. Weaver, a resident of the Chitina area since 1960, Mr. Andrew Kemak and Mr. Glenn DeSpain, both residents of Fairbanks, testified generally of their long time participation in the dip net fishery at O'Brien Creek and their personal observations of both non-Natives and Natives engaging in dip net fishing there. They also confirmed the fact that the area of EIN 22 has been heavily used over the years for parking of vehicles and camping. Mr. Kemak also said that it was about two years ago when the south approach to the O'Brien Creek

Bridge was damaged so that a vehicle could no longer cross the bridge. He qualified this by saying that the bridge was fully usable by all vehicles until 1975 and from then to 1980 by motorcycles. He also spoke of using the railroad right-of-way south of O'Brien Creek to go sport fishing at Haley Creek and hunting farther on down. Both Mr. Kemak and Mr. DeSpain have occasionally launched boats at site 22 (Tr. 517-585).

Chitina presented the testimony of two additional witnesses, Mr. Frank Billum and Mr. Joe Goodlataw, both members of the Chitina Native Corporation. Mr. Billum was born in 1915 in Chitina and spent most of his childhood in the area. He said Taral was the largest historical Indian village in the area, located across the Copper River from O'Brien Creek. Across the river from Taral was another historical Indian fish camp, apparently at or adjacent to EIN 22, which served the Native Village of Chitina. He said there is a grave site about 150 to 200 feet south of O'Brien Creek near the railroad trestle (Ex. 8). Also there were Native fish wheels and fish racks in the O'Brien Creek area until around the mid-1970's when the white people started coming in and crowded out the Natives. He expressed the opinion that EIN 22 should not be used for parking and camping by the general public for the reason that it is a traditional Native fish camp (Tr. 590-601). Mr. Goodlataw was born in 1900 at Taral which he left in 1919 at which time it was a good-sized Native village. There was then a Native village at O'Brien Creek with 25 to 30 people living there. He recalls seeing graveyards at O'Brien Creek in about 1915 (Tr. 602-604).

The settlement agreement in the case of Alaska Conservation Society v. William T. Coleman, supra, (Ex. N), entered into between the plaintiff and the State of Alaska and Federal defendants on July 21, 1975, was submitted into evidence by Chitina to show that during the period July 21, 1975, to December 18, 1978, the use of the O'Brien Creek bridge and the railroad bed to the south was closed to all traffic. The pertinent provision of the agreement reads:

4. During the time period [until December 18, 1978] \* \* \* STATE DEFENDANT will close the "Chitina local access road" which proceeds south from Chitina along the Copper River to all traffic beyond O'Brien Creek, located approximately five miles south of Chitina. The closure will be effected by means of a barrier sufficient to prevent unauthorized use of the road. Public use of the campground located at O'Brien Creek will be permitted.

Chitina contends that under this agreement use of the bridge and the railroad bed to the south was closed to both foot and vehicular traffic and that all use shown by the BLM to have occurred during that period was in trespass. The BLM contends that the agreement prohibited vehicular traffic only, not foot traffic, offering in support the Third Amended Complaint in the case (Ex. 15). The BLM's analysis of the Complaint was set forth in its post-hearing brief:

Upon examination of the Complaint, it becomes clear that the plaintiffs in that case were seeking to enjoin the construction of a highway for vehicular use from the O'Brien Creek Bridge south to Cordova, and had no intention of precluding non-vehicular traffic south of O'Brien Creek Bridge. <sup>4/</sup>

<sup>4/</sup> The land surrounding the State R/W was withdrawn by § 17(d)(2) of ANCSA for possible inclusion by Congress into either the National Park System and/or the Wilderness System. The land was "de facto" wilderness. See Ex. 15, at 24. Both the Alaska Conservation Society and the Sierra Club alleged that their members used the area ". . . for recreational and conservation purposes . . ." and had ". . . conducted hikes . . ." as part of their showing of "affected interests" which gave them standing to bring the action. See Ex. 15, at 4-5. It seems clear that it was not plaintiffs' intention to prohibit precisely the type of activities that it was trying to protect by enjoining the construction of the proposed highway.

#### DISCUSSION, FINDINGS AND CONCLUSIONS

From the evidence presented a number of findings of fact evolve:

1. Since at least 1969 the area encompassed by site easement EIN 22 and trail easement EIN 17 has been used extensively by the general public, both Native and non-Native. Stated another way the area has not been an exclusive Native use area within that time frame, but on the contrary has been used predominantly by non-Natives.

2. The use made of EIN 22 is primarily for the parking of automobiles, campers and other vehicles, concentrated in the months of June and July, with EIN 17 providing access from the State-owned railroad right-of-way over which the O'Brien Creek trail lies. A secondary use is for camping in conjunction with the parking use. A very limited and sporadic use of EIN 22 has been for the launching of boats into the Copper River.
3. The foremost reason for the parking and camping uses is, and has been during the stated time frame, to accommodate the public participating in subsistence salmon fishing done by dipnetting while standing on or near the west bank of the Copper River. Dipnetting takes place both north and south of O'Brien Creek but the great majority takes place to the south, extending as far as Haley Creek. The launching of boats is not material to pursuit of this activity.
4. With the impassibility of the O'Brien Creek Bridge since approximately the mid-1970's some parking use of EIN 22 has been made by officials servicing the U.S.G.S. gaging station, as well as by occasional hunters, sports fishermen going to Haley Creek and hikers. State Fish and Game officials have occasionally parked there and launched boats to service downstream fishery camps.
5. The Copper River in the Chitina area is a navigable stream, the bed of which is owned by the State of Alaska. The stretch of river downstream from Chitina to Haley Creek is Alaska's single most productive subsistence fishery. Boating activity is very light. Local launching of boats is done mainly at the readily accessible site near the Chitina-McCarthy Bridge close to the town. This site has been reserved as EIN 33 and is best suited and adequate to meet boat launching needs for the general area. It is located approximately three river miles upstream from EIN 22 (Tr. 323).

6. The State of Alaska owns the Copper River Northwestern Railroad right-of-way which extends south from Chitina to Cordova. The rails have been removed and the roadbed is used for some undisclosed distance from Chitina south as a vehicular road. From the evidence presented it appears that with the O'Brien Creek Bridge passable it is traversable by vehicular traffic at least as far south as Haley Creek. While no specific survey evidence was introduced it can be concluded that the width of the right-of-way is 100 feet on each side of the centerline and that at a number of places south of O'Brien Creek the right-of-way reaches to and/or extends into the State-owned riverbed (Tr. 440, 546-547, 561-563, 581-582; Ex. 1; see also BLM post-hearing brief at p. 36).

The import of this is that a person can gain access to the State-owned riverbed and pursue dip net fishing activities solely through use of the railroad right-of-way. Thus, access to the river for this purpose is available without trespassing on Chitina lands.

7. There are sites other than EIN 22 available and suitable for parking and camping in the general Chitina area. The nearest and most accessible site is the above-mentioned EIN 33. Across the road from EIN 33 is a State of Alaska campground which has drinking water available (Tr. 128-129).

EIN 8a, a general purpose site easement approved for reservation by the agreement above, is located approximately one and one-half miles north of Chitina near the Edgerton Highway. Farther north on the highway, about 10 miles from Chitina, is an established State campground at Liberty Falls (Tr. 94).

The court in Alaska Public Easement Defense Fund, supra, made an exhaustive analysis of the easement selection authority contained in section 17(b) of ANCSA and its legislative history. In that case the Secretary contended that section 17(b)(3) empowered him to reserve such public easements as he determines are necessary, without regard to the criteria contained in section 17(b)(1). The court rejected that contention and held that the Secretary must adhere to the specific selection criteria set forth in section 17(b)(1). The court made some additional observations which shed light on the types and purposes of easements contemplated by section 17(b):

The specific land which comprised the grant of eligible entities was not delineated. Rather the Village and Regional Corporations were to choose their land from the areas designated in conformity with the Act. In such circumstances Congress was justifiably concerned that certain portions of the State which were to remain in the public domain would become inaccessible, or landlocked by Native lands. It appears, therefore, that the public easements were to be reserved to provide access to the lands not selected, and they were not intended to provide the public with a right to use the Native lands for recreational activities. This construction of the Act is supported by its language and legislative history.

Subsection 17(b)(1), in defining the scope of public easements, states that they are to be "across lands" which would indicate an easement for travel. In addition to this language there is support for this construction in the legislative history.

\* \* \*

[T]he State owns or controls the land beneath navigable waters, and the people of the State have a right to use the water itself on non-navigable rivers and streams.

In apparent recognition of the fact that there would be valid public uses of the State's water, even when surrounded by lands withdrawn pursuant to the ANCSA, the public easement provision states that easements shall be reserved "at periodic points along the courses of major waterways."

\* \* \*

The purpose of the easements along waterways is to provide a place for docks, campsites, and such facilities to service those who are properly using the public waters. This purpose is apparently accommodated by the reservation of site easements under section 5(b)(4) of the order. By specifically stating that the reservation of easements along major waterways was to be "periodic" Congress clearly did not evince an intent to allow an easement of the type reserved here.

The type of easement referred to by the court and which was voided was a continuous shoreline easement 25 feet wide along a waterway. The court added:

Certainly, if these riverbank easements were intended merely to cross the Natives' land to reach other public lands they would be as valid as any other such easement.

Subsequent to the decision in Alaska Public Easement Defense Fund the Department published regulations governing easement reservations to conform to the court's analysis of ANCSA's statutory requirements. Pertinent sections of the regulations are set out above.

Based upon the foregoing, certain conclusions can be made:

1. Section 17(b) of ANCSA was designed to meet two major objectives: (1) that public lands not selected would remain open to access by the public across the selected lands -- that they would not become landlocked -- and (2) that places would be provided at periodic points along major waters to service public users of those waterways.
2. All reserved easements must have a definite connection with transportation, with the exception of certain miscellaneous easements not relevant here, which are discussed under section 2650.4-7(c) of the regulations. It should be noted that the regulations classify all easements (again with the exception of miscellaneous easements) under the category of "transportation easements". Section 2650.4-7(b). A sub-heading under that section includes "site easements" (2650.4-7(b)(3)), in which it is made clear that such sites must be related to transportation. Specifically, the subsection states that "[s]ite easements shall not be reserved for recreational use such as fishing, unlimited camping, or other purposes not associated with use of the public easement for transportation."
3. If site easement EIN 22 fails to qualify under the law, trail easement EIN 17 would also fail. Conversely, if EIN 22 qualifies, so would EIN 17.

Chitina contends that the use contemplated to be made of EIN 22 cannot qualify it to meet the requirements of the law. On the other hand the BLM contends that it does, based upon a combination of usage as a boat launching site on a major waterway and as access to public lands belonging to the State of Alaska, those being the submerged lands of the Copper River lying below the mean high watermark. From the evidence presented it is clear that EIN 22 cannot qualify as a periodic site easement for the purpose of servicing the needs of the public traveling the Copper River. There has been sporadic use made of the site for boat launching but this purpose is more than adequately served by use of the readily accessible launching site at the McCarthy-Chitina bridge, some three miles upstream. It is apparent from the record that even the BLM would concede that EIN 22 would not qualify solely as a periodic site easement on a major waterway.

The BLM's main contention is that EIN 22 would provide access for use and enjoyment of the submerged lands of the Copper River owned by the State of Alaska. This contention cannot be sustained. While these lands are regarded as public lands entitled to access under ANCSA, they can hardly be regarded as being rendered landlocked or deprived of access by virtue of the Chitina land selection. The entire stretch of the Copper River in the vicinity is a navigable stream with its shorelines reachable by watercraft. In addition the riverbed is legally accessible by land at several places south of O'Brien Creek where the width of the State-owned railroad right-of-way reaches the river. Nor can EIN 22 be sustained as a trail head to serve as a camping and vehicle parking site for people hiking, biking, or otherwise traveling over the railroad right-of-way south of O'Brien Creek for purposes of hunting, fishing, other recreation and whatever other purposes. Just because the State has allowed the O'Brien Creek Bridge to go into disrepair is hardly a valid reason to require Chitina to provide a parking and camping site for those users at O'Brien Creek. There is nothing in the record to indicate that the bridge cannot be restored to use and that vehicle parking and camping sites are not available at other points south along the railroad right-of-way.

In summary there is no showing that State-owned public lands will become landlocked or inaccessible for their use and enjoyment as a result of Chitina's land selection, notwithstanding that EIN 22 is voided.

The BLM clearly demonstrated an intensive and long continuing use of the site at EIN 22 by the general public participating in a very productive subsistence fishery. While elimination of EIN 22 will undoubtedly create a temporary inconvenience, it can hardly be concluded that the fishery will be lost to the general public. If EIN 22 were allowed to stand, one would be naive to believe that the public users engaged in dip net fishing and related activities would be or could be contained within the limits of the public lands, especially within such an ill-defined limit as the mean high water mark of the Copper River. This would almost certainly result in a violation of the prohibition that public easements cannot be reserved for the purpose of engaging in recreational activities on Native lands.

Chitina raised two other issues, namely that the BLM failed to involve the Chitina Natives in the decision making process prior to issuance of the D.I.C., and failed to give consideration regarding the impact that the easements would have on the Natives of Chitina. No specific findings or conclusions need to be made on these issues to reach the final holding in this case. Should a reviewing authority disagree with the final holding such findings can be made from the record already established.

#### RECOMMENDATION

I recommend that the BLM's decision to reserve site easement EIN 22 and trail easement EIN 17 be rescinded.

L. K. Luoma  
Administrative Law Judge

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